

petition sounds in equity, it may be alleged and shown that equity does not have jurisdiction.<sup>4</sup> It is, moreover, a rule that the facts conferring equitable jurisdiction must not only be alleged, but proved and found, before a party will be deprived of his right to a trial at law by jury or subjected to the stringent methods frequently employed to enforce judgments rendered by courts of equity.<sup>5</sup> Consequently, the question whether the pleadings determine the jurisdiction is not an abstract one, since the right to a jury trial is involved. A party may, however, generally waive his right to a jury trial by failing to assert it by timely demand where his adversary has moved for a trial without a jury.<sup>6</sup>

Although the formal demand of relief is not decisive of the legal or equitable character of an action, if a complaint or petition pleads an ambiguous state of facts, such as may support equally an action at law or a suit in equity, leaving the court with no means of determining which must prevail except by reference to the relief demanded, the relief as asked must necessarily resolve the doubt, because there is no other solution.<sup>7</sup> Generally, where the relief which is sought can be had only in equity, the Chancery Court's jurisdiction of the case is not ousted by the fact that the dispute involves questions which are legal in character.<sup>8</sup> But if the relief which is sought is such as a court of law is competent to grant, a court of equity has no jurisdiction although the complainant's estate is an equitable one.<sup>9</sup>

**§ 8. Time for determining jurisdiction; effect of change of circumstances.**

As a general thing, the jurisdiction of equity depends upon the position of the plaintiff and the relief he is entitled to at the time of bringing his action.<sup>10</sup> Thus, equitable jurisdiction must be determined by the conditions existing at the time the suit is filed, and not by conditions which come into existence after the commencement of the suit.<sup>11</sup> Having once attached, the jurisdiction cannot be defeated by subsequent events which do not affect the merits of the complainant's case.<sup>12</sup> If the case was one of equitable cognizance at the

A demand for legal relief does not destroy a complaint which is good in equity. *Speyer v School Dist.* 82 Colo 534, 261 P 859, 57 ALR 203.

The fact that no relief by injunction is sought in a suit by a state claiming the right to impose a succession tax on the estate of a decedent on the ground that his domicile was in the state, against other states making similar claims, to obtain an adjudication of the issue of the decedent's domicile, does not militate against the conclusion that a cause of action cognizable in equity is presented. *Texas v Florida*, 306 US 298, 83 L ed 817, 59 S Ct 563, 121 ALR 1179.

4. As to objection to jurisdiction, see § 18, *infra*.

5. *Fox v Fitzpatrick*, 190 NY 259, 82 NE 1103.

6. See *JURY* (Rev ed §§ 42 et seq.).

7. *Dykman v Keeney*, 154 NY 483, 48 NE 894; *O'Brien v Fitzgerald*, 143 NY 377, 38 NE 371.

8. *Gormley v Clark*, 134 US 338, 33 L ed 909, 10 S Ct 554.

9. *Fussell v Hughes*, 113 US 565, note, 28 L ed 998, 5 S Ct 639; *Fussell v Gregg*, 113 US 550, 28 L ed 993, 5 S Ct 631.

10. *Koehler v New York Elev. R. Co.* 159 NY 218, 53 NE 1114; *Van Allen v New York Elev. R. Co.* 144 NY 174, 38 NE 997.

11. *Busch v Jones*, 184 US 598, 46 L ed 707, 22 S Ct 511; *Fish v Prudential Ins. Co.* 225 Ind 448, 75 NE2d 57; *Mantell v International Plastic Harmonica Corp.* 141 NJ Eq 379, 55 A2d 250, 173 ALR 1185; *Associated Metals & Minerals Corp. v Dixon Chemical & Research, Inc.* 52 NJ Super 143, 145 A2d 49.

Equity's jurisdiction over parties and subject matter is always determined with regard to the situation existing at the time of filing the bill and as shown therein. *L'Hommedieu v Smith*, 351 Mich 223, 88 NW2d 510.

12. *North Chicago Rolling Mill Co. v St.*

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time when suit was commenced, the power or authority of the court to proceed therein is not lost by reason of the fact that the ground for interposition by a court of equity has ceased to exist.<sup>13</sup> The fact that a legal remedy has become available<sup>14</sup> or that legal proceedings are filed<sup>15</sup> is held not to cause a loss of jurisdiction.<sup>16</sup> Having had original jurisdiction of the case, the equity court may properly dispose of it, even though the legislature has conferred upon the common-law courts power to act in the premises.<sup>17</sup>

The fact that equitable *jurisdiction* is generally determined as of the time of filing the action does not mean that the *relief to be awarded* depends entirely upon the situation as it existed then. Having jurisdiction at the commencement of the action, equity has the power to award relief as the right thereto exists at the end of the trial, thus putting an end to the litigation.<sup>18</sup>

### § 9. Discretion of court.

It has been said that the assumption by a court of equitable jurisdiction is largely dependent on the chancellor's discretion.<sup>19</sup> Undoubtedly, in some situations the court's assumption of jurisdiction of a controversy is dependent upon an exercise of discretion, the chancellor being empowered to act or to refuse to act in accordance with the dictates of the judicial conscience.<sup>20</sup> However, the "conscience" which is an element of equitable jurisdiction is not the private opinion of an individual court, but is rather to be regarded as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines, to which the court appeals and by which it tests the conduct and rights of suitors—that is, it is a judicial and not a personal conscience.<sup>1</sup>

Louis Ore & Steel Co. 152 US 596, 38 L ed 565, 14 S Ct 710.

13. Rice & A. Corp. v Lathrop, 278 US 509, 73 L ed 480, 49 S Ct 220 (holding that jurisdiction of a suit to enjoin the infringement of a patent will be retained although the ground for equitable relief has expired because of expiration of the patent before the hearing); Busch v Jones, 184 US 598, 46 L ed 707, 22 S Ct 511; Clark v Wooster, 119 US 322, 30 L ed 392, 7 S Ct 217; Carnegie Steel Co. v Colorado Fuel & Iron Co. (CA8 Colo) 165 F 195; McCarthy v Gaston Ridge Mill. & Min. Co. 144 Cal 542, 78 P 7; Michigan Iron & Land Co. v Nester, 147 Mich 599, 111 NW 177; Tucker v Edison Electric Illuminating Co. 100 App Div 407, 91 NYS 439, affd 184 NY 548, 76 NE 1110.

As to retaining jurisdiction generally, see §§ 108 et seq., *infra*.

14. As to a remedy at law as affecting jurisdiction, see §§ 86 et seq., *infra*.

15. Where equity has taken jurisdiction of an equitable cause, it will not be ousted of that jurisdiction by the subsequent institution of legal proceedings concerning the same controversy. Fish v Prudential Ins. Co. 225 Ind 448, 75 NE2d 57.

16. American L. Ins. Co. v Stewart, 300 US 203, 81 L ed 605, 57 S Ct 377, 111 ALR 1268; Dawson v Kentucky Distilleries & Warehouse Co. 255 US 288, 65 L ed 638, 41 S Ct 272; New York L. Ins. Co. v Seymour (CA6 Ohio) 45 F2d 47, 73 ALR 1523; Jay-Bee Realty Corp. v Agricultural Ins. Co. 320 Ill App 310, 50 NE2d 973.

42 Mich L Rev 945.

17. Jay-Bee Realty Corp. v Agricultural Ins. Co. 320 Ill App 310, 50 NE2d 973; Carter v Suburban Water Co. 131 Md 91, 101 A 771.

18. § 249, *infra*.

19. Chisolm v Pryor, 207 SC 54, 35 SE2d 21.

20. Stefanelli v Minard, 342 US 117, 96 L ed 138, 72 S Ct 118; People v System Properties, Inc. 2 NY2d 330, 160 NYS2d 859, 141 NE2d 429; Tucker v Simmons, 199 Tenn 359, 287 SW2d 19; Wadhams Oil Co. v Tracy, 141 Wis 150, 123 NW 785.

Where a court of equity is asked to interfere with the enforcement of a criminal statute, the discretion of the court is to be wisely and deliberately exercised. § 57, *infra*.

1. National City Bank v Gelfert, 284 NY 13, 29 NE2d 449, 130 ALR 1472, *revd on*

The question whether a case does or does not satisfy the test of equity jurisdiction is not always easy to determine. Its solution must often be a matter of judgment, and necessarily so where precedents are not sufficiently clear to furnish the court a certain guide. In the latter situation, the decision of the trial court should not be disturbed unless manifestly wrong. Where no certain guide exists as to any particular situation, by way of the general rule illustrated by precedents, as to whether it should be dealt with by equity jurisdiction, the matter in a large degree must be solved by the exercise of judicial discretion.<sup>2</sup> After equity has properly assumed jurisdiction of a case, the relief to be granted is generally determined by the exercise of discretion. This is not, however, an arbitrary discretion but one to be exercised in accordance with equitable principles. Indeed, in this connection, under some circumstances discretion becomes little or nothing less than judicial duty.<sup>3</sup>

### § 10. Concurrent jurisdiction of equity and law.

It is well recognized that courts of equity may in some cases have concurrent jurisdiction with courts of law.<sup>4</sup> Indeed, concurrent jurisdiction of equity extends to many cases of legal rights where there is not under the circumstances a plain, adequate, and complete remedy at law.<sup>5</sup> In cases of fraud, the jurisdiction of law and equity is in many respects concurrent,<sup>6</sup> and the same is true with regard to matters of account,<sup>7</sup> partnership,<sup>8</sup> and private nuisances.<sup>9</sup>

A case of which the courts have concurrent jurisdiction must be decided by the tribunal which first obtains authority thereover, and each court must respect the judgment or decree of the other. Consequently, a question decided at law cannot be reviewed in a court of equity without the suggestion of some equitable circumstances of which the party could not avail himself at law.<sup>10</sup>

other grounds 313 US 221, 85 L ed 1299, 61 S Ct 898, 133 ALR 1467.

2. *Tucker v Simmons*, 199 Tenn 359, 287 SW2d 19; *Johnson v Swanke*, 128 Wis 68, 107 NW 481.

Discretion must exist in an equity court when it is called upon to grant unusual relief and become involved in foreign matters. Indeed, in every such case the exercise of equitable jurisdiction rests in the sound discretion of the court, and depends upon the special circumstances disclosed. The discretion should be exercised to decline jurisdiction of an action which is wholly unsuited to entertainment by the court and for which no reason appears except the unconvincing statement of the plaintiff that he cannot get a fair trial in the courts of a certain foreign state. *Rothstein v Rothstein*, 272 App Div 26, 68 NYS 2d 305, affd 297 NY 705, 77 NE2d 13.

3. § 102, *infra*.

4. *Armstrong v Athens County*, 16 Pet (US) 281, 10 L ed 965; *Floyd v Ring Constr. Corp.* (CA8 Minn) 165 F2d 125, cert den 334 US 838, 92 L ed 1763, 68 S Ct 1496; *Glanding v Industrial Trust Co.* (Sup) 28 Del Ch 499, 45 A2d 553; *Nevitt v Gillespie*, 1 How (Miss) 108.

528

5. *Wehrman v Conklin*, 155 US 314, 39 L ed 167, 15 S Ct 129; *Grand Chute v Winegar*, 15 Wall (US) 355, 21 L ed 170; *Phoenix Mut. L. Ins. Co. v Bailey*, 13 Wall (US) 616, 20 L ed 501.

6. See FRAUD AND DECEIT (1st ed §§ 189 et seq.).

7. See 1 Am Jur 2d, ACCOUNTS AND ACCOUNTING §§ 50 et seq.

A prayer for an accounting as to an alleged "pecuniary loss" caused by a breach of contract will not sustain equity jurisdiction, where such an accounting can be had in an action at law as well as in equity. *O'Melia v Berghoff Brewing Corp.* 304 Mich 471, 8 NW2d 141, 145 ALR 679.

8. See PARTNERSHIP (1st ed §§ 461 et seq.).

9. Concurrent jurisdiction in cases of private nuisance exists with limitations. See NUISANCES (1st ed §§ 146 et seq.).

10. *Smith v M'Iver*, 9 Wheat (US) 532, 6 L ed 152; *Haughy v Strang*, 2 Port (Ala) 177; *Hempstead v Watkins*, 6 Ark 317; *Welch v Union Cent. L. Ins. Co.* 108 Iowa 224, 78 NW 853; *Davidson v Givins*, 2 Bibb (Ky) 200; *Merrill v Lake*, 16 Ohio 373; *Brenner v Alexander*, 16 Or 349, 19 P 9; *Overton v Searcy*,

It is held to be proper, however, where the case can be better determined by a jury, to bring an action at law rather than in equity, although the case is such that it is necessary for the court, exercising its equity powers, to protect and preserve any recovery that may be had, for the benefit of those entitled thereto.<sup>11</sup>

### § 11. Ancillary or auxiliary jurisdiction.

There are some situations in which suit is maintainable in a court of equity on the ground that it is ancillary or auxiliary to an action in another court and in aid of the enforcement of rights therein involved.<sup>12</sup> The remedy by injunction<sup>13</sup> or receivership<sup>14</sup> may be accorded if it is necessary for the preservation of the status of property until the proper disposition thereof has been determined by the outcome of pending litigation.<sup>15</sup> Similarly, in aid of another proceeding, a court of equity may entertain a bill of discovery<sup>16</sup> or a bill to perpetuate testimony.<sup>17</sup> Generally, however, an available legal remedy must be exhausted before resort is had to the equity court.<sup>18</sup> If a claim is legal in its nature, involving a trial at law by a jury, it may not be made the basis for relief in equity until it has been reduced to judgment at law.<sup>19</sup> Hereinafter, attention is given to the rule which precludes a party from resorting to the equity court where it appears that he has an adequate remedy at law.<sup>20</sup>

### § 12. New and novel cases.

Ordinarily, the fact that an action in equity is an unusual one because the facts upon which it is based are unusual is not sufficient to condemn the petition or complaint, since it is a distinguishing feature of equity jurisdiction that it will apply settled rules to unusual conditions, and mold its decrees so as to do equity between the parties.<sup>1</sup> Peculiar and extraordinary cases

Cooke (Tenn) 36; *Prewett v Citizens Nat. Bank*, 66 W Va 184, 66 SE 231.

11. *Louisville Cooperage Co. v Rudd*, 276 Ky 721, 124 SW2d 1063, 144 ALR 763.

12. *Root v Woolworth*, 150 US 401, 37 L ed 1123, 14 S Ct 136.

Courts of law and courts of chancery should not oppose one another but each in its turn should be subservient to the other. *Tilton v Cofield*, 93 US 163, 23 L ed 858; *Rees v Watertown*, 19 Wall (US) 107, 22 L ed 72; *Heady v Crouse*, 203 Mo 100, 100 SW 1052.

Where several actions at law have been brought between the same parties, the jurisdiction of equity to interfere to prevent a multiplicity of actions is dependent and ancillary and is referable to that invoked and existing in the actions at law, so that if the actions at law are pending in a federal court, equitable jurisdiction exists in a federal court. *Eichel v United States Fidelity & G. Co.* 245 US 102, 62 L ed 177, 38 S Ct 47.

Suits to enforce stockholders' liability are held not to be maintainable as being in aid of a decree of the state court. *Hale v Allinson*, 188 US 56, 47 L ed 380, 23 S Ct 244.

13. See INJUNCTIONS.

[27 Am Jur 2d]—34

14. See RECEIVERS.

15. *Vila v Grand Island Electric Light, Ice & Cold Storage Co.* 68 Neb 222, 94 NW 136, 97 NW 613; *Martin v Harnage*, 26 Okla 790, 110 P 781.

16. See 23 Am Jur 2d, DEPOSITIONS AND DISCOVERY §§ 141, 142.

17. See 23 Am Jur 2d, DEPOSITIONS AND DISCOVERY § 8.

18. Jurisdiction to enforce the payment of corporation bonds does not exist until the remedy at law has been exhausted. *Heine v Levee Comrs.* 19 Wall (US) 655, 22 L ed 223.

19. *Swan Land & Cattle Co. v Frank*, 148 US 603, 37 L ed 577, 13 S Ct 691.

A mere creditor cannot come into a court of equity to enforce his legal demand until he has demonstrated that there is no adequate remedy at law by obtaining a judgment and issuing thereon an execution which has been returned unsatisfied. *Dunham v Kauffman*, 385 Ill 79, 52 NE2d 143, 154 ALR 90.

20. §§ 86 et seq., infra.

1. §§ 103 et seq., infra.

either of the parties,<sup>15</sup> or under the modern practice in some jurisdictions, it may transfer the case to the law side of the court.<sup>16</sup>

### III. GROUNDS OF INTERPOSITION

#### A. IN GENERAL

#### § 19. Generally; equitable causes or defenses.

It is fundamental that in order for a court of equity to assume jurisdiction of a case, there must be grounds for equitable relief; otherwise, the action is not subject to equitable cognizance.<sup>17</sup> Courts of equity act upon equitable causes by the administration of equitable remedies,<sup>18</sup> and in the determination of a dispute as to whether the court has jurisdiction, the primary consideration is whether the cause is in its nature a legal or equitable one.<sup>19</sup> Generally, if the cause of action is equitable in character, even in part, and equity jurisdiction once attaches, full and complete adjustment of the rights of all parties will be properly made in the suit.<sup>20</sup>

While equity acts upon equitable causes by the administration of equitable remedies, equitable jurisdiction does not necessarily depend upon an exact relation of the cause of action stated to some definite head of equitable relief.<sup>1</sup> Nor does equity confine its relief to cases for which there is a precedent precisely in the situation presented to the court.<sup>2</sup> Where grounds exist calling for the exercise of equitable power to furnish a remedy, the court will not hesitate to act even though the question presented is a novel one.<sup>3</sup> Nevertheless, the court may not depart from precedent and assume an unregulated power of administering abstract justice.<sup>4</sup> Equity has no jurisdiction over imperfect obligations resting upon conscience and moral duty only, unconnected with legal obligations.<sup>5</sup> Equities must be alleged and proved in order that the court may have jurisdiction of a suit,<sup>6</sup> and although the legislature may direct new classes of cases to be tried in equity, these cases, on being tested by the

15. *Mansfield, C. & L. M. R. Co. v Swan*, 111 US 379, 28 L ed 462, 4 S Ct 510; *Youngblood v Sexton*, 32 Mich 406; *Freer v Davis*, 52 W Va 1, 43 SE 164.

16. See TRIAL (1st ed § 7).

17. *Saperstein v Mechanics & F. Sav. Bank*, 228 NY 257, 126 NE 708.

*Practice Aids.*—Demurrer for absence of ground for equitable relief. 8 AM JUR PL & PR FORMS 8:245.1.

18. *Brent v Bank of Washington*, 10 Pet (US) 596, 9 L ed 547.

19. *Davis v Forrestal*, 124 Minn 10, 144 NW 423.

20. *Davis v Forrestal*, supra.

1. *Empire Engineering Corp. v Mack*, 217 NY 85, 111 NE 475.

For the absence or inadequacy of a legal remedy as ground for equity jurisdiction, see §§ 86 et seq., infra.

2. § 121, infra.

3. § 12, supra.

4. *Heine v Levee Comrs.* 19 Wall (US) 655, 22 L ed 223; *Linville v Ripley*, 237 Mo App 1275, 173 SW2d 687.

5. *Rees v Watertown*, 19 Wall (US) 107, 22 L ed 72; *Linville v Ripley*, 237 Mo App 1275, 173 SW2d 687.

6. *Lutton v Baker*, 187 Iowa 753, 174 NW 599, 6 ALR 1696.

The court acts only on the conscience of a party; if he has done nothing that taints such conscience, no demand can attach upon it so as to give any jurisdiction. *Boone v Chiles*, 10 Pet (US) 177, 9 L ed 388.

Unless the facts conferring equitable jurisdiction are alleged, proved, and found, a party cannot be deprived of his right to demand a trial by jury, nor be subjected to the stringent methods frequently employed to enforce judgments rendered by courts of equity. *Fox v Fitzpatrick*, 190 NY 259, 82 NE 1103.