

a decree of a court of equity, while declaring the equitable estate, interest, or right of the complainant to exist, does not operate by its own intrinsic force to vest the complainant with the legal estate, interest, or right to which he is pronounced entitled; such decree is not itself a legal title, nor can it either directly or indirectly transfer the title from the defendant to the complainant.<sup>6</sup>

Important as was this doctrine in the earlier stages of the development of equity jurisprudence, its operation has been greatly modified and, in most cases affecting the title to lands, entirely abrogated by statutes which have been passed in England and in the United States. The power of the court to act in personam, however, has not been affected thereby; the court may still enforce its decrees in personam—as, for example, where the subject matter of the controversy is situated in a foreign state or country and the parties to be affected are subject to the jurisdiction of the court.<sup>7</sup>

### § 123. Equity follows the law.

A fundamental maxim, frequently stated, is that equity follows the law.<sup>8</sup> Its Latin form is "aequitas sequitur legem."<sup>9</sup> This maxim is susceptible of various interpretations. It may mean that equity adopts and follows the rules of law in all cases to which those rules may in terms be applicable; or it may mean that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law.<sup>10</sup> The main purpose of the maxim seems to be to keep judicial action within the boundaries which have been established by the prior course of adjudication,<sup>11</sup> in line with the precepts that equity will follow established rules and precedents and will not change or unsettle rights which are defined and established by existing legal principles.<sup>12</sup> A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, nor can

6. Atlantic Seaboard Natural Gas Co. v Whitten, 315 Pa 529, 173 A 305, 93 ALR 615, stating that the maxim means that equity deals primarily with the person and usually only through him with the res.

7. Levenson v Wolfson, 42 Ohio App 318, 182 NE 111.

As to land situated outside the state, see § 17, supra.

8. Freedman's Sav. & T. Co. v Earle, 110 US 710, 28 L ed 301, 4 S Ct 226; Neslin v Wells F. & Co. 104 US 428, 26 L ed 802; Carpenter v Longan (US) 16 Wall 271, 21 L ed 313; Sparks v Douglas & S. Realty Co. 19 Ariz 123, 166 P 285; Shive v Barrow, 88 Cal App 2d 838, 199 P2d 693; Smyth v Stoddard, 203 Ill 424, 67 NE 980; Cartwright v McGown, 121 Ill 388, 12 NE 737; Johnson County Sav. Bank v Creston, 212 Iowa 929, 231 NW 705, 237 NW 507, 84 ALR 926; Kenly v Huntingdon Bldg. Asso. 166 Md 182, 170 A 526, 90 ALR 1321; Gardner v Gardner (NY) 22 Wend 526; McGuinn v High Point, 219 NC 56, 13 SE2d 48; Lighty v Shorb (Pa) 3 Penr & W 447; Drayton v Marshall, 14 SC Eq (Rice) 373; Elliott v Thompson, 23 Tenn (4

Humph) 99; Pardee v Camden Lumber Co. 70 W Va 68, 73 SE 82.

This maxim is just as potent as the "clean hands" doctrine. Morrissey v Bologna, 240 Miss 284, 123 So 2d 537, cert den and app dismd 366 US 212, 6 L ed 2d 239, 81 S Ct 1091.

9. Hedges v Dixon County, 150 US 182, 37 L ed 1044, 14 S Ct 71.

10. Stewart v Jones, 219 Mo 614, 118 SW 1.

11. The maxim "aequitas sequitur legem" is strictly applicable in all cases where the rights and situation of litigants are clearly defined and established by law, and hence in all such cases equity is powerless to change the rights or unsettle the situation. Hedges v Dixon County, 150 US 182, 37 L ed 1044, 14 S Ct 71.

Equity follows the law, and is not invoked to destroy or supplant a legal right. Re Dickey, 87 Ohio App 255, 42 Ohio Ops 474, 57 Ohio L Abs 346, 94 NE2d 223, 20 ALR2d 1220.

12. § 118, supra.

equity create a remedy where there is no legal liability.<sup>13</sup> Neither can equity courts disregard, or in effect repeal, statutory and constitutional requirements and provisions.<sup>14</sup> However, equity does not always, or in all respects, follow the law,<sup>15</sup> nor is equity's ordinary pursuit of the law ever slavish.<sup>16</sup> While it is true in ordinary circumstances that equity follows the law and will not divest rights that have been legally acquired, that doctrine must yield if extraordinary circumstances or countervailing equities call for relief.<sup>17</sup> Over the cases of which the equity court takes cognizance, jurisdiction is exercised in conformity with settled principles of equity and independently of those governing actions at law.<sup>18</sup> Plainly, the court will not aid the assertion of a legal right which is contrary to the equity and justice of the case.<sup>19</sup> Likewise, where a plaintiff comes into equity asking for unusual and extraordinary relief, he cannot insist on a strict legal right.<sup>20</sup> It is said, on the other hand, that equity follows the law except in those matters which entitle one to equitable relief notwithstanding a strict rule of law to the contrary.<sup>1</sup>

**§ 124. — Application of maxim; statutory and constitutional provisions.**

The maxim that equity follows the law is applicable to the interpretation of statutes and to matters of public policy.<sup>2</sup> Indeed, equity follows the law more circumspectly in the interpretation and application of statute law than otherwise.<sup>3</sup> Equity courts cannot disregard, or in effect repeal, statutory and constitutional requirements and provisions.<sup>4</sup> Equity courts are bound by positive provisions of a statute equally with courts of law, and where a transaction or a contract is declared void because it is not in compliance with an

13. § 120, supra.

14. § 124, infra.

15. *Spoon-Shacket Co. v Oakland County*, 356 Mich 151, 97 NW2d 25; *Giberson v First Nat. Bank*, 100 NJ Eq 502, 136 A 323.

16. *Spoon-Shacket Co. v Oakland County*, 356 Mich 151, 97 NW2d 25.

Indeed, an eminent commentator has observed that equity, throughout the mass of its jurisprudence, instead of following the law, either ignores or openly disregards and opposes the law. *Spoon-Shacket Co. v Oakland County*, supra, citing 2 Pomeroy, *Equity Jurisprudence* 5th ed § 427.

17. *Monmouth Lumber Co. v Indemnity Ins. Co.* 21 NJ 439, 122 A2d 604, 59 ALR2d 742.

18. *Bodley v Taylor (US)* 5 Cranch 191, 3 L ed 75.

19. *Jones v New York Guaranty & I. Co.* 101 US 622, 25 L ed 1030; *Donoghue v Tonopah Oriental Min. Co.* 45 Nev 110, 198 P 553, 15 ALR 937.

20. *Nassau County v Long Beach*, 274 NY 458, 9 NE2d 50.

1. *Jones v Guy*, 135 Tex 398, 143 SW2d 906, 142 ALR 77.

A court of equity should not intervene

against the rules of law unless some equitable reason exists. *Frank Oil Co. v Bellevue Gas & Oil Co.* 29 Okla 719, 119 P 260.

2. *Camden Trust Co. v Handle*, 132 NJ Eq 97, 26 A2d 865, 154 ALR 602.

3. *Milgram v Jiffy Equipment Co.* 362 Mo 1194, 247 SW2d 668, 30 ALR2d 925.

Equity may not grant relief in contravention of the Constitution of the United States and the laws thereof. *Federal Land Bank v Wilmarth*, 218 Iowa 339, 252 NW 507, 94 ALR 1338.

4. *Litchfield v Ballou*, 114 US 190, 29 L ed 132, 5 S Ct 820; *Madrid Lumber Co. v Boone County*, 255 Iowa 380, 121 NW2d 523; *Kaufman v Kaufman*, 292 Ky 351, 166 SW2d 860, 144 ALR 866; *Milgram v Jiffy Equipment Co.* 362 Mo 1194, 247 SW2d 668; *Wade v Major*, 36 ND 331, 162 NW 399; *Safe Deposit & T. Co. v Diamond Coal & Coke Co.* 234 Pa 100, 83 A 54; *Arnold v Board of Education*, 110 W Va 32, 156 SE 835; *Glenrock v Abadie*, 72 Wyo 111, 262 P2d 393.

Equitable powers of the court may not be invoked to sanction disregard of statutory safeguards and restrictions. *Seif v Long Beach*, 286 NY 382, 36 NE2d 630, reh den 287 NY 836, 41 NE2d 164.

An important limitation upon equity jurisdiction is that equity cannot repeal a statute. *Hunt v Hunt*, 171 NY 396, 64 NE 159.

express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract or any part thereof.<sup>5</sup> Thus, wherever the rights or the situation of parties are clearly defined and established by law, whether it is common or statutory law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim, "aequitas sequitur legem," is strictly applicable.<sup>6</sup> Generally, courts of equity are as much bound by positive rules and general maxims concerning property as are courts of law,<sup>7</sup> and in the administration of assets equity does not interfere with absolute legal priority.<sup>8</sup> With regard to setoffs, equity follows the law unless some special circumstances occur to justify an interposition—as where peculiar equities intervene between the parties<sup>9</sup>—and courts of equity as well as courts of law are bound to regard the statute of frauds.<sup>10</sup>

However, in some situations the letter of a legislative act is restrained by an equitable construction, in others it is enlarged, and in still others the construction is contrary to the letter.<sup>11</sup> Moreover, while equity has no power to abrogate or to assail a perfect and independent legal right, it may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage.<sup>12</sup> Equity will remove impediments which are in the way to legal rights and will give redress where, according to the forms of procedure at law, the complainant might have a right without a remedy, or where that remedy would be incomplete. Equity will enforce a recognized right in a manner unattainable at law,<sup>13</sup>

5. *Hedges v Dixon County*, 150 US 182, 37 L ed 1044, 14 S Ct 71; *Allen v Kitchen*, 16 Idaho 133, 100 P 1052; *Stone v Gardner*, 20 Ill 304; *Madrid Lumber Co. v Boone County*, 255 Iowa 380, 121 NW2d 523; *Milgram v Jiffy Equipment Co.* 362 Mo 1194, 247 SW 2d 668, 30 ALR2d 925; *Straube v Bowling Green Gas Co.* 360 Mo 132, 227 SW2d 666, 18 ALR2d 1335; *Mullany v Mullany*, 4 NJ Eq 16; *Arnold v Board of Education*, 110 W Va 32, 156 SE 835; *Glenrock v Abadie*, 72 Wyo 111, 262 P2d 393.

Where the legislature has prescribed a rule of law which governs the rights of parties, equity is bound equally with courts of law, and cannot disregard such provisions. *Giberson v First Nat. Bank*, 100 NJ Eq 502, 136 A 323.

6. *Magniac v Thomson (US)* 15 How 281, 14 L ed 696; *Hall v Henderson*, 134 Ala 455, 32 So 840; *Sparks v Douglas & S. Realty Co.* 19 Ariz 123, 166 P 285; *Shive v Barrow*, 88 Cal App 2d 838, 199 P2d 693; *De Mattos v McGovern*, 25 Cal App 2d 429, 77 P2d 522 (stating that as a general thing, where the law determines the rights of the parties, equity is without power to decree relief which the law denies); *Harper v Clayton*, 84 Md 346, 35 A 1083; *Jackson v Holbrook*, 36 Minn 494, 32 NW 852; *Arnold v Board of Education*, 110 W Va 32, 156 SE 835; *Glenrock v Abadie*, 72 Wyo 111, 262 P2d 393.

Equity will not grant relief on the principle that once a court of equity obtains jurisdiction, it retains jurisdiction for all purposes,

where the relief sought is contrary to the principle that equity follows the law, for equity has no power to change rights defined and established by law. *Welch v Montgomery*, 201 Okla 289, 205 P2d 288, 9 ALR2d 294.

Equity will not hold a surety liable where he is discharged at law. *United States v Price (US)* 9 How 83, 13 L ed 56.

7. *Kenly v Huntingdon Bldg. Asso.* 166 Md 182, 170 A 526, 90 ALR 1321; *Mullany v Mullany*, 4 NJ Eq 16; *Depue v Miller*, 65 W Va 120, 64 SE 740.

8. *Lee v Stone (Md)* 5 Gill & J 1; *Meech v Allen*, 17 NY 300.

9. See 20 Am Jur 2d, COUNTERCLAIM, RECOURSEMENT, AND SETOFF § 24.

10. See STATUTE OF FRAUDS (1st ed § 535).

11. *Riggs v Palmer*, 115 NY 506, 22 NE 188.

The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: "aequitas est correctio legis generaliter latae, qua parte deficit" (equity is the correction of law that is too wide, in the particular part that is defective). *Beley v Naphtaly*, 169 US 353, 42 L 2d 775, 18 S Ct 354.

12. *Magniac v Thomson (US)* 15 How 281, 14 L ed 696; *Heady v Crouse*, 203 Mo 100, 100 SW 1052.

13. *Hall v Henderson*, 134 Ala 455, 32 So 840.

and in some cases a court of equity acting on more liberal principles will soften the rigor of law. Thus, though a party cannot show a legal compliance with a condition, if he can do it cy pres, equity will protect and save him from a forfeiture.<sup>14</sup>

### § 125. Equity is equality, and equality is equity.

Fundamental to the jurisprudence of equity courts is the maxim which declares that equality is equity,<sup>15</sup> or, as it sometimes is expressed, that equity delights in equality.<sup>16</sup> Latin forms of the maxim are "aequitas est aequalitas" and "aequitas est quasi aequalitas."<sup>17</sup>

Generally, the maxim should always be applied unless it is clearly intended not to apply. Burdens as well as rights fall within its ambit. Accordingly, equity will treat all members of a class on an equal footing, and will impose burdens or distribute rights without preference, either equally or in proportion to the several interests.<sup>18</sup> Thus, a court of equity in many situations, in order to give effect to this maxim, seeks to secure equality among persons who are equally obligated<sup>19</sup> or who are equally entitled to claim a benefit<sup>20</sup> or share in a fund.<sup>1</sup> Instances of the application of the maxim are found in the law of contribution,<sup>2</sup> the marshaling of assets,<sup>3</sup> partition,<sup>4</sup> and the abatement of legacies.<sup>5</sup> In pursuance of the principle that equality is equity, interest will not be allowed on claims against a fund in the hands of a liquidator

While equity will provide means of enforcement not to be had at law, it is bound to regard the rights of the parties as established by law unless a countervailing equity calls for relief. *Camden Trust Co. v Handle*, 132 NJ Eq 97, 26 A2d 865, 154 ALR 602.

14. *United States v Arredondo (US)* 6 Pet 691, 8 L ed 547.

15. *Sutherland v Mayer*, 271 US 272, 70 L ed 943, 46 S Ct 538; *United States Rubber Co. v American Oak Leather Co.* 181 US 434, 45 L ed 938, 21 S Ct 670; *Glover v Patten*, 165 US 394, 41 L ed 760, 17 S Ct 411; *Hammond Pure Ice & Coal Co. v Heitman*, 221 Ind 352, 47 NE2d 309, 145 ALR 997; *Pearcy v Citizens Bank & Trust Co.* 121 Ind App 136, 96 NE2d 918, reh den 121 Ind App 158, 98 NE2d 231; *Comstock v Rayford*, 9 Miss (1 Smedes & M) 423; *Re Miglietta*, 287 NY 246, 39 NE2d 224, reh den 288 NY 661, 42 NE2d 749; *Bourne v Wilson-Case Lumber Co.* 58 Or 48, 113 P 52.

16. *Richmond v Irons*, 121 US 27, 30 L ed 864, 7 S Ct 788.

17. *Merrill v National Bank*, 173 US 131, 43 L ed 640, 19 S Ct 360.

18. *Pearcy v Citizens Bank & Trust Co.* 121 Ind App 136, 96 NE2d 918, reh den 121 Ind App 158, 98 NE2d 231.

However, it has been said that the maxim "equality is equity" can only be applied according to established rules, and must be read in connection with the maxim "equity aids the vigilant," and whenever the rights of parties

are clearly defined and established by law, equity follows the law despite the rule that equality is equity. *Price v Price*, 122 W Va 122, 7 SE2d 510, 128 ALR 1088.

19. Equal contribution, even among wrongdoers, is just, although no action will lie to adjust any inequality in the payments. *Selz v Unna (US)* 6 Wall 327, 18 L ed 799.

20. *Hampton v Phipps*, 108 US 260, 27 L ed 719, 2 S Ct 622.

Even where claims have been reduced to judgment, the doctrine of equality of treatment is applied where justice requires it to prevent the unseemly scramble for preferences at the expense of the pursuit of orderly business methods. *Monmouth Lumber Co. v Indemnity Ins. Co.* 21 NJ 439, 122 A2d 604, 59 ALR2d 742.

1. *Monmouth Lumber Co. v Indemnity Ins. Co.*, supra, holding that cases in which creditors who seek payment from a common bond fund are of equal right usually call for application of the principle, "Equity is equality."

**Annotation:** 128 ALR 1096 (equality among claimants under indemnity or surety bond which is insufficient to pay all claimants in full).

2. See 18 Am Jur 2d, CONTRIBUTION §§ 3 et seq.

3. See MARSHALING ASSETS.

4. See PARTITION.

5. See WILLS.

for distribution where that fund is insufficient to pay all creditors in full.<sup>6</sup> Although out of legal assets payment must be made of obligations according to their dignity or priority of right, as to equitable assets, debts may be deemed by a court of equity to stand in pari jure (in equal right) and to be entitled to payment proportionally without reference to priority of right at law.<sup>7</sup> An application for the issuance of remedial process may be denied if the granting thereof will secure to the applicant a preference contrary to the maxim in question.<sup>8</sup>

§ 126. Equity regards as done that which ought to be done; acts directed, agreed, or intended to be done.

One of the maxims of equity is that equity regards as done that which ought to be done.<sup>9</sup> Thus, a court of equity, in determining a dispute between litigants, regards and treats as done that which, in fairness and good conscience, ought to be or should have been done.<sup>10</sup> If, for instance, by means of fraud or misrepresentation, a litigant has prevented acts from being done, equity treats the case as though the acts had in fact been performed.<sup>11</sup>

The court considers as actually having been performed acts which have been directed<sup>12</sup> or which have been agreed<sup>13</sup> or intended<sup>14</sup> to be done, there being

6. See INTEREST AND USURY (Rev ed §§ 9 et seq.); RECEIVERS (1st ed § 265).

7. Blair v Illinois Steel Co. 159 Ill 350, 42 NE 895; Wilder v Keeler (NY) 3 Paige 167.

Generally, the equitable doctrine that as between creditors, equality is equity, admits of no exception founded on the greater supposed sacredness of one debt, or on the fact that it arose out of a violation of duty, or that its loss involved greater apparent hardship in one case than another, unless it appears in addition that there is some specific recognized equity founded on some agreement, or the relation of the debt to assigned property, which entitles the claimant, according to equitable principles, to preferential payment. Cavin v Gleason, 105 NY 256, 11 NE 504.

8. State ex rel. Buckwalter v Lakeland, 112 Fla 200, 150 So 508, 90 ALR 704.

9. Re Kammerer's Estate, 8 Wis 2d 494, 99 NW2d 841.

This means that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been. Johnson v Dichiaro (Fla) 84 So 2d 537.

The maxim is one of the fundamental equitable principles which treats legal requirements that may be coerced in judicial proceedings as having been complied with, without waiting for the circuitous action of courts. It also applies to certain duties and principles of an equitable nature not strictly coercible at law. Fighting Bayou Drainage Dist. v Leflore County, 180 Miss 223, 177 So 6.

This major principle is related to the

maxim which states that a court of equity regards the substance and not the mere forms and circumstances of agreements and other instruments. Cropley v Cooper (US) 19 Wall 167, 22 L ed 109; Craig v Leslie (US) 3 Wheat 563, 4 L ed 460.

10. Independent Wireless Teleg. Co. v Radio Corp. 269 US 459, 70 L ed 357, 46 S Ct 166; Camp v Boyd, 229 US 530, 57 L ed 1317, 33 S Ct 785; United States v Colorado Anthracite Co. 225 US 219, 56 L ed 1063, 32 S Ct 617; James Supply Co. v Frost, 214 Ala 226, 107 So 57; McDonald v McDonald, 212 Ala 137, 102 So 38, 36 ALR 761; Waldon v Holland, 206 Ark 401, 175 SW2d 570; Malvern v Young, 205 Ark 886, 171 SW2d 470; Johnson v Dichiaro (Fla) 84 So 2d 537; Barrett v Barrett, 173 Ga 375, 160 SE 399, 78 ALR 962; Johnson v Long, 174 Md 478, 199 A 459, 116 ALR 617; Baseball Pub. Co. v Bruton, 302 Mass 54, 18 NE2d 362, 119 ALR 1518; Holland v Duluth Iron Min. & Development Co. 65 Minn 324, 68 NW 50; Bank of Poplar Bluff v Millsbaugh, 313 Mo 412, 281 SW 733, 47 ALR 754; Morgan's Estate, 223 Pa 228, 72 A 498; Ellerd v Murray (Tex Civ App) 247 SW 631; Federal Reserve Bank v Peters, 139 Va 45, 123 SE 379, 42 ALR 742.

11. Carpenter v Providence Washington Ins. Co. (US) 4 How 185, 11 L ed 931; Re Kammerer's Estate, 8 Wis 2d 494, 99 NW2d 841.

12. Peter v Beverly (US) 10 Pet 532, 9 L ed 522; Craig v Leslie (US) 3 Wheat 563, 4 L ed 460.

13. Seymour v Freer (US) 8 Wall 202, 19 L ed 306; Peter v Beverly (US) 10 Pet 532,