

- § 249. — Granting of relief as of time of decree or close of trial
- § 250. Form and parts, and submission, entry, and enrollment, of decree
- § 251. Revision, modification, or vacation of decree; rehearing
- § 252. Enforcement of decree; supplemental bill

D. BILLS OF REVIEW

1. IN GENERAL

- § 253. Generally
- § 254. Jurisdiction, and effect of appeal
- § 255. Review of consent decree, or decree pro confesso

2. GROUNDS

- § 256. Generally
- § 257. Error apparent on face of record
- § 258. Newly discovered evidence
- § 259. New matter arising after decree; change of law

3. RIGHT OR LEAVE TO FILE; PROCEDURE

- § 260. Generally; pleading
- § 261. Persons entitled to present bill; parties
- § 262. Time, or stage of proceedings, for filing; limitations and laches
- § 263. Showing required as to new matter or newly discovered evidence
- § 264. Showing of performance of prior decree
- § 265. Hearing and determination

E. APPELLATE REVIEW

- § 266. Generally; erroneous admission or rejection of evidence
- § 267. Cases in which jury used; advisory verdicts

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 Strobb) 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 main-

tained, 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*

by this change was the avoidance of a multiplicity of suits and vexatious and cumbersome procedure, and the securing to litigants of full and complete relief in a single action, where, under the old practice, several suits were often necessary to accomplish that result.²⁰ It is to be observed, though, that the modern action does not abolish the distinctions between law and equity.¹ Although the distinction between actions at law and suits in equity is abolished generally, the distinguishing features of the two classes of remedies, legal and equitable, are clearly marked and widely recognized; such recognition is essential to the administration of justice in an orderly manner and the preservation of the substantial rights of litigants, not from any necessary difference in the forms of pleadings and of actions, but the substantial difference between legal and equitable rights.² Over the years, however, some distinctions between law and equity have become less vivid. While in general the trial in an action in equity is by the court without a jury, and an action at law is tried before a jury, there are statutes in many jurisdictions which provide for the trial of issues of fact by the jury in certain actions in equity.³ Also, the principle that permits an equity court to give relief as of the date of trial, taking account of facts pertaining to the matter in controversy occurring after the commencement of the action so as to put an end to the litigation,⁴ which is historically distinctive to equity,⁵ has become less important with the enactment of statutes providing for supplemental pleadings in actions at law.⁶

While the jurisprudence of the equity system seems to have been introduced into this country as a part of the unwritten law,⁷ the judicial machinery by which it is administered has been for a long time largely statutory.⁸

Theis, 133 Ohio St 387, 11 Ohio Ops 51, 14 NE2d 1; Upjohn v Moore, 45 Wyo 96, 16 P2d 40, 85 ALR 1063.

5 Ohio St LJ 222.

Generally, see 1 Am Jur 2d, ACTIONS § 5.

20. Coleman v Jagers, 12 Idaho 125, 85 P 894.

1. Evans v Mason, 82 Ariz 40, 308 P2d 245, 65 ALR2d 936; Wolfe v Wallingford Bank & T. Co. 122 Conn 507, 191 A 88; Spoon-Shacket Co. v Oakland County, 356 Mich 151, 97 NW2d 25.

Generally, see 1 Am Jur 2d, ACTIONS §§ 7, 30.

The inherent and fundamental difference between actions at law and suits in equity cannot be ignored. Jackson v Strong, 222 NY 149, 118 NE 512.

The provision of the Kentucky statutes that there shall be but "one form of action," equitable or ordinary, did not abrogate the established distinction between courts of law and courts of equity, but merely provided for a transfer of a case to the right court if brought in the wrong one, or tried and decided as if brought in the proper one. Louisville Coopers Co. v Rudd, 276 Ky 721, 124 SW2d 1063, 144 ALR 763.

2. Cox v New York, 265 NY 411, 193 NE

251, 105 ALR 1378, cert den 294 US 729, 79 L ed 1259, 55 S Ct 638.

The distinction between legal and equitable actions is as fundamental as that between actions ex contractu and ex delicto, and no legislative fiat can wipe it out. Gould v Cayuga County Nat. Bank, 86 NY 75.

Although the same court administers both systems of law and equity, where a party brings an equitable action he must maintain it upon equitable grounds or fail, even though he may prove a good cause of action at law on the trial. Massman Constr. Co. v Nebraska Workmen's Compensation Court, 141 Neb 270, 3 NW2d 639, 27 Minn L Rev 319.

3. §§ 238 et seq., infra.

4. § 249, infra.

5. Kilbourne v Sullivan County, 137 NY 170, 33 NE 159.

6. See PLEADING (1st ed §§ 261 et seq.).

7. State ex rel. Rhodes v Saunders, 66 NH 39, 25 A 588, 18 LRA 646.

8. Montandon v Deas, 14 Ala 33; Soutter v Atwood, 34 Me 153; Somerby v Buntin, 118 Mass 279; Dwight v Pomeroy, 17 Mass 303; Hagner v Heyberger, 7 Watts & S (Pa) 104; Greene v Keene, 14 RI 388.

Equity suits in federal courts and the appellate procedure therein have always been regulated exclusively by federal statutes, rules of court, and decisions, unaffected by statutes of the states. The equity procedure in federal courts is now governed by various provisions of the Judicial Code and by the Federal Rules of Civil Procedure.⁹

Under the Federal Rules of Civil Procedure there is one form of action known as a "civil action."¹⁰ These rules, as is true of the codes in many states, apply merely to procedure, and do not destroy the differences between the substantive law and equity.¹¹

II. JURISDICTION, IN GENERAL

§ 5. Generally.

Speaking strictly, jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced nor the right of the plaintiff to avail himself of it, if it exists. It precedes those questions, and a decision upholding the jurisdiction of the court is entirely consistent with the denial of any equity in the plaintiffs, or in anyone else.¹² Generally speaking, however, courts of equity exercise a broad and flexible jurisdiction to grant remedial relief where justice or good conscience requires it.¹³ But a court of equity cannot create rights; it is limited to determining what rights the parties have and whether or in what manner it is just and proper to enforce them.¹⁴ These courts, of course, equally with courts of law, are bound by the positive provisions of statutes and they cannot, any more than courts of law, disregard constitutional and statutory requirements.¹⁵ If a plain defect of jurisdiction becomes apparent at the hearing or on appeal, a court of equity will not proceed to a decree.¹⁶

As shown in the subsequent discussion, the jurisdiction of equity is dependent upon a number of factors, including the following: (1) the matter in dispute, as being equitable in its nature; (2) the want of an adequate remedy at law; and (3) the relief involved or requested, as being equitable in character and available in equity. Most of equity's jurisdiction, however, falls generally into two categories. The one, generally exclusive, depends upon the substantive character of the right sought to be enforced; the other, generally

9. See FEDERAL PRACTICE AND PROCEDURE (1st ed, UNITED STATES COURTS §§ 25, 26).

10. Rule 2, Fed Rules of Civ Proc. See 1 Am Jur 2d, ACTIONS §§ 28, 30.

11. See FEDERAL PRACTICE AND PROCEDURE (1st ed, UNITED STATES COURTS § 25).

12. *People ex rel. Davis v Sturtevant*, 9 NY 263; *People ex rel. Gaynor v McKane*, 78 Hun 154, 28 NYS 981.

20 Fordham L Rev 23.

As to jurisdiction of courts in general, see 20 Am Jur 2d, COURTS §§ 87 et seq.

13. *Dorman v Crooks State Bank*, 55 SD 209, 225 NW 661, 64 ALR 614.

522

14. *Callahan v Auburn Production Credit Asso.* 240 Ala 104, 197 So 347, 129 ALR 893; *Fleming-Gilchrist Constr. Co. v McGonigle*, 338 Mo 56, 89 SW2d 15, 107 ALR 1003; *Swartz v Atkins*, 204 Tenn 23, 315 SW2d 393.

A court of equity can intervene only where legal rights are invaded or the law violated. *Chapman v Sheridan-Wyoming Coal Co.* 338 US 621, 94 L ed 393, 70 S Ct 392.

15. § 124, *infra*.

16. *Tyler v Savage*, 143 US 79, 36 L ed 82, 12 S Ct 340.

concurrent, depends as a rule upon the inadequacy of the legal remedy. The former is predicated upon such fiduciary relationships as trusts, and other matters historically in the province of a Chancery Court. In the other class falls the case where a substantive right is merely legal, arising out of no true traditional chancery relationship, and the resort to equity is permitted only because some extraneous circumstance makes it impossible to secure adequate relief at law. Although the employment of equity's powers must be exercised within the confines of equity's jurisdiction, the power of the court of equity is generally coextensive with the rights of persons to the relief which it provides. In the final analysis, however, whether a proper case is made for the exercise of a court's equitable powers necessarily depends upon the circumstances.¹⁷

The equity jurisdiction of the federal courts is derived from the Constitution and laws of the United States,¹⁸ and throughout the different states of the Union, the jurisdiction of these courts in equity is uniform and unaffected by state legislation.¹⁹ The equity jurisdiction which was conferred on inferior courts of the United States by the Judiciary Act of 1789, and continued by the Judicial Code, is that of the English Court of Chancery at the time of the separation of the two countries.²⁰

Unless expressly authorized to do so by statute, probate courts cannot exercise general equity powers, although they may apply equitable principles concerning a matter over which they have jurisdiction.¹ It has been held that the Chancery Court may take jurisdiction of a case without regard to the exclusiveness of the authority of the Probate Court over decedents' estates and matters of administration. For example, while the equity court will not take cognizance of a suit which is brought for the purpose of securing construction of a will,² except where statutory authority has been invoked,³ yet, if the existence of a trust affords ground for assuming jurisdiction,⁴ the court will determine a dispute as to construction or interpretation of the provisions of the testamentary instrument.⁵

§ 6. Legislative control, enlargement, or restriction; constitutional limitations.

Equity courts generally have the jurisdiction which was vested in the English High Court of Chancery⁶ and such additional power or authority as may have

17. *St. Stephen's Protestant Episcopal Church v Church of Transfiguration*, 201 NY 1, 94 NE 191; *Cohen v New York Mut. L. Ins. Co.* 50 NY 610.

41 Cornell LQ 351.

18. *Noonan v Lee* (*Noonan v Braley*) 2 Black (US) 499, 17 L ed 278.

19. *Mississippi Mills v Cohn*, 150 US 202, 37 L ed 1052, 14 S Ct 75; *Payne v Hook*, 7 Wall (US) 425, 19 L ed 260; *Tower Hill-Connellsville Coke Co. v Piedmont Coal Co.* (CA4 W Va) 64 F2d 817, 91 ALR 648, cert den 290 US 675, 78 L ed 582, 54 S Ct 93.

20. *Sprague v Ticonic Nat. Bank*, 307 US 161, 83 L ed 1184, 59 S Ct 777; *Matthews v Rodgers*, 284 US 521, 76 L ed 447, 52 S Ct 217; *Pankey v Ortiz*, 26 NM 575, 195 P 906, 30 ALR 92.

Generally, see FEDERAL PRACTICE AND PROCEDURE (1st ed, UNITED STATES COURTS §§ 22, 25-27).

1. *State ex rel. Baker v Bird*, 253 Mo 569, 162 SW 119.

2. *Hough v Martin*, 22 NC (2 Dev & B Eq) 379; *Bussy v M'Kie*, 7 SC Eq (2 M'Cord) 23.

Generally, see WILLS (1st ed §§ 1024 et seq.).

3. *Burroughs v Cutter*, 98 Me 178, 56 A 649.

4. As to jurisdiction over trusts, see TRUSTS.

5. *Toland v Earl*, 129 Cal 148, 61 P 914; *Wakefield v Wakefield*, 256 Ill 296, 100 NE 275; *Simmons v Hendricks*, 43 NC (8 Ired Eq) 84.

6. §§ 3, 4, supra.

been conferred by statutory enactment.⁷ So, the legislative body ordinarily has power to enlarge the jurisdiction of courts of equity to embrace cases wherein the remedy is otherwise inadequate.⁸ In a number of jurisdictions, powers have been conferred by the legislature in addition to those generally exercisable.⁹ Moreover, in many states in which the courts formerly exercised a very limited power, legislation has conferred full equity jurisdiction, according to the usage and practice of courts of chancery, in all cases where there is not a full, adequate, and complete remedy at law.¹⁰ However, to be properly consigned to the jurisdiction of a court of equity, the legal situation must be one which is equitable in its nature.¹¹ Thus, under a constitutional provision authorizing the legislature to establish courts of equity, a court, on being created, may be given jurisdiction only over matters in equity.¹²

Where the court has not been granted general equity powers, being authorized to act as a court of equity only in certain cases and classes of cases, the rule of a strict construction applies, insofar as the ascertainment of the range of jurisdiction is concerned.¹³ Consequently, it is necessary for a plaintiff to make it appear affirmatively on the face of his pleading that his case is within the jurisdiction of the court.¹⁴ In some states, statutes have restricted the courts' equity jurisdiction.¹⁵ However, statutes abrogating or abridging equitable jurisdiction are to be strictly construed,¹⁶ and unless a statute in so many words, or by a necessary and inescapable inference, restricts a court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.¹⁷

7. *Williamson v Berry*, 8 How (US) 495, 12 L ed 1170; *Bodley v Taylor*, 5 Cranch (US) 191, 3 L ed 75.

8. *People ex rel. Lemon v Elmore*, 256 NY 489, 177 NE 14, 75 ALR 1292.

The legislature may, for example, extend the power to issue the writ of injunction to a new class of cases to which the remedy is appropriate. *Hedden v Hand*, 90 NJ Eq 583, 107 A 285, 5 ALR 1463.

9. *Central Stock & Grain Exch. v Bendinger* (CA7 Ill) 109 F 926, cert den 183 US 699, 46 L ed 396, 22 S Ct 935; *Littleton v Fritz*, 65 Iowa 488, 22 NW 641; *Adams v Williams*, 97 Miss 113, 52 So 865; *Jones v Williams*, 139 Mo 1, 39 SW 486, 40 SW 353; *Greene v Keene*, 14 RI 388.

10. *Somerby v Buntin*, 118 Mass 279.

11. *Cates v Allen*, 149 US 451, 37 L ed 804, 13 S Ct 883, 977; *Hedden v Hand*, 90 NJ Eq 583, 107 A 285, 5 ALR 1463.

12. *Walls v Brundidge*, 109 Ark 250, 160 SW 230.

13. *Jones v Newhall*, 115 Mass 244; *Dwight v Pomeroy*, 17 Mass 303; *King v Brigham*, 23 Or 262, 31 P 601.

14. *May v Parker*, 12 Pick (Mass) 34.

15. *Soutter v Atwood*, 34 Me 153; *Jones v*

Newhall, 115 Mass 244; *Hagner v Heyberger*, 7 Watts & S (Pa) 104.

16. *Jay-Bee Realty Corp. v Agricultural Ins. Co.* 320 Ill App 310, 50 NE2d 973, 42 Mich L Rev 945.

17. *Porter v Warner Holding Co.* 328 US 395, 90 L ed 1332, 66 S Ct 1086.

The full equity jurisdiction of the Supreme Judicial Court of Maine is not limited by legislative acts conferring equity powers over certain special subjects incorporated in statutes enacted before and after the grant of full equity jurisdiction to the court, or by the recital of the phrase "in all other cases" in the statutory grant of full equity jurisdiction "in all other cases where there is not a plain, adequate, and complete remedy at law." *Usen v Usen*, 136 Me 480, 13 A2d 738, 128 ALR 1449, further holding that the jurisdiction of a court vested by statute with "full equity jurisdiction according to the usage and practice of courts of equity," to enjoin, at the suit of a wife, the prosecution by her husband of a divorce suit in another state in which he pretends residence, is not affected by the fact that at the time the equity jurisdiction was conferred, no suit could have been maintained in equity by a wife against her husband, where at such time the court was exercising limited equity powers and also had jurisdiction of actions at law, so that the phrase "according to the usage and practice of courts of equity" may be taken

Jurisdiction which the Constitution has conferred upon a court may not of course be curtailed by legislative enactment.¹⁸ The legislature may not add to equity jurisdiction by taking away from law courts, also created by the Constitution, powers which they possess and by transferring the authority to equity courts.¹⁹ Nor may the legislature, as a general rule, extend the court's power so as to deprive a litigant of the right of trial by jury.²⁰ Moreover, the right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury. Consequently, a statute which provides for a final decision of questions of fact in equity proceedings by the verdict of a jury and for the rejection of testimony by the judge, as in suits at law, has been held to be unconstitutional.¹

§ 7. Jurisdiction as determined by pleadings or by relief asked.

As a general rule, the nature and character of an action is determined by the pleadings; therefore, where the petition or complaint sounds in equity, it ordinarily stamps the action as one in equity.² To confer equitable jurisdiction, the relief requested in the complaint or petition must generally be equitable in character; thus, the prayer is of considerable importance in determining equitable jurisdiction, although it is not necessarily controlling, particularly where it is erroneous.³ Of course, even though the complaint or

as intended as a direction that the then newly granted "full equity jurisdiction" should be according to the usage and practice in equity rather than according to the procedure followed in the same court in actions of law.

18. *Marvel v State*, 127 Ark 595, 193 SW 259, 5 ALR 1458; *Hedden v Hand*, 90 NJ Eq 583, 107 A 285, 5 ALR 1463.

Annotation: 5 ALR 1476, s. 22 ALR 542, 75 ALR 1298.

A court having general equity jurisdiction is not limited in the exercise of such jurisdiction by statute. *Bodie v Bates*, 95 Neb 757, 146 NW 1002.

Compare *Young v Young*, 207 Ark 36, 178 SW2d 994, 152 ALR 327, holding that the rule in Arkansas that the jurisdiction of the equity court as it existed at the time of the adoption of the Constitution of 1874 can neither be enlarged nor diminished by the legislature is not violated by a statute abolishing the defense of recrimination in divorce actions where the ground of divorce is separation without cohabitation for 3 consecutive years, since this is a matter going, not to the jurisdiction itself, but merely to the grounds for its exercise.

19. *Hedden v Hand*, 90 NJ Eq 583, 107 A 285, 5 ALR 1463.

20. *Wiggins v Williams*, 36 Fla 637, 18 So 859, 30 LRA 754; *Brady v Carteret Realty Co.* 70 NJ Eq 748, 64 A 1078, 8 LRA NS 866; *North Pennsylvania Coal Co. v Snowden*, 42 Pa 488; *Bank of State v Cooper*, 2 Yerg (Tenn) 599; *Kwass v Kersey*, 139 W Va 497, 81 SE2d 237, 47 ALR2d 695.

The legislature may not arbitrarily extend judicial power so as to deprive a litigant of the right to a jury trial. *Hightower v Bigoney* (Fla App) 145 So 2d 505, *revd on other grounds* (Fla) 156 So 2d 501.

But it has been held that jurisdiction of equity may be extended by the legislature, eliminating constitutional questions involved by denying a jury trial. *State ex rel. Wilcox v Ryder*, 126 Minn 95, 147 NW 953, 5 ALR 1449.

1. *Brown v Buck*, 75 Mich 274, 42 NW 827.

2. *Van Allen v New York Elev. R. Co.* 144 NY 174, 38 NE 997.

Unless the complainant has shown a right to relief in equity, he can have no redress, however clear his rights at law. *Wright v Ellison*, 1 Wall (US) 16, 17 L ed 555.

Where the bill is in the nature of a bill of interpleader, the relief sought must be equitable relief. *Killian v Ebbinghaus*, 110 US 568, 28 L ed 246, 4 S Ct 232.

3. *Deckert v Independence Shares Corp.* 311 US 282, 85 L ed 189, 61 S Ct 229; *Fussell v Gregg*, 113 US 550, 28 L ed 993, 5 S Ct 631.

Even where a suit is based on an equitable title, the nature of the relief asked must be equitable to give a court of equity jurisdiction. *Smith v Bourbon County*, 127 US 105, 32 L ed 73, 8 S Ct 1043.

The test of equity jurisdiction is not necessarily the prayer or that a money demand is made, but is in the facts and what is to be accomplished. *Finzer v Peter*, 120 Neb 389, 232 NW 762, 73 ALR 1170.

petition sounds in equity, it may be alleged and shown that equity does not have jurisdiction.⁴ 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.⁵ 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.⁶

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.⁷ 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.⁸ 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.⁹

§ 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.¹⁰ 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.¹¹ Having once attached, the jurisdiction cannot be defeated by subsequent events which do not affect the merits of the complainant's case.¹² 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.*

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.¹³ The fact that a legal remedy has become available¹⁴ or that legal proceedings are filed¹⁵ is held not to cause a loss of jurisdiction.¹⁶ 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.¹⁷

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.¹⁸

§ 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.¹⁹ 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.²⁰ 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.¹

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.² 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.³

§ 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.⁴ 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.⁵ In cases of fraud, the jurisdiction of law and equity is in many respects concurrent,⁶ and the same is true with regard to matters of account,⁷ partnership,⁸ and private nuisances.⁹

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.¹⁰

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.

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.¹¹

§ 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.¹² The remedy by injunction¹³ or receivership¹⁴ 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.¹⁵ Similarly, in aid of another proceeding, a court of equity may entertain a bill of discovery¹⁶ or a bill to perpetuate testimony.¹⁷ Generally, however, an available legal remedy must be exhausted before resort is had to the equity court.¹⁸ 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.¹⁹ 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.²⁰

§ 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.¹ 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,¹⁵ or under the modern practice in some jurisdictions, it may transfer the case to the law side of the court.¹⁶

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.¹⁷ Courts of equity act upon equitable causes by the administration of equitable remedies,¹⁸ 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.¹⁹ 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.²⁰

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.¹ Nor does equity confine its relief to cases for which there is a precedent precisely in the situation presented to the court.² 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.³ Nevertheless, the court may not depart from precedent and assume an unregulated power of administering abstract justice.⁴ Equity has no jurisdiction over imperfect obligations resting upon conscience and moral duty only, unconnected with legal obligations.⁵ Equities must be alleged and proved in order that the court may have jurisdiction of a suit,⁶ 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.

general principles of equity, must be of an equitable character⁷ or be based upon some recognized ground of interposition by the court of equity.⁸

Under the modern practice in most jurisdictions defenses pleaded in an action may be either legal or equitable. Therefore, the grounds for invoking equitable jurisdiction are sometimes stated by way of an affirmative defense. Generally, under the head of equitable defenses all matters are included which would have authorized an application to a court of equity for relief against a legal liability, but which at law would not have been pleaded in bar. An equitable defense is good as a defense whenever it is good as a bar—that is, where the equities when established are destructive of the plaintiff's right—even though if the defendant had chosen, he might have used it as a counterclaim. Thus, for example, in ejectment, where the defendant claims that the property in dispute was by mistake omitted from his deed, he may set up the mistake as an equitable defense.⁹ Likewise, in an action on a contract, an answer in effect that enforcement would be inequitable because fraud or mistake has brought about the result that the writing is not a true expression of the parties is good.¹⁰

The invalidity or unconstitutionality of a statute or ordinance is not of itself a ground of equity jurisdiction.¹¹

§ 20. Fraud, misrepresentation, or concealment; bad faith or breach of fiduciary duty.

One of the most important grounds for equitable intervention is fraud or fraudulent misrepresentation or concealment. Indeed, there is probably no other ground on which jurisdiction in equity is so readily entertained and freely exercised. Thus, there is no question as to the jurisdiction of equity to relieve against fraud, especially where there is no adequate remedy at law.¹² While false representations which are made with knowledge of their falsity and with a fraudulent intent are of course grounds for relief in equity, such relief is also granted where statements are made recklessly and without regard to truth or falsity. It is the prevailing rule that equity will grant appropriate relief in cases involving transactions arising from misstatements, even though no fraudulent intent on the part of the person making the representation is shown, and although he made them innocently, as the result of misapprehension or mistake; all that need be shown under such circumstances is that the representations are false and actually mislead the person to whom they are made.¹³

A suppression or concealment of the truth may constitute a means of committing fraud as well as may a suggestion of falsehood, and therefore conceal-

7. § 6, *supra*.

8. *Cates v Allen*, 149 US 451, 37 L ed 804, 13 S Ct 883, 977.

9. *Susquehanna S. S. Co. v A. O. Andersen & Co.* 239 NY 285, 146 NE 381.

Generally as to equitable defenses in an action of ejectment, see 25 Am Jur 2d, EJECTMENT §§ 58-60.

10. *Susquehanna S. S. Co. v A. O. Andersen & Co.*, *supra*.

11. *Asplund v Hannett*, 31 NM 641, 249 P 1074, 58 ALR 573; *Thompson v Smith*, 155 Va 367, 154 SE 579, 71 ALR 604.

The unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. *Terrace v Thompson*, 263 US 197, 68 L ed 255, 44 S Ct 15.

12. See FRAUD AND DECEIT (1st ed §§ 133 et seq., 189 et seq.).

13. See FRAUD AND DECEIT (1st ed § 133).

ment of facts constitutes a ground of equitable jurisdiction no less than misrepresentation openly made. However, a suppression of the truth is not at all times such fraud as will be relieved against in equity. It is generally necessary to prove that the person charged had knowledge of the fact which he is said to have suppressed. Moreover, it must be a suppression of the facts which the party is under a legal or equitable obligation to communicate, and in respect of which he could not be innocently silent.¹⁴

While misrepresentation constitutes a ground upon which courts of equity commonly grant relief, the misrepresentation must generally relate to something material or important to the interests of the other party; it must not be vague and inconclusive in its nature, or a mere matter of opinion, and it must actually mislead the other party.¹⁵

Although there is some difference of opinion as to the effect of an adequate remedy at law upon the jurisdiction of equity in case of fraud, the prevailing view in this country is that equity will not take jurisdiction where there is such an adequate legal remedy. In a large number of cases, however, equity jurisdiction may be said to be practically exclusive of that of the law courts where fraud is involved. This is principally for the reason that the remedies of a plaintiff at law for fraud are few indeed, and those that do exist are seldom adequate. Even though the jurisdiction of law and equity is almost equal in the right to try and determine questions of fraud, the means of proving the fraud are not equal, and the modes of granting relief are widely different. In exercising jurisdiction to correct the defects of fraud, the equity court is not confined to the rules acted upon by the courts of law, but may act upon rules which go far beyond the rules of law. The law relieves against fraud negatively by preventing either a recovery or a defense founded on fraud, while equity frequently affirms the transaction and compels the party who has fraudulently obtained an apparent right to transfer it to the person equitably entitled to it. Moreover, although whatever amounts to fraud according to the legal conception is also fraud in the equitable conception, the converse of this statement is not true. The equitable theory of fraud is much more comprehensive than that of the law, and contains elements entirely different from any which enter into the legal notion. Indeed, equity may construct a fraud from the circumstances, whereas the law must find it as a fact.¹⁶ For example, courts of equity may grant affirmative relief by way of reformation or cancellation of instruments on the ground of constructive as well as actual fraud.¹⁷

Bad faith is held to be a ground for equitable relief or to constitute a foundation therefor. It is said that the good faith of the defendant is a proper and fundamental subject to be adjudged, and that good faith or bad faith or intent when constituent and essential in a cause of action or defense is a fact and may be alleged and proved as such.¹⁸

14. See FRAUD AND DECEIT (1st ed §§ 76 et seq.).

15. See FRAUD AND DECEIT (1st ed §§ 23 et seq.).

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

17. See 13 Am Jur 2d, CANCELLATION OF INSTRUMENTS §§ 16 et seq.; REFORMATION OF INSTRUMENTS (1st ed §§ 57 et seq.).

18. City Bank Farmers' Trust Co. v Hewitt Realty Co. 257 NY 62, 177 NE 309, 76 ALR 881; Kavanaugh v Kavanaugh Knitting Co. 226 NY 185, 123 NE 148.

A breach of fiduciary duty is ground for the exercise of equity jurisdiction in the absence of an adequate and complete remedy at law.¹⁹

§ 21. Irreparable injury.

As a general rule, an equity court may assume jurisdiction of a cause on the ground of irreparable injury,²⁰ such an injury being one for which a court of law furnishes no redress¹ that is fair or reasonable.² The power of the court to act in this situation is said to be one of the most valuable characteristics of equity jurisdiction.³ Accordingly, equity will act to prevent irreparable injury to a freehold.⁴ Threatened irreparable injury is one of the grounds for issuance of the writ of injunction.⁵

Because of the inadequacy of the legal remedy, the equity court may properly hear and determine a case where it appears that the injury complained of is of a destructive or continuous character,⁶ where the dispute involves loss of health or trade, where the means of subsistence is threatened, or where ruin of property must ensue.⁷ Where a continued use or threatened danger is such as to cause reasonable fear of irreparable injury, it is not essential that there be actual damage, or even a completed violation of the plaintiff's rights, in order to entitle him to the protection of equity.⁸ It has been held,

19. *Kocon v Cordeiro (RI)* 200 A2d 708.

As to particular fiduciaries, see the specific articles dealing therewith.

20. *Philadelphia Co. v Stimson*, 223 US 605, 56 L ed 570, 32 S Ct 340; *Cruickshank v Bidwell*, 176 US 73, 44 L ed 377, 20 S Ct 280; *Walla Walla v Walla Walla Water Co.* 172 US 1, 43 L ed 341, 19 S Ct 77; *Farris v Dudley*, 78 Ala 124; *Ada County v Bullen Bridge Co.* 5 Idaho 188, 47 P 818; *Engel v Walsh*, 258 Ill 98, 101 NE 222; *Inter-Ocean Pub. Co. v Associated Press*, 184 Ill 438, 56 NE 822; *Phillips v Winslow*, 18 B Mon (Ky) 431; *Peabody v Norfolk*, 98 Mass 452; *Coast Co. v Spring Lake*, 58 NJ Eq 586, 47 A 1131; *Thomas v Musical Mut. Protective Union*, 121 NY 45, 24 NE 24; *Venice v Woodruff*, 62 NY 462; *Taliaferro v Reiridon*, 186 Okla 603, 99 P2d 522; *Sullivan v Jones & L. Steel Co.* 208 Pa 540, 57 A 1065; *Hoffman v Tooele City*, 42 Utah 353, 130 P 61; *Bettman v Harness*, 42 W Va 433, 26 SE 271.

An injury is irreparable where there exists no certain pecuniary standard for measuring the damage. *Miller v Lawlor*, 245 Iowa 1144, 66 NW2d 267, 48 ALR2d 1058.

But inadequate damages and irreparable injury are not synonymous terms in determining grounds of equitable relief. *Jador Serv. Co. v Werbel*, 140 NJ Eq 188, 53 A2d 182, 172 ALR 1199.

Practice Aids.—Allegation of irreparable injury. 8 AM JUR PL & PR FORMS 8:247.

1. *Foster v Mansfield, C. & L. M. R. Co.* 146 US 88, 36 L ed 899, 13 S Ct 28.

2. *Thompson v Smith*, 155 Va 367, 154 SE 579, 71 ALR 604.

3. *Vicksburg Waterworks Co. v Vicksburg*, 185 US 65, 46 L ed 808, 22 S Ct 585.

4. *Guest v Brooklyn*, 69 NY 506.

5. See INJUNCTIONS (Rev ed §§ 30, 47, 48).

6. *D. M. Osborne & Co. v Missouri P. R. Co.* 147 US 248, 37 L ed 155, 13 S Ct 299.

7. *Parker v Winnipiseogee Lake Cotton & Woolen Co.* 2 Black (US) 545, 17 L ed 333.

A railroad company which has located the best line between its terminals is entitled to resort to a court of equity for relief against the acts of another railway company which, with full knowledge, has threatened and intended to take and occupy, and has crossed and recrossed such location at many points and different grades, making it impracticable for the former railroad company to proceed with the construction of its line. *Denver & R. G. R. Co. v Arizona & C. R. Co.* 233 US 601, 58 L ed 1111, 34 S Ct 691.

Where future infringement of a patent is threatened, it seems that equitable relief may be obtained. *Goshen Mfg. Co. v Hubert A. Myers Mfg. Co.* 242 US 202, 61 L ed 248, 37 S Ct 105.

8. *Texas & P. R. Co. v Marshall*, 136 US 393, 34 L ed 385, 10 S Ct 846; *Parker v Winnipiseogee Lake Cotton & Woolen Co.* 2 Black (US) 545, 17 L ed 333; *Blackman v Mauldin*, 164 Ala 337, 51 So 23; *Dennis v Mobile & M. R. Co.* 137 Ala 649, 35 So 30; *Schmaltz v York Mfg. Co.* 204 Pa 1, 53 A

however, that in stating an equitable cause of action it is essential to show that substantial injury has been done or will occur if equity does not act.⁹ Equity does not interfere on the ground of mere apprehensions of injury.¹⁰ It has been observed that the inadequacy of a recovery of damages is not synonymous with irreparable injury in determining grounds of equitable relief.¹¹ Nor is irreparable injury or inadequacy of legal remedy established by the claim that a jury may not find the determinative fact in one case the same way that they find it in another case.¹²

§ 22. Lack of volition, understanding, or intent; foreseeableness of, and ability to avert, prejudicial situation.

A party to a transaction the result or consequence of which has been to place him in a harmful or prejudicial situation may claim relief from a court of equity on a showing that the situation is the consequence of accident,¹³ mistake,¹⁴ surprise,¹⁵ duress¹⁶ or undue influence,¹⁷ oppression,¹⁸ imposition,¹⁹ fraud,²⁰ concealment,¹ overreaching,² or conduct which is described by many

522; *Johnson v Swanke*, 128 Wis 68, 107 NW 481; *Lawson v Menasha Wooden-Ware Co.* 59 Wis 393, 18 NW 440.

9. *State ex rel. Commissioners of Land Office v Cities Service Oil Co. (Okla)* 317 P2d 722.

10. *Erwin v Mississippi State Highway Com.* 213 Miss 885, 58 So 2d 52.

11. *Jador Serv. Co. v Werbel*, 140 NJ Eq 188, 53 A2d 182, 172 ALR 1199.

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

13. §§ 44, 45, *infra*.

14. §§ 28 et seq., *infra*.

15. The word "surprise" is a word of general signification, so general and so uncertain that it is impossible to fix it. A man is surprised in whatever is not done with so much judgment as it ought to be. But those who use that word often mean such surprise as is accompanied with fraud and circumvention. Such a surprise may be good ground to set aside a deed in equity, and has been so in all times. But any other surprise never was. *McDaniels v Bank of Rutland*, 29 Vt 230.

Relief from a judgment may be had on the ground of surprise. See *JUDGMENTS* (Rev ed § 768).

16. *Kronmeyer v Buck*, 258 Ill 586, 101 NE 935; *Central Bank v Copeland*, 18 Md 305.

17. *Wagg v Herbert*, 215 US 546, 551, 54 L ed 321, 324, 30 S Ct 218; *Harding v Handy*, 11 Wheat (US) 103, 6 L ed 429.

Annotation: 14 ALR2d 651, § 2 (undue influence in gift to clergyman, spiritual adviser, or church); 24 ALR2d 1292, § 3 (un-

due influence in gift from client to attorney); 70 ALR2d 591-613, §§ 1-20 (undue influence in gift from patient to physician, nurse, or other medical practitioner).

Generally as to duress and undue influence, see 25 Am Jur 2d, *DURESS AND UNDUE INFLUENCE*.

18. *Wagg v Herbert*, 215 US 546, 551, 54 L ed 321, 324, 30 S Ct 218; *Peugh v Davis*, 96 US 332, 24 L ed 775.

It has been said that equity always stands ready to relieve the oppressed from the oppressor's demand for possession or retention of an iniquitously exacted pound of material or personal flesh. *Spoon-Shacket Co. v Oakland County*, 356 Mich 151, 97 NW2d 25.

19. *St. Louis Smelting & Ref. Co. v Kemp*, 104 US 636, 26 L ed 875; *Harding v Handy*, 11 Wheat (US) 103, 6 L ed 429.

20. See § 20, *supra*; *FRAUD AND DECEIT* (1st ed §§ 23 et seq., 133 et seq., 189 et seq.).

1. *Tyler v Savage*, 143 US 79, 36 L ed 82, 12 S Ct 340.

In a court of conscience, deliberate concealment is equivalent to deliberate falsehood. *Crosby v Buchanan*, 23 Wall (US) 420, 23 L ed 138.

As to fraudulent concealment generally, see *FRAUD AND DECEIT* (1st ed §§ 76 et seq.).

2. *Howard v Howard*, 122 Vt 27, 163 A2d 861, 84 ALR2d 585, holding that the strictness imposed on transactions of husband and wife has equal application to persons falsely pretending to the marital status, and where there is misrepresentation, concealment, or artifice resulting in undue advantage to one participant over the other, equity will intervene to free the transaction from fraudulent overreaching.

other like terms.³ Cases identified by such expressions are peculiarly within the jurisdiction of the equity court if the law does not afford an adequate remedy,⁴ and ordinarily such cases may be dealt with more competently by that court.⁵

While definitions of the above expressions are infinite, the practical characteristic of the situations thereby described is that the complaining party did not participate in the disputed transaction understandingly, intentionally, or of his own free will. But where the complainant seeks relief from the harmful or prejudicial situation in which he is placed, contending that he did not enter therein intentionally or voluntarily, the action of the court in granting or withholding an appropriate remedy depends primarily on the showing as to whether he could have foreseen and averted the situation of which he complains.⁶ If the issue as to knowledge or foreseeableness is determined against him, the conclusion is that he is not entitled to relief.⁷ If the evidence shows that the complainant acted innocently or ignorantly, relief will not be accorded where it further appears that he could have ascertained the facts by the exercise of "due diligence."⁸ He is barred by his own negligence or carelessness.⁹ The court will not grant relief from a verbal contract which is within the purview of the statute of frauds, the complainant being deemed to have known that the law required the agreement to be evidenced by writing.¹⁰ On the other hand, relief will not be denied where it is to be concluded that the complainant was not negligent,¹¹ or that his failure to make inquiries or investigations or otherwise inform himself as to the facts

3. *Simmons Creek Coal Co. v Doran*, 142 US 417, 425, 35 L ed 1063, 1071, 12 S Ct 239 (inequitable conduct); *Drexel v Berney*, 122 US 241, 30 L ed 1219, 7 S Ct 1200 (conduct giving rise to estoppel); *Thackrah v Haas*, 119 US 499, 30 L ed 486, 7 S Ct 311 (extortion).

A contract procured by threats may be relieved against. *Beindorff v Kaufman*, 41 Neb 824, 60 NW 101; *Delta County Bank v McGranahan*, 37 Wash 307, 79 P 796.

As to naming one a party to an instrument without his consent, see Annotation: 51 ALR 867.

4. *Clements v Macheboeuf*, 92 US 418, 23 L ed 504; *Nelson v Cowling*, 77 Ark 351, 91 SW 773; *Dunlap v Steere*, 92 Cal 344, 28 P 563; *Wells v Bridgeport Hydraulic Co.* 30 Conn 316; *Brooks v Brooke*, 12 Gill & J (Md) 306; *Glass v Hulbert*, 102 Mass 24; *Minnis v Newbro-Gallogly Co.* 174 Mich 635, 140 NW 980; *Ashcom v Smith*, 2 Pen & W (Pa) 211; *McGinnis v Caldwell*, 71 W Va 375, 76 SE 834.

5. *Rees v Watertown*, 19 Wall (US) 121, 22 L ed 72.

6. §§ 34, 43, 45, *infra*.

7. *Liggett v Koivunen*, 227 Minn 114, 34 NW2d 345.

Equity will not relieve a purchaser of land

where equal information touching the nature and condition thereof was possessed by both parties. *McCobb v Richardson*, 24 Me 82.

8. *Hill v Ritchie*, 90 Vt 318, 98 A 497.

Ignorance of the facts is never sufficient to constitute a ground of relief if it appears that the requisite knowledge might have been obtained by reasonable diligence. *United States v Ames*, 99 US 35, 25 L ed 295.

9. *Johnston v Dunavan*, 17 Ill App 59; *Capehart v Mhoon*, 58 NC (5 Jones Eq) 178; *Korne v Korne*, 30 W Va 1, 3 SE 17.

Courts of equity are not established to relieve parties from the consequences of their own negligence or folly. *Dunphy v Ryan*, 116 US 491, 29 L ed 703, 6 S Ct 486.

A court of equity will not relieve a party from the result of his own carelessness, negligence, or laches. *Bigby v Powell*, 25 Ga 244; *Campbell v Whittingham*, 5 JJ Marsh (Ky) 96; *Parham v Randolph*, 4 How (Miss) 435; *Myler v Fidelity Mut. L. Ins. Co.* 64 Okla 293, 167 P 601; *Crompton v Beedle*, 83 Vt 287, 75 A 331; *Stone v Moody*, 41 Wash 680, 84 P 617, 85 P 346.

10. *Dunphy v Ryan*, 116 US 491, 29 L ed 703, 6 S Ct 486.

11. *Myler v Fidelity Mut. L. Ins. Co.* 64 Okla 293, 167 P 601.

was induced by conduct on the part of the defendant.¹² Furthermore, the rule is stated by some authorities that where one has been induced to act by fraudulent misrepresentation or wilful concealment, the defendant cannot avoid responsibility for the result of the action because the actor might, except for his own neglect, have discovered the wrong and prevented its accomplishment.¹³

Where the complainant can show that the defendant was in a better position than was he to foresee and avert the prejudicial situation, relief will generally be granted.¹⁴ A court of equity, it is said, will not visit on an innocent party the consequences of inequitable conduct on the part of the other party to the transaction.¹⁵ Accordingly, where it appears that the owner of property knowingly allowed another to deal therewith in ignorance of the state of the title, equity will not permit him to assert his ownership of the property to the injury of such other person.¹⁶ Furthermore, while equity will not aid a party who through negligence has failed to make a proper defense at law, relief may be granted if by fraud he has been prevented from so doing.¹⁷

In determining the issue as to the knowledge of the one party and the ability of the other to foresee the prejudicial situation, importance attaches to the complainant's mental strength or weakness,¹⁸ his intelligence,¹⁹ and his information and experience.²⁰ Accordingly, it is held that equity has jurisdiction of a suit by heirs to set aside a conveyance which has been obtained by imposition or undue influence from their ancestor who is shown to have been infirm of mind because of advanced age and other circumstances.¹ Moreover, while weakness of mind, standing alone, does not establish a case for equitable relief, yet if there is any unfairness in the transaction, the mental imbecility of the party may be taken into account to show such imposition or fraud as will annul the transaction.²

§ 23. Injustice or unfairness; ungenerous behavior.

It is a generally recognized principle that equity will exert its authority and grant its remedies to prevent injustice where other courts are helpless,³

12. If a complainant had a right to rely on false representations of the defendant, he is entitled to claim relief. *Lufkin v Republic Bldg. & L. Asso.* (Tex Civ App) 80 SW2d 1110.

13. *Jones v Stearns*, 97 Vt 37, 122 A 116, 31 ALR 653.

14. §§ 34, 43, 45, *infra*.

15. *Miltenberger v Logansport, C. & S. W. R. Co.* 106 US 286, 305, 27 L ed 117, 125, 1 S Ct 140.

16. *Morgan v Chicago & A. R. Co.* 96 US 716, 24 L ed 743.

17. *Hungerford v Sigerson*, 20 How (US) 156, 15 L ed 869; *Lufkin v Republic Bldg. & L. Asso.* (Tex Civ App) 80 SW2d 1110.

18. *Allore v Jewell*, 94 US 506, 24 L ed 260.

Age and ignorance are to be considered. *McGhee v Bell*, 170 Mo 121, 70 SW 493.

19. *Thackrah v Haas*, 119 US 499, 30 L ed 486, 7 S Ct 311; *Swan v Talbot*, 152 Cal 142, 94 P 238; *Shevlin v Shevlin*, 96 Minn 398, 105 NW 257.

20. *New York L. Ins. Co. v McMaster* (CA8 Iowa) 87 F 63; *Kimmell v Skelly*, 130 Cal 555, 62 P 1067; *Taylor v Glens Falls Ins. Co.* 44 Fla 273, 32 So 887; *Marshall v Westrope*, 98 Iowa 324, 67 NW 257.

1. *Harding v Handy*, 11 Wheat (US) 103, 6 L ed 429.

2. *Owings' Case*, 1 Bland Ch (Md) 370; *Tracey v Sacket*, 1 Ohio St 54; *Thomas v Sheppard*, 7 SC Eq (2 M'Cord) 36.

3. *Peugh v Davis*, 96 US 332, 24 L ed 775; *McClure v Leaycraft*, 183 NY 36, 75 NE 961; *Dorman v Crooks State Bank*, 55 SD

but will withhold its remedies if the result would be unjust.⁴ The court will never interfere in opposition to conscience,⁵ or aid in the assertion of a legal right contrary to the equity or justice of the case,⁶ and where the conduct of parties does not commend them to the favor of the court, every doubt will be resolved against them.⁷ Similarly, it is a familiar equitable principle that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, injury, or oppression.⁸ This principle is the basis of the rule that equity will exercise its power in a proper case to relieve a party from a forfeiture or penalty.⁹

A degree of unfairness may induce a court of equity to withhold its aid, even though such unfairness would not be sufficient to induce the court to interfere actively to set aside a contract.¹⁰ The equity court will not give effect to a bargain or agreement which is unconscionable¹¹ or illegal.¹² If a contract appears to be destitute of equity, the court will leave the parties to their remedy at law,¹³ and if this remedy has been lost, they must abide by the consequences of their conduct.¹⁴ Relief may be denied because of gross

209, 225 NW 661, 64 ALR 614; *Hoffman v Tooele City*, 42 Utah 353, 130 P 61.

Equity will exert its authority in proper cases to prevent injustice without any dependency on the merely legal rights of the parties. *Cotton v Cresse*, 80 NJ Eq 540, 85 A 600.

4. *McClure v Leaycraft*, 183 NY 36, 75 NE 961.

The court should not be made the instrument by which an injustice is continued. *People's Nat. Bank v Marye*, 191 US 272, 48 L ed 180, 24 S Ct 68.

Equity will not marshal securities where it will work injustice to an innocent third person. *Hite v Reynolds*, 163 Ky 502, 173 SW 1108.

Equity will not permit a person to derive any benefit from a fraud perpetrated by him, and this principle applies to inequitable defenses as well as to the maintenance of an action. *Callner v Greenberg*, 376 Ill 212, 33 NE2d 437, 134 ALR 1485.

5. § 24, *infra*.

6. *Jones v New York Guaranty & I. Co.* 101 US 622, 25 L ed 1030.

One who makes a homestead entry of land, knowing that it has been selected and certified and has been transferred to purchasers for value, will not be aided by a court of equity in attacking the title under such grant. *Deweese v Reinhard*, 165 US 386, 41 L ed 757, 17 S Ct 340.

Where a surveyor, while employed to make a survey of a plantation, thought he discovered an error by which it would appear that the lands were not in fact situated as officially surveyed, and induced a third party to obtain a patent for the land, which the surveyor then purchased from him, knowing that it had been possessed and cultivated for a

long period of years, a court of equity will not readily enforce an advantage thus obtained. *Cragin v Powell*, 128 US 691, 32 L ed 566, 9 S Ct 203.

An exclusive privilege to deceive the public by means of a trademark containing misrepresentations is not one that a court of equity will aid or sanction. *Manhattan Medicine Co. v Wood*, 108 US 218, 27 L ed 706, 2 S Ct 436.

7. *Providence Rubber Co. v Goodyear*, 9 Wall (US) 788, 19 L ed 566.

8. *Humphrey v Humphrey*, 254 Ala 395, 48 So 2d 424, 31 ALR2d 315; *Noyes v Anderson*, 124 NY 175, 26 NE 316.

9. §§ 77 et seq., *infra*.

10. *Cathcart v Robinson*, 5 Pet (US) 264, 8 L ed 120.

Whatever is unfair or even illiberal will be repelled by a court of equity. *Creath v Sims*, 5 How (US) 192, 12 L ed 111.

11. § 24, *infra*.

12. *De Wolf v Johnson*, 10 Wheat (US) 367, 6 L ed 343.

13. *Mississippi & M. R. Co. v Cromwell*, 91 US 643, 23 L ed 367.

Although equity cannot set aside a binding contract where the effect would be inequitable owing to facts arising after the date of the agreement and not within the contemplation of the parties at the time it was made, it will refuse to enforce the contract, and remand the party complaining to his remedy at law. *McClure v Leaycraft*, 183 NY 36, 75 NE 961.

14. *Dade v Irwin*, 2 How (US) 383, 11 L ed 308.

inadequacy of consideration¹⁵ or other great inequality.¹⁶ Where the case presented is that of an effort on the part of the defendant to avoid or delay the payment of a just debt, a court of equity will not strain a point to assist him.¹⁷ However, it seems that where a party has been compelled against his will to come into a court of equity, relief may not be denied upon considerations of injustice or unreasonableness.¹⁸

It has been held that something more must be shown than ungenerous behavior as a ground for invoking equitable relief,¹⁹ but that, conversely, the fact that a plaintiff is ungenerous in his demands will not cause an equity court to deny him rights, for generosity is a voluntary attribute and cannot be enforced even by equity.²⁰

§ 24. — Unconscionable conduct, advantage, contract, or bargain.

Undoubtedly, equity may take jurisdiction of a case on the ground of unconscionable conduct provided the conduct is serious enough to justify the court's interference.¹ While a court of equity will not relieve a party from a bargain merely because of hardship,² yet he may claim the interposition of the court if an unconscionable advantage has been taken of his necessity or weakness.³ In general, it may be said that wherever advantage is taken of a party under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning, where proper time is not allowed to the party and he acts improvidently, or if he is importunately pressed, if those

15. § 26, *infra*.

16. *Sun Printing & Pub. Asso. v Moore*, 183 US 642, 46 L ed 366, 22 S Ct 240.

17. *Sheffield Furnace Co. v Witherow*, 149 US 574, 37 L ed 853, 13 S Ct 936.

18. The fact that a party is obliged to go into a federal court of equity to enforce an essentially legal right arising upon a contract valid and unassailable under the controlling state law does not authorize that court to modify or ignore the terms of the legal obligation upon the claim, or to refuse to enforce the same because the court thinks that these terms are harsh or oppressive or unreasonable. *Manufacturers' Finance Co. v McKey*, 294 US 442, 79 L ed 982, 55 S Ct 444.

19. *Golde Clothes Shop v Loew's Buffalo Theaters*, 236 NY 465, 141 NE 917, 30 ALR 931.

20. *Graf v Hope Bldg. Corp.* 254 NY 1, 171 NE 884, 70 ALR 984, holding that equity will not relieve an owner of mortgaged property who, through a miscalculation, has failed to pay the full amount of interest due on a certain date, from the operation of a provision accelerating maturity of the mortgage debt upon default in the payment of any interest instalment, on the ground that the mortgagee's demand for enforcement of the provision is ungenerous.

1. *Weirfield Holding Corp. v Pless & Seeman, Inc.* 257 NY 536, 178 NE 784; *Graf v Hope Bldg. Corp.* 254 NY 1, 171 NE 884, 70 ALR 984.

A court of equity is a court of conscience, and nothing unconscionable will be permitted within its jurisdiction. *Humphrey v Humphrey*, 254 Ala 395, 48 So 2d 424, 31 ALR2d 315.

2. § 25, *infra*.

3. *Howard v Howard*, 122 Vt 27, 163 A2d 861, 84 ALR2d 585.

Where a person is illiterate or ignorant of the nature and extent of his rights, or ignorant of the nature of the transaction in which he is engaging, and acts without professional or other advice, and advantage is taken of his condition by unfairness, equity will give him relief. *Isaacson v Isaacson (Sup)* 28 NYS2d 517.

It seems that equity will intervene where advantage has been taken of the inexperience of youth, particularly in the case of infants; indeed, the jurisdiction of equity is broad, comprehensive, and plenary over the persons and property of infants, and in all suits or legal proceedings in which the personal or property rights of a minor are involved, the protective powers of equity may be invoked whenever it becomes necessary to protect such rights against unconscionable advantage or conduct. See *INFANTS* (1st ed §§ 101 et seq.).

in whom he places confidence make use of strong persuasions, if he is not fully aware of the consequences, but is suddenly drawn in to act, if he is not permitted to consult disinterested friends or counsel before he is called on to act in circumstances of sudden emergency or unexpected right or acquisition—in these and many similar cases, if there has been great inequality in the bargain, courts of equity will assist the party on the ground of fraud, imposition, or unconscionable advantage.⁴ Unconscionable bargains include most of those transactions, frequently found in English reports, which are known as "catching bargains" with heirs, reversioners, etc.⁵

On the other hand, it is fundamental that equity will never interfere in opposition to conscience,⁶ and will not give effect to an unconscionable agreement or bargain.⁷

§ 25. Hardship; hard or unprofitable bargains or agreements.

As a general thing, a court of equity may not assume power to administer justice because of the hardship of a case⁸ or the failure of the party's remedy at law.⁹ Nor does equity relieve parties from bargains merely because they are hard,¹⁰ harsh, unwise, improvident,¹¹ oppressive,¹² or unprofitable,¹³ or

4. Sprenger v Sprenger, 298 Mich 551, 299 NW 711; Bell v Campbell, 123 Mo 1, 25 SW 359; Crane v Conklin, 1 NJ Eq 345; Tracey v Sacket, 1 Ohio St 54; Howard v Howard, 122 Vt 27, 163 A2d 861, 84 ALR2d 385.

5. Butler v Duncan, 47 Mich 94, 10 NW 123; Osgood v Franklin, 2 Johns Ch (NY) 1, affd 14 Johns 527.

Chesterfield v Janssen, 2 Ves Sr 125, 28 Eng Reprint 32, 1 Atk 301, 26 Eng Reprint 191.

6. Creath v Sims, 5 How (US) 192, 12 L ed 111.

A court of equity is never active in relief against conscience. Bowman v Wathen, 1 How (US) 189, 11 L ed 97.

7. Mississippi & M. R. Co. v Cromwell, 91 US 643, 25 L ed 367; Kitchen v Rayburn, 19 Wall (US) 254, 22 L ed 64.

But the bargain must be so unconscionable as to warrant the presumption of fraud, imposition, or undue influence. Sun Printing & Pub. Assn. v Moore, 183 US 642, 46 L ed 366, 22 S Ct 240.

8. Heine v Levee Comrs, 19 Wall (US) 635, 22 L ed 223; Tamko Asphalt Products, Inc. v Fenix (Mo App) 321 SW2d 527.

The fact that holders of interest coupons on corporate bonds are prevented by the existence of war from presenting them for payment when due does not present a case of hardship which will cause a court of equity to give such holders priority over general creditors of the corporation, when it becomes bankrupt, out of a fund deposited in the bank to pay such coupons. Re Interborough Consol. Corp. (CA2 NY) 288 F 334, 32 ALR 952, cert den 262 US 752, 67 L ed 1215, 43 S Ct 760.

850

Merely because a security in an admiralty suit becomes ineffectual, relief in equity will not be granted if it appears that it became so without fraud, misrepresentation, or accident. United States v Ames, 99 US 35, 25 L ed 293.

9. Heine v Levee Comrs, 19 Wall (US) 635, 22 L ed 223.

10. Columbus R. Power & L. Co. v Columbus, 249 US 399, 63 L ed 669, 39 S Ct 549, 6 ALR 1648; Re Interborough Consol. Corp. (CA2 NY) 288 F 334, 32 ALR 952, cert den 262 US 752, 67 L ed 1215, 43 S Ct 760; Tamko Asphalt Products, Inc. v Fenix (Mo App) 321 SW2d 527.

Because the World War made bargains hard, relief therefrom may not be granted. Lenawee County Gas & E. Co. v Adams, 209 Mich 52, 176 NW 590, 10 ALR 1328.

11. Crabill v Montgomery Ward & Co. (App) 73 Ohio L Abs 60, 136 NE2d 332; Cox v Freeman, 264 Okla 138, 227 P2d 670, 28 ALR2d 1230 (saying that the general rule is that a court of equity must, when its jurisdiction is properly invoked, give full force and effect to a contract which has been voluntarily, understandingly, and fairly entered into, and which is free from fraud, accident, mistake, or other circumstance recognized as a ground for equitable relief, although the contract is hard, unwise, or improvident).

A contract will not be disturbed because it is a hard one. Union Cent. L. Ins. Co. v Audet, 94 Mont 79, 21 P2d 53, 92 ALR 571.

12. The court may not modify or ignore the terms of the contract or refuse to enforce the same because it considers them hard, oppressive, or unreasonable. Manufacturers