

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

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

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

VII. MAXIMS AND PRINCIPLES GUIDING EXERCISE OF JURISDICTION

A. IN GENERAL; MAXIMS HAVING REFERENCE TO OR GOVERNING COURT ACTION

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

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

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

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

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

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

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

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

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

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

because there is no precedent for it,³ it is its duty to follow those principles which have been established by precedent⁴ except where the application of such a principle would compel an unjust and unreasonable result.⁵ A court of equity is never required to render or justified in rendering an inequitable decision or decree⁶ or in aiding the accomplishment of that which is a violation of law⁷ or public policy.⁸

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

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

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

3. § 121, *infra*.

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

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

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

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

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

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

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

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

A court of equity will not lend its aid to

a clever attempt by a litigant to escape his just obligation. Hammer v Michael, 243 NY 445, 154 NE 305.

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

9. §§ 102 et seq., *supra*.

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

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

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

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

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

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

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

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

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

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

§ 119. Classification and kinds of maxims.

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

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

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

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

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

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

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

20. §§ 120 et seq., *infra*.

1. §§ 129-144, *infra*.

2. §§ 145-147, *infra*.

3. §§ 148-151, *infra*.

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

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

6. *Tompers v Bank of America*, 217 App Div 691, 217 NYS 67 (saying that the first principle of equity is justice); *Grether v*

Nick, 193 Wis 503, 213 NW 304, 215 NW 571, 55 ALR 525.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The fact that there is no wrong without a remedy has been the boast of many of the

sages of the law from early times. Says Lord Coke (Co Lit 197, b, 1 Thomas's Coke, 902): "The law wills that, in every case where a man is wronged and endangered, he shall have a remedy." And Lord Holt has said: "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it. . . . It is a vain thing to imagine a right without a remedy." *First State Bank v Fitch*, 105 Fla 435, 141 So 299; *Ritter v Ritter*, 219 Ind 487, 38 NE2d 997; *Pierce v Swan Point Cemetery*, 10 RI 227.

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

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

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

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

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

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

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

§ 121. — Effect of lack of precedent.

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

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

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

17. *Rees v Watertown*, supra.

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

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

20. § 118, supra.

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

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

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

A mere lack of precedent is no obstacle to equitable relief where the instant case is refer-

able to an established head of equity jurisprudence, either of remedy or primary right. *Re Burton's Estate*, 203 Minn 275, 281 NW 1, 118 ALR 741.

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

2. § 12, supra.

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

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

5. §§ 15 et seq., supra.

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.⁶

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.⁷

§ 123. Equity follows the law.

A fundamental maxim, frequently stated, is that equity follows the law.⁸ Its Latin form is "aequitas sequitur legem."⁹ 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.¹⁰ 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,¹¹ 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.¹² 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.¹³ Neither can equity courts disregard, or in effect repeal, statutory and constitutional requirements and provisions.¹⁴ However, equity does not always, or in all respects, follow the law,¹⁵ nor is equity's ordinary pursuit of the law ever slavish.¹⁶ 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.¹⁷ 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.¹⁸ Plainly, the court will not aid the assertion of a legal right which is contrary to the equity and justice of the case.¹⁹ Likewise, where a plaintiff comes into equity asking for unusual and extraordinary relief, he cannot insist on a strict legal right.²⁰ 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.¹

§ 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.² Indeed, equity follows the law more circumspectly in the interpretation and application of statute law than otherwise.³ Equity courts cannot disregard, or in effect repeal, statutory and constitutional requirements and provisions.⁴ 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.⁵ 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.⁶ Generally, courts of equity are as much bound by positive rules and general maxims concerning property as are courts of law,⁷ and in the administration of assets equity does not interfere with absolute legal priority.⁸ With regard to setoffs, equity follows the law unless some special circumstances occur to justify an interposition—as where peculiar equities intervene between the parties⁹—and courts of equity as well as courts of law are bound to regard the statute of frauds.¹⁰

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.¹¹ 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.¹² 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,¹³

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 establish 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.¹⁴

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

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

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.¹⁸ 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 obligated¹⁹ or who are equally entitled to claim a benefit²⁰ or share in a fund.¹ Instances of the application of the maxim are found in the law of contribution,² the marshaling of assets,³ partition,⁴ and the abatement of legacies.⁵ 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.⁶ 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.⁷ 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.⁸

§ 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.⁹ 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.¹⁰ 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.¹¹

The court considers as actually having been performed acts which have been directed¹² or which have been agreed¹³ or intended¹⁴ 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,

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

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

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

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

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

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

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

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

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

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

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

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

See 27 Am Jur 2d, *EQUITABLE CONVERSION*.

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

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

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

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

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

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

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

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

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

9. *Head v Sellers*, *supra*.

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

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

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

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

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

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

12. *Beck v Uhrich*, 13 Pa 636.

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

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

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

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

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

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

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

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

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

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

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

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

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

Remedies and relief,¹⁰ the authorities point out, are adapted to the exigencies of the case¹¹ and are calculated to protect the rights of parties in view of the situation in which they are placed.¹² The true and intrinsic character of proceedings, in courts of law as well as in pais, is subject to the scrutiny of

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

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

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

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

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

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

4. *Segall v Loeb*, 218 Ala 433, 118 So 633;

Ogden v Stevens, 241 Ill 556, 89 NE 741; *Hess v Haas*, 230 Mich 646, 203 NW 471; *Dunham v Chatham*, 21 Tex 231.

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

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

6. See § 22, supra.

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

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

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

10. §§ 102 et seq., supra.

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

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

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

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

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

B. MAXIMS APPLICABLE TO LITIGANT

1. IN GENERAL

§ 129. Generally.

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

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

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

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

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

Thus, where it appeared that A by a mar-

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

17. §§ 130 et seq., *infra*.

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

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

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

§ 130. Equity aids the vigilant and diligent.

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

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

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

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

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

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

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

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

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

"Leges vigilantibus, non dormientibus factae

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

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

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

6. *Lorenz v Rowley*, supra.

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

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

asserted.⁹ The doctrine of estoppel,¹⁰ as applied to this situation, is in a practical view the equivalent of the maxim in question. The principle under discussion is given effect in innumerable fact settings.¹¹ Equity will not take rights acquired by one who has been vigilant and give their benefit to one who has lost them through nonaction.¹²

The maxim discussed above also expresses the notion which is fundamental to the doctrine of laches,¹³ and it signifies, according to the authorities, that relief will be denied to one whose prejudicial situation is attributable to his own "negligence,"¹⁴ "carelessness,"¹⁵ "want of diligence,"¹⁶ "folly,"¹⁷ or "inat-

9. *Wisconsin-Alabama Lumber Co. v Sewell*, 222 Ala 696, 134 So 9.

Courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by reason of the neglect, ignorance, or even the want of means of those to whom they were once presented. *Leavenworth County v Chicago, R. I. & P. R. Co.* 134 US 688, 33 L ed 1064, 10 S Ct 708; *Aldridge & Stroud, Inc. v American-Canadian Oil & Drilling Corp.* 235 Ark 8, 357 SW2d 8.

10. See ETOPPEL AND WAIVER.

11. It may be invoked, for example, where the evidence shows that a landowner erected a building which encroached upon the adjoining property and that the owner of the land which was thus encroached on had knowledge of the facts and yet took no measures to protect his rights. See 1 Am Jur 2d, *ADJOINING LANDOWNERS*, § 125.

Where the owner of a building has projected a portion of it over the street line, an adjoining owner may be denied relief on proof that with knowledge of the plans, he took no measures to prevent the encroachment until the building had been completed. *Lewis v Pingree Nat. Bank*, 47 Utah 35, 151 P 558.

Similarly, where one takes an assignment of a contract after sundry breaches of which he might have known if he had used ordinary diligence, seeks compensation therefor or pays certain notes forming the consideration of the assigned contract with full knowledge or means of knowledge that they were drawn for too much, and then seeks repayment of the overplus, his want of vigilance will be a bar to relief in equity. *Marshall v Means*, 12 Ga 61.

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

13. *Graham v Boston, H. & E. R. Co.* 118 US 161, 30 L ed 196, 6 S Ct 1009; *Wisconsin-Alabama Lumber Co. v Sewell*, 222 Ala 696, 134 So 9.

The time at which a party appeals to a court of equity for relief affects largely the character of the relief; if one, aware of the situation, believes that he has certain legal rights and desires to insist upon them, he

should do so promptly; if by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived, especially if it is in respect to a matter which will largely affect the public convenience and welfare, a court of equity may properly refuse to enforce those rights, and in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal. *New York v Pine*, 185 US 93, 46 L ed 820, 22 S Ct 592.

Generally, as to laches, see §§ 152 et seq., *infra*.

14. *Hungerford v Sigerson*, 20 How (US) 156, 15 L ed 869; *Sample v Varnes*, 14 How (US) 70, 14 L ed 330; *Creath v Sims*, 5 How (US) 192, 12 L ed 111; *Wisconsin-Alabama Lumber Co. v Sewell*, 222 Ala 696, 134 So 9; *Roberts v Hughes*, 81 Ill 130; *Bibber v Carville*, 101 Me 59, 63 A 303; *Follingstad v Syverson*, 160 Minn 307, 200 NW 90; *Federal Land Bank v Gallatin County*, 84 Mont 98, 274 P 288.

Courts of equity do not 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.

15. *Slaughter v Gerson*, 13 Wall (US) 379, 20 L ed 627.

16. *Creath v Sims*, 5 How (US) 192, 12 L ed 111; *Bend v Hoyt*, 13 Pet (US) 263, 10 L ed 154.

Equity will not assist one whose condition is attributable only to a want of that diligence which may be fairly expected from a reasonable person. *Upton v Tribilcock*, 91 US 45, 23 L ed 203.

Equity will not give relief to a party who has acted in ignorance of facts which he could have ascertained by the exercise of due diligence and inquiry. *Farm Bureau Mut. Auto Ins. Co. v Houle*, 118 Vt 154, 102 A2d 326.

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

tion."¹⁸ In equity a party is not permitted to sleep on his rights to the prejudice of the party on whom he makes a claim and who by the delay may be deprived of the evidence and means of effectually defending himself. Therefore, a demand must be made within a reasonable time; otherwise, the claim is considered stale, and a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept on his rights and acquiesced for a great length of time.¹⁹

Generally, equity refuses its aid to a party who has slept on his rights and acquiesced in certain conduct for a great length of time even though the period which has elapsed without suit or other action is less than that which is prescribed by the appropriate statute of limitations. In other words, equity, independently of positive legislative limitations, will not ordinarily entertain stale demands, although it may in its discretion apply a statute of limitations, where there is such a statute, as a guide to the decision which it is to make with regard to its own doctrine of laches.²⁰ It has been held, however, that mere delay, however long, without the necessary elements to create an equitable estoppel, does not, in the absence of statute, preclude the granting of equitable relief.¹ Delay alone is not ordinarily enough to constitute laches.²

2. HE WHO SEEKS EQUITY MUST DO EQUITY

§ 131. Generally.

It is a fundamental principle that one who seeks equity may be required to do equity with respect to the subject matter involved before relief will be awarded.³ Indeed, one of the most frequently invoked maxims of equity declares that he who seeks equity must do equity.⁴ This is statutory in some

18. *Slaughter v Gerson*, 13 Wall (US) 379, 20 L ed 627.

19. *Urquhart v McDonald*, 252 Ala 505, 42 So 2d 9; *Sampson v Cottongim*, 249 Ky 670, 61 SW2d 309; *Burns v Dillon*, 226 Ky 82, 9 SW2d 1095; *Pendleton v Galloway*, 9 Ohio 178; *Neppach v Jones*, 20 Or 491, 26 P 569, 849; *Silver v Korr*, 392 Pa 26, 139 A2d 552; *Frost v Wolf*, 77 Tex 455, 14 SW 440; *Larscheid v Kittell*, 142 Wis 172, 125 NW 442.

20. §§ 157 et seq., *infra*.

1. *Weiss v Mayflower Doughnut Corp.* 1 NY2d 310, 152 NYS2d 471, 135 NE2d 208.

2. §§ 152 et seq., 163, *infra*.

3. *Colleston v Oftedahl*, 48 Cal App 2d 756, 120 P2d 710; *Ward v Lovell*, 21 Tenn App 560, 113 SW2d 759.

Annotation: 164 ALR 1393 (necessity of payment of, or offer to pay, debt in proceeding for cancellation or removal of mortgage or deed of trust as cloud on title).

4. *Manufacturers' Finance Co. v McKey*, 294 US 442, 79 L ed 982, 55 S Ct 444; *Pan American Petroleum & Transport Co. v Unit-*

ed States, 273 US 456, 71 L ed 734, 47 S Ct 416; *Myers v Hurley Motor Co.* 273 US 18, 71 L ed 515, 47 S Ct 277, 50 ALR 1181; *Drennen & Co. v Mercantile Trust & D. Co.* 115 Ala 592, 23 So 164; *Bank of Fayetteville v Lorwein*, 76 Ark 245, 88 SW 919; *Weyant v Murphy*, 78 Cal 278, 20 P 568; *Chamberlain v Thompson*, 10 Conn 243; *Evans v Tucker*, 101 Fla 688, 135 So 305, 85 ALR 170; *Taylor v Rawlins*, 86 Fla 279, 97 So 714, 35 ALR 271; *Atlanta Bkg. & Sav. Co. v Johnson*, 179 Ga 313, 175 SE 904, 95 ALR 1436; *Kelley v Clark*, 23 Idaho 1, 129 P 921; *Springfield & N. E. Traction Co. v Warrick*, 249 Ill 470, 94 NE 933; *Sjulin v Clifton Furniture Co.* 241 Iowa 761, 41 NW2d 721; *Louisville Asphalt Co. v Cobb*, 310 Ky 126, 220 SW2d 110, 8 ALR2d 981; *Jefferson County v McGrath*, 205 Ky 484, 266 SW 29, 41 ALR 586; *Wood v Goodwin*, 49 Me 260; *Cityco Realty Co. v Slaysman*, 160 Md 357, 153 A 278, 76 ALR 296; *Williams v Williams*, 167 Miss 115, 148 So 358, 88 ALR 197; *Adler v Interstate Trust & Bkg. Co.* 166 Miss 215, 146 So 107, 87 ALR 347; *Griggs v Miller (Mo)* 374 SW2d 119; *Jones v McGonigle*, 327 Mo 457, 37 SW2d 892, 74 ALR 550; *Hall v Lommasson*, 113 Mont 272, 124 P2d 694; *Ames v New Jersey Franklinite Co.* 12 NJ Eq 66; *Brown v Robinson*, 224 NY

states.⁵ The principle thus expressed governs the court in administering any kind of equitable relief in any controversy where its application may be necessary to work out complete justice.⁶ Having come into court seeking equitable relief, a complainant must offer to do equity,⁷ and will be required by the court to do equity as a condition to the granting of the remedy or relief sought.⁸ By appealing to the equitable jurisdiction, the complainant is deemed to have submitted himself to the court's decision as to what is necessary to do justice to the defendant⁹ as determined in the light of equitable principles.¹⁰

The principle under discussion is as applicable to a party defendant who seeks the aid of equity as it is to a party complainant.¹¹ Such maxim is applicable to complainants seeking relief from judgments against them,¹² or seeking to complete or effectuate a judgment in their favor.¹³ It applies in proceedings for an injunction,¹⁴ specific performance,¹⁵ and the quieting of title,¹⁶ and is said to be the basis of the right to accept a benefit under a deed¹⁷ or will,¹⁸ in return for which the recipient is bound to give effect to all the provisions of the instrument and perform the burdens imposed on him therein,

301, 120 NE 694, 21 ALR 777; *Owens v Wright*, 161 NC 127, 76 SE 735; *Winthrop v Huntington*, 3 Ohio 327; *Dickerson v Murfield*, 173 Or 662, 147 P2d 194; *Workman v Guthrie*, 29 Pa 495; *Jorgensen-Bennett Mfg. Co. v Knight*, 156 Tenn 579, 3 SW2d 668, 60 ALR 393, app dismd 278 US 583, 73 L ed 519, 49 S Ct 186; *Julian v American Nat. Bank*, 21 Tenn App 137, 106 SW2d 871; *United Cigarette Mach. Co. v Brown*, 119 Va 813, 89 SE 850; *Peters v Case*, 62 W Va 33, 57 SE 733; *Helbig v Bonsness*, 227 Wis 52, 277 NW 634, 115 ALR 373.

5. *Marietta Realty & Development Co. v Reynolds*, 189 Ga 147, 5 SE2d 347.

6. *Lindell v Lindell*, 150 Minn 295, 185 NW 929; *Lindsey v Clark*, 193 Va 522, 69 SE2d 342.

7. *High Knob, Inc. v Allen*, 205 Va 503, 138 SE2d 49.

The maxim applies to one who affirmatively seeks equitable relief. *Columbus v Mercantile Trust & D. Co.* 218 US 645, 54 L ed 1193, 31 S Ct 105.

8. *Nicosia v Sher* (CA10 Okla) 239 F2d 456; *Griggs v Miller* (Mo) 374 SW2d 119; *Fidelity Union Trust Co. v Multiple Realty & Constr. Co.* 131 NJ Eq 527, 26 A2d 155; *Edwards v Tobin*, 132 Or 38, 28 P 562, 68 ALR 152; *High Knob, Inc. v Allen*, 205 Va 503, 138 SE2d 49.

A plaintiff is equitably bound to do equity as a condition precedent to obtaining equitable relief. *Duggan v Platz*, 263 NY 505, 189 NE 566; *Grosch v Kessler*, 256 NY 477, 177 NE 10.

9. *Fidelity Union Trust Co. v Multiple Realty & Constr. Co.* 131 NJ Eq 527, 26 A2d 155; *Lindsey v Clark*, 193 Va 522, 69 SE2d 342.

One who institutes a suit for specific performance necessarily submits himself to the

judgment of the court to do what it shall adjudge to be equitable to the defendant. *Willard v Tayloe*, 8 Wall (US) 557, 19 L ed 501.

10. *Lindsey v Clark*, 193 Va 522, 69 SE2d 342.

Anyone asking the aid of the court whether that aid is such as could be obtained in a court of law or whether it is of a character obtainable only in a court of equity, submits himself to the jurisdiction of the court, and in asking its aid, subjects himself to the imposition of such terms as well-established equitable principles would require. *Charleston & W. C. R. Co. v Hughes*, 105 Ga 1, 30 SE 972; *Russell Petroleum Co. v Walker*, 162 Okla 216, 19 P2d 582; *Comstock v Thompson*, 286 Pa 457, 133 A 638.

11. *Brown, B. & Co. v Lake Superior Iron Co.* 134 US 530, 33 L ed 1021, 10 S Ct 604.

12. See JUDGMENTS (Rev ed § 816).

13. *Union Cent. L. Ins. Co. v Drake* (CA8 Neb) 214 F 536; *Compton v Jesup* (CA6 Ohio) 68 F 263, ctd ques ans 167 US 1, 42 L ed 55, 17 S Ct 795; *Terry v McClintock*, 41 Mich 492, 2 NW 787.

Annotation: 139 ALR 1507.

14. See INJUNCTIONS (Rev ed § 34).

15. See SPECIFIC PERFORMANCE (1st ed §§ 6, 177).

16. See QUIETING TITLE AND DETERMINATION OF ADVERSE CLAIMS (1st ed §§ 67 et seq.).

17. *Peters v Bain*, 133 US 670, 33 L ed 696, 10 S Ct 354; *Barrier v Kelly*, 82 Miss 233, 33 So 974.

18. See WILLS (1st ed § 1526).

including the renunciation of any inconsistent rights or claims. The maxim applies to a state when it seeks the aid of a court of equity.¹⁹

Although the maxim that he who seeks equity must do equity meets with the universal approval of the courts, the latter are not to determine arbitrarily what the equities between the parties are. This is a question which must be presented by proper pleading, and the issue thus presented determined upon the evidence.²⁰ It has been said that the maxim requires a plaintiff to proceed in accordance with his own theory.¹ On the other hand, it has been held that a pleading relying upon or invoking the maxim is not essential, for such relief is in the nature of a condition imposed upon the complainant, and is not granted in response to an affirmative pleading by the defendant.²

§ 132. Nature of defendant's claim which equity will protect or enforce.

The maxim "he who seeks equity must do equity" has been said to presuppose that equitable claims, as distinguished from legal rights, have arisen out of the subject matter of litigation in favor of each of the parties,³ and that the maxim is not applicable to a defendant who asserts a pure legal right to defeat the application of a complainant for equitable relief.⁴ The equity of the defendant must exist in fact, and it must be that of which the law takes cognizance.⁵ However, an equity court will protect a defendant's equitable right arising upon his answer regardless of the nature of relief sought by the plaintiff.⁶ The court finds no obstacle in the way of decreeing that which is right and just to the defendant although the latter may be in some particular a wrongdoer.⁷ Again, affirmative relief may be accorded notwithstanding that the defendant would be precluded from obtaining it if he were the complainant⁸ or if he tried to enforce his claim in any other manner.⁹ The fact

19. *Daniell v Sherrill* (Fla) 48 So 2d 736, 23 ALR2d 1410, holding that a state which invokes the jurisdiction of a court of equity to quiet title to certain property is bound by the maxim "he who seeks equity must do equity" to the same extent as any citizen.

20. *Gettins v Boyle*, 184 App Div 499, 177 NYS 711, affd on reh 186 App Div 966, 173 NYS 907.

1. *Kam Chin Chun Ming v Kam Hee Ho*, 45 Hawaii 521, 371 P2d 379, reh den 46 Hawaii 13, 373 P2d 141.

2. *Ward v Lovell*, 21 Tenn App 560, 113 SW2d 759.

A party may invoke the maxim that one who seeks equity must do equity without pleading it. *Dickerson v Murfield*, 173 Or 662, 147 P2d 194.

3. *Manufacturers' Finance Co. v McKey*, 294 US 442, 79 L ed 982, 55 S Ct 444.

4. *Garbutt v Mayo*, 128 Ga 269, 57 SE 495, wherein the court rejected the contention that the maxim was applicable and said: "While the plaintiffs have resorted to a court of equity to obtain relief against the defendants, the defendants are entitled to defeat the claim for equitable relief by showing that the

plaintiffs have no title to the property, but that the title is in the defendants; that is to say, the defendants may assert their legal title as against the plaintiffs' equitable claim. The defendants are not the movants in the matter. They have not appealed to a court of equity for relief. They relied upon their legal title to defeat the plaintiffs; and, in order to secure the benefit resulting from their ownership, it is not incumbent upon them to do anything more than to establish that they are in law the owners of the property. It is not incumbent upon them, in the assertion of their legal title to the property, to do anything more than to establish the fact that the legal title in them exists. So far as their assertion of title is concerned, they are seeking no equitable relief whatever against the plaintiffs."

5. *Cityco Realty Co. v Slaysman*, 160 Md 357, 153 A 278, 76 ALR 296; *City Investing Co. v Davis* (Mo) 334 SW2d 63.

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

7. *Gaffney v Kent* (Tex Civ App) 74 SW2d 176.

8. *Walker v Galt* (CA5 Fla) 171 F2d 613,

that the defendant's demand is barred by the statute of limitations does not preclude the court from requiring the complainant to satisfy it.¹⁰ Thus, the court may require or authorize the enforcement of a claim or equity which is held by the defendant and which, by reason of the statute of limitations or a former judgment, the defendant could not enforce affirmatively or in any other way.¹¹

§ 133. Relation of adverse equity, or obligation of complainant to do equity, to subject matter of and parties to suit.

The general rule that he who seeks equity must do equity will be applied where the adverse equity grows out of the very controversy before the court, or out of such circumstances as the records shows to be a part of its history, or is so connected with the cause and litigation as to be presented in the pleadings and proof, with full opportunity afforded to the complainant to explain or refute the charges.¹² Thus, the obligations which a complainant will be required to perform as a condition to the obtaining of the relief which he prays for are those arising out of the transaction which is the subject matter of litigation.¹³ A complainant will not be required to fulfil obligations which are founded on other contracts or transactions between the parties to the suit¹⁴ or between the complainant and a third person.¹⁵ Accordingly, the maxim that he who seeks equity must do equity is held to be limited to conduct in dealings between the parties to the controversy, since to hold otherwise would bar equitable relief to a litigant upon proof that at any time prior to his application therefor, he was guilty of inequitable conduct.¹⁶ On the other hand, a person cannot expect a court of equity to enforce an agreement made with the intent that it shall operate as a fraud on the private rights and interests of third persons or the public generally.¹⁷

6 ALR2d 808. cert den 336 US 925, 93 L ed 1086, 69 S Ct 656; *Evans v Tucker*, 101 Fla 688, 135 So 305, 85 ALR 170; *Martin v Martin*, 164 Ill 640, 45 NE 1007; *Lindell v Lindell*, 150 Minn 295, 185 NW 929; *Williams v Williams*, 167 Miss 115, 148 So 358, 88 ALR 197; *Anderson v Purvis*, 211 SC 255, 44 SE2d 611; *Gaffney v Kent* (Tex Civ App) 74 SW2d 176.

9. *Anderson v Purvis*, 211 SC 255, 44 SE 2d 611; *Lindsey v Clark*, 193 Va 522, 69 SE2d 342.

10. *Bank of Alma v Hamilton*, 85 Neb 441, 123 NW 458; *United Cigarette Mach. Co. v Brown*, 119 Va 813, 89 SE 850.

11. *United Cigarette Mach. Co. v Brown*, *supra*.

Although a note is set aside on the ground that it was procured through duress, nevertheless, in giving such relief, equity may provide that the relief shall be without prejudice to the right to maintain an action at law upon the original cause of action to settle which the note was given, even though any remedy at law to enforce this cause of action would otherwise be barred by the statute of limitations. *Macke v Jungels*, 102 Neb 123, 166 NW 191.

12. *Lindell v Lindell*, 150 Minn 295, 185 NW 929; *Comstock v Johnson*, 46 NY 615.

13. *Colleston v Oftedahl*, 48 Cal App 2d 756, 120 P2d 710; *Anderson v Purvis*, 211 SC 255, 44 SE2d 611.

One is bound not only to perform his engagements, but also to repair all the damages which accrue naturally from their breach. *Curtis v Innerarity*, 6 How (US) 146, 12 L ed 380.

14. *Mahoney v Bostwick*, 96 Cal 53, 30 P 1020; *Kirby v Union P. R. Co.* 51 Colo 509, 119 P 1042; *Huggins v Johnston* (Tex Civ App) 3 SW2d 937, affd 120 Tex 21, 35 SW2d 688; *Rosenthyne v Matthews-McCulloch Co.* 51 Utah 38, 168 P 957.

One who seeks to avoid a conveyance need only offer to repay the consideration; he need not offer to pay for services rendered by the defendant under an independent contract. *Warner v Flack*, 278 Ill 303, 116 NE 197, 2 ALR 423.

15. *Garland v Rives*, 4 Rand (Va) 282.

16. *Ranger Steel Products Corp. v Chodak* (Sup) 128 NYS2d 607.

17. § 136, *infra*.

Although the maxim that he who seeks equity must do equity generally applies to what a party does or is required to do with respect to the subject matter of the suit after he gets into court, it has also been applied to what he has done with respect thereto before coming into court; in other words, he must not only do equity, but he must have done equity, to the other party with respect to the subject matter of the suit.¹⁸

§ 134. Conditions to relief.

As a corollary of the maxim that he who seeks equity must do equity, courts of equity have for a long time granted relief upon such conditions as are just and proper and demanded by the exigencies of the circumstances.¹⁹ It is fundamental that anyone going into equity and asking its aid submits himself to the imposition of such terms as well-established equitable principles require.²⁰ Undoubtedly, a court of equity has power to make its granting of relief dependent upon the performance of conditions by a party litigant,¹ if the conditions are such as are imposed in the exercise of a sound discretion² and of a character calculated to satisfy the dictates of conscience.³ The court may

18. *Ranger Steel Products Corp. v Chodak* (Sup) 128 NYS2d 607.

19. *Milanko v Austin*, 362 Mo 357, 241 SW2d 881, cert den 342 US 906, 96 L ed 678, 72 S Ct 298.

Where equitable rules and principles demand it, a court may condition the grant of relief to a complainant in order to place the defendant in the position that he should equitably occupy in view of the relief granted. *Nicosia v Sher* (CA10 Okla) 239 F2d 456.

20. *Marietta Realty & Development Co. v Reynolds*, 189 Ga 147, 5 SE2d 347; *Lindsey v Clark*, 193 Va 522, 69 SE2d 342.

The court's own terms may be imposed on a party to whom it grants relief. *Marine Ins. Co. v Hodgson*, 7 Cranch (US) 332, 3 L ed 362.

1. *Central Kentucky Natural Gas Co. v Railroad Commission*, 290 US 264, 78 L ed 307, 54 S Ct 154; *Nicosia v Sher* (CA10 Okla) 239 F2d 456; *Mason v Ellison*, 63 Ariz 196, 160 P2d 326 (stating that when an equity court renders a conditional decree, it is not making a contract between the parties, but is simply adjusting the equities and granting to one or the other certain relief provided that one or the other complies with certain directions by the court, in order to properly administer equity and effect justice); *State ex rel. Peevy v Cate*, 236 Ark 836, 371 SW2d 541; *Seeger v Odell*, 18 Cal 2d 409, 115 P2d 977, 136 ALR 1291; *Pure Oil Co. v Byrnes*, 388 Ill 26, 57 NE2d 356; *Cantwell v Cantwell*, 237 Ind 168, 143 NE 2d 275, cert dismd and app den 356 US 225, 2 L ed 2d 712, 78 S Ct 700, reh den 356 US 954, 2 L ed 2d 847, 78 S Ct 913 (stating that the rule requiring a meritorious defense to be shown before a judgment will be set aside is a reasonable condition interposed

by equity courts); *Givens v Turner*, 272 Ky 211, 113 SW2d 1166; *Mississippi State Highway Com. v Spencer*, 233 Miss 155, 101 So 2d 499; *Milanko v Austin*, 362 Mo 357, 241 SW2d 881; *Hall v Lommasson*, 113 Mont 272, 124 P2d 694; *Winthrop v Huntington*, 3 Ohio 327; *Henderson v Arkansas*, 71 Okla 253, 176 P 751.

2. *Central Kentucky Natural Gas Co. v Railroad Commission*, 290 US 264, 78 L ed 307, 54 S Ct 154; *State ex rel. Peevy v Cate*, 236 Ark 836, 371 SW2d 541; *Pure Oil Co. v Byrnes*, 388 Ill 26, 57 NE2d 356.

A court of equity has discretion, in the exercise of the jurisdiction committed to it, to grant or deny relief upon the performance of conditions which will safeguard the public interests. *Securities & Exch. Commission v United States Realty & Improv. Co.* 310 US 434, 84 L ed 1293, 60 S Ct 1044.

3. *Cantwell v Cantwell*, 237 Ind 168, 143 NE2d 275, cert dismd and app den 356 US 225, 2 L ed 2d 712, 78 S Ct 700, reh den 356 US 954, 2 L ed 2d 847, 78 S Ct 913; *Givens v Turner*, 272 Ky 211, 113 SW2d 1166.

In accordance with the maxim that "he who asks equity must do equity," it is within the province of a court of equity, as a condition to granting relief, to make it conditional upon the complainant's observing the requirements of conscience and of righteous conduct, even though this is not demanded by a cross bill. *White v Masee*, 202 Iowa 1304, 211 NW 839, 66 ALR 1434.

By an active exertion of its powers, a court of equity is not positively bound to interfere so as to permit a suitor to redeem lands which he had conveyed; the court has a discretion on the subject and may prescribe the terms of its interference and demand that its conscience be satisfied by the doing of

thus protect and give effect to the rights of one party while awarding relief to the other,⁴ and in doing so, the court is not restrained by strict legal rights.⁵ In the exercise of its power, the court may require the performance of conditions which are designed to protect the rights of the parties pending appeal or to safeguard temporarily the public interest while the decree is being carried into effect.⁶ Furthermore, where a judgment debtor comes into court asking protection on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant the prayer upon such conditions as justice demands.⁷

In some situations, however, the court's power in this respect should be exercised with caution.⁸ Moreover, in some cases, and in accordance with the indication above that the court's power in this respect is not absolute, the imposition of conditions upon the granting of relief has been held to be reversible error.⁹

Where a final decree is to be enforced on certain conditions, the court should see that the conditions are complied with; it has been held to be erroneous to leave that question to the determination of the clerk.¹⁰ It has been held, however, that conditions of relief do not constitute an affirmative decree against a plaintiff. He may perform them or not at his option, but if he fails and refuses to perform them, the court may deny him all relief and dismiss his action.¹¹

One seeking in equity to be relieved from the performance of a condition precedent to obtaining relief, on the ground that it is impossible to perform such condition, must also show that the granting of the relief will not jeopardize the legitimate interest of the persons entitled to performance of the condition.¹²

§ 135. — What may be required of complainant; restoration of status quo.

While a determination of the question as to what a complainant must do as a condition to securing relief is primarily the function of the court or chancellor, the latter, in arriving at a decision, is not vested with unlimited or arbitrary power. He may not impose a condition which in his individual opinion will work substantial justice between the parties. On the contrary, the complainant may be required to do only that which fixed principles

equity on the part of him who asks it. *Holden Land & Live Stock Co. v Inter-State Trading Co.* 233 US 536, 58 L ed 1083, 34 S Ct 661.

4. *Kinney-Coastal Oil Co. v Kieffer*, 277 US 488, 72 L ed 961, 48 S Ct 580; *Mississippi State Highway Com. v Spencer*, 233 Miss 155, 101 So 2d 499.

5. *White v Massee*, 202 Iowa 1304, 211 NW 839, 66 ALR 1434.

6. *Central Kentucky Natural Gas Co. v Railroad Commission*, 290 US 264, 78 L ed 307, 54 S Ct 154; *Mississippi State Highway Com. v Spencer*, 233 Miss 155, 101 So 2d 499.

7. *Mechanics Bank v Lynn*, 1 Pet (US) 376, 7 L ed 185.

8. The power of federal equity courts to attach conditions to decrees enjoining state rates should be cautiously exercised. *Central*

Kentucky Natural Gas Co. v Railroad Commission, 290 US 264, 78 L ed 307, 54 S Ct 154.

9. *State ex rel. State Highway Com. v Gilham*, 188 Okla 10, 105 P2d 773, the court saying, however, that it is not holding that equity cannot in any case impose conditions upon the granting of relief if and when special conditions are appropriate and accomplish the ends of justice.

10. *Farmer v Samuel*, 4 Litt (Ky) 187; *Griffith v Depew*, 3 AK Marsh (Ky) 177.

11. *Nicosia v Sher* (CA10 Okla) 239 F2d 456.

12. *Martin v New York L. Ins. Co.* (CA7 Ill) 104 F2d 573, 124 ALR 1163, cert den 308 US 594, 84 L ed 497, 60 S Ct 123, 124.

obligate him to do.¹³ But if there is a distinctly equitable right to which the defendant is entitled, even though not at common law, the court will make it a condition precedent to the plaintiff's relief that he shall grant such equitable right to the defendant.¹⁴

As to whether the complainant must offer to discharge the obligation which is owed by him depends, it seems, upon the showing whether the obligation is definite and certain in all respects. If he simply owes to the defendant a sum of money, he must, so it has been held, offer to pay the amount; and if he has failed to make payment, the court may properly deny the relief for which he has prayed and dismiss the bill.¹⁵ In some situations the complaint or petition must incorporate allegations offering to do equity to the defendant.¹⁶ An offer on the part of the complainant is appropriate, apparently, although not always a requisite of good pleading.¹⁷ On the other hand, the complainant need not make an offer to do equity if there is doubt or uncertainty as to what he is obligated to do.¹⁸

The basic principle upon which restoration of the status quo is required in order to avoid a contract is that one who seeks equity must do equity.¹⁹ An offer in the bill to make restitution when an accounting shall be had may be held to be insufficient; and the complainant may be required, before the court proceeds with the case, to pay to the defendant sums which have been wrongfully withheld, the bill to be dismissed at the complainant's costs in the event restitution is not made within a specified time.²⁰ So also, where a person in possession of property under claim of title has in good faith made improvements and incurred expense in other respects, the true owner, seeking the aid of equity to establish his title, will be compelled to reimburse the occupant for his expenditures, upon the principle that he who seeks equity must do equity.¹

3. "CLEAN HANDS" MAXIM

§ 136. Generally.

The frequently stated maxim that "he who comes into equity must come with clean hands"² is an ancient and favorite precept of the equity court.³

13. *Marietta Realty & Development Co. v Reynolds*, 189 Ga 147, 5 SE2d 347; *Manternach v Studdt*, 240 Ill 464, 88 NE 1000; *Lindell v Lindell*, 150 Minn 295, 185 NW 929.

14. *Anderson v Purvis*, 211 SC 255, 44 SE 2d 611.

15. *King v Eldora*, 220 Iowa 568, 261 NW 602.

A proceeding for the collection of a debt will not be set aside unless the complainant tenders the amount due. *McQuiddy v Ware* (US) 20 Wall 14, 22 L ed 311.

16. *Florida East Coast Fruit Land Co. v Mitchell*, 80 Fla 291, 85 So 661.

17. *United States v Beebe*, 180 US 343, 45 L ed 563, 21 S Ct 371; *Miller v Louisville & N. R. Co.* 83 Ala 274, 4 So 842; *Jones v*

McGonigle, 327 Mo 457, 37 SW2d 892, 74 ALR 550.

18. A deed to real estate need not be tendered if there is uncertainty as to who should be named as the grantee. *Jones v McGonigle*, supra.

19. *Kam Chin Chun Ming v Kam Hee Ho*, 45 Hawaii 521, 371 P2d 379, reh den 46 Hawaii 13, 373 P2d 141; *Sjulin v Clifton Furniture Co.* 241 Iowa 761, 41 NW2d 721; *York v Cole*, 254 NC 224, 118 SE2d 419.

See also 13 Am Jur 2d, CANCELLATION OF INSTRUMENTS §§ 37 et seq.; 17 Am Jur 2d, CONTRACTS §§ 512 et seq.

20. *Comstock v Thompson*, 286 Pa 457, 133 A 638.

1. See IMPROVEMENTS (1st ed § 26).

2. *Manufacturers' Finance Co. v McKey*,

The principle announced thereby is recognized as being a fundamental of equity jurisprudence,⁴ and the same principle is expressed in the language that he who has done inequity shall not have equity.⁵ The maxim and principle for which it stands signifies that a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable,⁶ unfair and dishonest, or fraudulent and deceitful⁷ as to the controversy in issue.⁸ It is held that equity denies affirmative relief because of such conduct even though it thereby leaves undisturbed, and in ostensibly full legal effect, acts or proceedings which it would otherwise set aside.⁹

It has been pronounced that where a plaintiff comes into equity for relief, he and those in privity with him must be free of any inequitable conduct relative to the controversy.¹⁰ It has been held that although all members of a group suing as plaintiffs are not guilty of unconscionable conduct, they

294 US 442, 79 L ed 982, 55 S Ct 444; Loughran v Loughran, 292 US 216, 78 L ed 1219, 54 S Ct 684, reh den 292 US 615, 78 L ed 1474, 54 S Ct 861; Keystone Driller Co. v General Excavator Co. 290 US 240, 78 L ed 293, 54 S Ct 146; Carmen v Fox Film Corp. (CA2 NY) 269 F 928, 15 ALR 1209, cert den 255 US 569, 65 L ed 790, 41 S Ct 323; Memphis Keeley Inst. v Leslie E. Keeley Co. (CA6 Tenn) 155 F 964; Moore v Tarlton, 3 Ala 444; Boretz v Segar, 124 Conn 320, 199 A 548; Stehli v Thompson, 151 Fla 566, 10 So 2d 123; Cutler v Hicks, 268 Ill App 161; Boos v Morgan, 130 Ind 305, 30 NE 141; Proctor v Hansel, 205 Iowa 542, 218 NW 255, 58 ALR 153; Adler v Interstate Trust & Bkg. Co. 166 Miss 215, 146 So 107, 87 ALR 347; Stierlin v Teschemacher, 333 Mo 1208, 64 SW2d 647, 91 ALR 121; Re First Trust & Sav. Bank, 45 Mont 89, 122 P 561; Munn v Americana Co. 83 NJ Eq 309, 91 A 87; Skirvin v Sigler, 183 Okla 523, 83 P2d 530; Teuscher v Gragg, 136 Okla 129, 276 P 753, 66 ALR 143; McKee v Fields, 187 Or 323, 210 P2d 115; Dickerson v Murfield, 173 Or 662, 147 P2d 194; McVey v Brendel, 144 Pa 235, 22 A 912; State ex rel. Daniel v Kizer, 164 SC 383, 162 SE 444, 81 ALR 722; Humphreys-Mexia Co. v Arseneaux, 116 Tex 603, 297 SW 225, 53 ALR 1147; Pittsburgh & W. V. Gas Co. v Nicholson, 87 W Va 540, 105 SE 784, 12 ALR 1392; David Adler & Sons Co. v Maglio, 200 Wis 153, 228 NW 123, 66 ALR 1085; Grether v Nick, 193 Wis 503, 213 NW 304, 215 NW 571, 55 ALR 525.

Sorrell v Smith (Eng) [1925] AC 700 (HL).

Annotation: 4 ALR 44.

3. Bishop v Bishop (CA3 Virgin Islands) 257 F2d 495, cert den 359 US 914, 3 L ed 2d 576, 79 S Ct 578; Eristavi-Tchitcherine v Lasser (CA5 Fla) 164 F2d 144; Padgett v Padgett, 199 Cal App 2d 652, 18 Cal Rptr 789; Katz v Karlsson, 84 Cal App 2d 469, 191 P2d 541; State ex rel. Summa v Starke Circuit Court, 238 Ind 204, 149 NE 541;

Duncombe v Amfot Oil Co. 201 Ky 290, 256 SW 427.

Annotation: 4 ALR 44.

4. State ex rel. Summa v Starke Circuit Court, 238 Ind 204, 149 NE2d 541; Schaeffer v Sterling, 176 Md 553, 6 A2d 254; Rust v Gillespie, 90 Okla 59, 216 P 480.

The "clean hands" maxim is far more than a mere banality. New York Football Giants, Inc. v Los Angeles Chargers Football Club, Inc. (CA5 Miss) 291 F2d 471.

5. Milwaukee & M. R. Co. v Soutter (US) 13 Wall 517, 20 L ed 543; State ex rel. Summa v Starke Circuit Court, 238 Ind 204, 149 NE2d 541; Duncombe v Amfot Oil Co. 201 Ky 290, 256 SW 427; Cedar Springs v Schlich, 81 Mich 405, 45 NW 994; Rueb v Rehder, 24 NM 534, 174 P 992, 1 ALR 423; Rust v Gillespie, 90 Okla 59, 216 P 480; Palmer v Harris, 60 Pa 156; James v Bird, 35 Va (8 Leigh) 510.

Annotation: 4 ALR 46.

6. National F. Ins. Co. v Thompson, 281 US 331, 74 L ed 881, 50 S Ct 288; McKnight v Taylor (US) 1 How 161, 11 L ed 86; Shikes v Gabelnick, 273 Mass 201, 173 NE 495, 87 ALR 1339; Adler v Interstate Trust & Bkg. Co. 166 Miss 215, 146 So 107, 87 ALR 347; Stierlin v Teschemacher, 333 Mo 1208, 64 SW2d 647, 91 ALR 121; King v Antrim Lumber Co. 70 Okla 52, 172 P 958, 4 ALR 21; Humphreys-Mexia Co. v Arseneaux, 116 Tex 603, 297 SW 225, 53 ALR 1147.

Annotation: 4 ALR 47 et seq.

7. § 138, *infra*.

8. §§ 142 et seq., *infra*.

9. Padgett v Padgett, 199 Cal App 2d 652, 18 Cal Rptr 789.

10. Gables Racing Asso. v Persky, 148 Fla 627, 6 So 2d 257.

cannot claim the benefit of a fraud perpetrated by one or two of their number.¹¹ If the maxim is applicable to the conduct of the individual, relief will be denied to his heirs or personal representative.¹²

Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate inequitably or as a fraud on the private rights and interests of third persons¹³ or on the public generally.¹⁴ Thus, the requirements of public policy will be considered in determining the applicability of the maxim.¹⁵ Indeed, where a suit in equity concerns the public interest as well as the private interests of the litigants, the doctrine that he who comes into equity must come with clean hands assumes a greater significance, since it not only prevents a wrongdoer from enjoying the fruits of his transgression, but also averts an injury to the public.¹⁶

According to good authority, a party may invoke the maxim without pleading it.¹⁷ Moreover, in order that the suit may be dismissed, the defendant need not have invoked the clean hands maxim;¹⁸ the court will act sua sponte or of its own motion.¹⁹ However, it seems that the maxim may not be raised

11. *Ford v Buffalo Eagle Colliery Co.* (CA4 W Va) 122 F2d 555.

48 W Va LQ 172.

12. *Stierlin v Teschemacher*, 333 Mo 1208, 64 SW2d 647, 91 ALR 121.

13. *Selz v Unna* (US) 6 Wall 327, 18 L ed 799; *Owens v Owens*, 21 Tenn App 104, 106 SW2d 227.

Inequitable conduct justifying a denial of relief extends not only to parties dealing with each other, but as well to private rights and interests of third persons. *Camp v Camp*, 196 Okla 199, 163 P2d 970.

Where the plaintiff, in order to recover, must overcome upon equitable grounds a wrongful modification of the contract, executed by the plaintiff, and where the plaintiff admits inequitable or immoral conduct in entering into such contract, in that it was executed solely for the purpose of deceiving a third person and inducing him to relinquish certain rights, the relief will be denied the plaintiff. *Skirvin v Sigler*, 183 Okla 523, 83 P2d 530; 23 Minn L Rev 382.

In many cases the refusal of a court to decree a conveyance to the purchaser of property paid for by him and transferred to a third person to defraud creditors is based on the ground that the purchaser does not come into court with clean hands. *Haggerty v Wilmington Trust Co.* 22 Del Ch 152, 194 A 134; *Summers v Morley*, 95 NJ Eq 505, 123 A 377, affd 96 NJ Eq 677, 126 A 925; *Turner v Eford*, 58 NC 106. Annotation: 117 ALR 1466.

14. *New York Football Giants, Inc. v Los Angeles Chargers Football Club, Inc.* (CA5 Miss) 291 F2d 471.

15. *Baue v Embalmers Federal Labor Union* (Mo) 376 SW2d 230.

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16. *Precision Instrument Mfg. Co. v Automotive Maintenance Machinery Co.* 324 US 806, 89 L ed 1381, 65 S Ct 993, reh den 325 US 893, 89 L ed 2005, 65 S Ct 1189; *Republic Molding Corp. v B. W. Photo Utilities* (CA9 Cal) 319 F2d 347; *Bankers Life & Casualty Co. v Alexander*, 242 Iowa 364, 45 NW2d 258.

17. *Dickerson v Murfield*, 173 Or 662, 147 P2d 194.

The doctrine of clean hands need not be pleaded in order to be available where the evidence discloses applicability. *Brenner v Smullian* (Fla) 84 So 2d 44.

18. *Bishop v Bishop* (CA3 Virgin Islands) 257 F2d 495, cert den 359 US 914, 3 L ed 2d 576, 79 S Ct 578; *Frank Adam Electric Co. v Westinghouse Electric & Mfg. Co.* (CA8 Mo) 146 F2d 165; *Bell & H. Co. v Bliss* (CA7 Ill) 262 F 131; *Cody v Landis*, 68 Ohio App 225, 22 Ohio Ops 364, 35 Ohio L Abs 68, 40 NE2d 209.

19. *Bishop v Bishop* (CA3 Virgin Islands) 257 F2d 495, cert den 359 US 914, 3 L ed 2d 576, 79 S Ct 578; *Frank Adam Electric Co. v Westinghouse Electric & Mfg. Co.* (CA8 Mo) 146 F2d 165 (saying that whenever in the course of a proceeding the court is informed in any way that the plaintiff is without clean hands, it should inquire into the facts of its own accord and if it finds the charge to be true, relief should not be granted); *Bell & H. Co. v Bliss* (CA7 Ill) 262 F 131; *Sisson v Janssen*, 244 Iowa 123, 56 NW2d 30.

Annotation: 4 ALR 47.

The fact that the defendant has not in his answer alleged the delinquency of the complainant does not preclude the court from

in an appellate court for the first time except on a showing of very strong grounds.²⁰

The clean hands maxim is subject to reasonable limitations.¹ Generally, it may be invoked only to prevent affirmative equitable relief.² The maxim is not one of absolutes and should be applied in the court's discretion, so as to accomplish its purpose of promoting public policy and the integrity of the courts.³ It may not be invoked if the consequence of its application would be to produce a result which is denounced by statute or which is contrary to public policy.⁴ It has been held that the maxim may not be invoked against a litigant who seeks, not the relief which is accorded by an equity court, but the enforcement of a legal right by means of a proceeding in equity, the reason therefor being the inability to proceed in the court of law without subjecting himself to a charge of contempt.⁵ A party who is insane may be relieved from the consequences of his conduct.⁶

The validity and enforceability of contracts, as against the contention that they are illegal, immoral, or against public policy, are considered in another article.⁷

§ 137. Basis, rationale, and purpose of maxim.

"Clean hands" is a legal euphemism which refers to the acceptability, clean-

refusing relief. *Munn v Americana Co.* 83 NJ Eq 309, 91 A 87.

A court will of its own motion apply the maxim at any stage in the proceedings. *General Electric Co. v Hygrade Sylvania Corp.* (DC NY) 45 F Supp 714.

20. *Mosley v Magnolia Petroleum Co.* 45 NM 230, 114 P2d 740, saying that if there was a dismissal by the appellate court under the clean hands maxim, there would be no shadow of doubt of the inequity of the party so charged, where the maxim had not been invoked in the trial court.

1. *Baue v Embalmers Federal Labor Union (Mo)* 376 SW2d 230.

2. *Sisson v Janssen*, 244 Iowa 123, 56 NW 2d 30.

The "clean hands" doctrine does not preclude defendant, in a suit to set aside a deed of conveyance and attacking a transfer of funds to her by her father, alleged to have been obtained by undue influence, from setting up a defense that, by reason of the provisions of the father's will forfeiting the shares of other beneficiaries to her in event of a contest, complainants had no interest in their father's estate. *Alper v Alper*, 2 NJ 105, 65 A2d 737, 7 ALR2d 1350.

3. *Walsh v Atlantic Research Associates*, 321 Mass 57, 71 NE2d 580.

60 Harvard L Rev 980.

The application of the doctrine of clean hands is purely discretionary and it should not be applied where it will produce a result contrary to the firm public policy of the state

in a matter of such fundamental importance as the preservation of the dignity of the marital relationship. *Staedler v Staedler*, 6 NJ 380, 78 A2d 896, 28 ALR2d 1291.

4. *Johnson v Yellow Cab Transit Co.* 321 US 383, 88 L ed 814, 64 S Ct 622; *Simmons v Simmons*, 57 App DC 216, 19 F2d 690, 54 ALR 75; *Heflinger v Heflinger*, 136 Va 289, 118 SE 316, 32 ALR 1088; *Gardner v Gardner*, 144 W Va 630, 110 SE2d 495.

The reimbursement of public funds is not to be defeated by the private defense of the want of clean hands on account of any official delinquencies or mismanagement of that fund, and as to which there have been no injurious consequences, beyond those that are fanciful or illusory, to those raising that defense. *Love v Robinson*, 161 Miss 585, 137 So 499, 78 ALR 608.

Equity will not refuse to annul an incestuous marriage on account of the fact that the complainant was guilty of an offense in contracting the marriage. *Arado v Arado*, 281 Ill 123, 117 NE 816, 4 ALR 28.

5. *Manufacturers' Finance Co. v McKey*, 294 US 442, 79 L ed 982, 55 S Ct 444.

6. *Hier v Farmers Mut. F. Ins. Co.* 104 Mont 471, 67 P2d 831, 110 ALR 1051, holding that the equitable maxim that he who comes into equity must come with clean hands will not preclude recovery on a fire insurance policy covering property set on fire by the assured while insane.

7. See 17 Am Jur 2d, *CONTRACTS* §§ 155 et seq.

liness, and decency of the claim put forth. It means that a claim tainted with deceit and impurity of motive, which, if of decent character, would perhaps receive approval, will unhesitatingly be ignored. It means that whenever a party who seeks to set the judicial machinery in motion and obtain some equitable remedy has violated conscience or good faith, or other equitable principle in his prior conduct with reference to the subject in issue, the doors of equity will be shut against him notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief.⁸ The foundation of the "clean hands" maxim is said to be the same as that upon which rest related maxims,⁹ such as "he who seeks equity must do equity"¹⁰ and "ex turpi causa non oritur actio" (from an unrighteous inducement, no cause of action arises).¹¹ The underlying theory is that equity has for its purpose the dispensing of unalloyed justice and that "no polluted hand shall touch the pure fountain of justice."¹² It has been said that the maxim is most applicable when a party seeks to take advantage of an act or omission which he has himself induced, and that it may be invoked because of the very nature of the wrong, either for the benefit of the court and society, or for the benefit of the defendant, when to do so otherwise would be to allow plaintiff to take an unfair advantage of the defendant.¹³ The maxim is said to govern the discretionary powers of courts of equity in the exercise of their remedial functions and to furnish a universal rule affecting their administration as to remedies and remedial rights.¹⁴

8. *Hoehn v Crews* (CA10 Okla) 144 F2d 665, *affd Garber v Crews*, 324 US 200, 89 L ed 870, 65 S Ct 600; *Ohio Oil Co. v Sharp* (CA10 Okla) 135 F2d 303; *Katz v Karlsson*, 84 Cal App 2d 469, 191 P2d 541; *Shrader v Shrader* (Clark v Shrader) 228 Ky 374, 15 SW2d 246, 66 ALR 139; *Wolfenstein v Fashion Originators Guild*, 244 App Div 656, 280 NYS 361; *Schultz v Morgan Sash & Door Co.* (Okla) 344 P2d 253, 74 ALR2d 967.

Annotation: 4 ALR 45.

The doctrine that he who comes into equity must come with clean hands is a self-imposed ordinance that closes the door of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant; and is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith, which presupposes a refusal on its part to be an abettor of inequity. *Precision Instrument Mfg. Co. v Automotive Maintenance Machinery Co.* 324 US 806, 89 L ed 1381, 65 S Ct 993, *reh den* 325 US 893, 89 L ed 2005, 65 S Ct 1189.

While equity does not purport to enforce moral as distinguished from legal obligations, it can and should, as a matter of public policy involving the standing and integrity of the court, refuse aid to a litigant who has been guilty of such reprehensible conduct in reference to the subject matter of the litigation

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that good conscience must revolt against granting him relief. See §§ 138 et seq., *infra*.

9. *Harris v Harris*, 208 Ala 20, 93 So 841.

10. *Kinner v Lake Shore & M. S. R. Co.* 69 Ohio St 339, 69 NE 614.

Annotation: 4 ALR 45.

11. *Langley v Devlin*, 95 Wash 171, 163 P 395, 4 ALR 32.

12. *Duncombe v Amfot Oil Co.* 201 Ky 290, 256 SW 427.

Lord Chief Justice Wilmot observed: "No polluted hand shall touch the pure fountain of justice; and those so entering the temple will be expelled with the anathema 'Procul, O procul este, profani!'" See *Rock v Matthews*, 35 W Va 531, 14 SE 137.

The purpose of the maxim is to secure justice and equity, and not to aid one in an effort to acquire property to which he has no right. *Batesville Truck Line, Inc. v Martin*, 219 Ark 603, 243 SW2d 729.

13. *Stewart v Stewart*, 158 Fla 326, 29 So 2d 247, 170 ALR 1073.

The principle underlying the maxim is that equity will not aid an applicant in securing or protecting gains from his wrongdoing or in escaping the consequences thereof. *Niner v Hanson*, 217 Md 298, 142 A2d 798.

14. *Rust v Gillespie*, 90 Okla 59, 216 P 480.

The maxim is not used, however, merely as a means of punishing a complainant for wrongful, immoral, or illegal acts. It is applied in the interest of the public and to protect the court and the defendant, but not to favor him.¹⁵

§ 138. Kinds of acts or conduct within maxim.¹⁶

The maxim that he who comes into equity must come with clean hands necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant; and accordingly, one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character, but any wilful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim.¹⁷ In discussing the significance of the words "clean hands," the courts use numerous expressions,¹⁸ those commonly employed being "inequitable,"¹⁹ "unconscionable,"²⁰

15. Republic Molding Corp. v B. W. Photo Utilities (CA9 Cal) 319 F2d 347.

48 W Va LQ 172.

The maxim is not employed for the punishment of wrongdoers, but to protect the equity court and the defendant from having the court's powers used in bringing about an inequitable result in the particular litigation before it. Ford v Buffalo Eagle Colliery Co. (CA4 W Va) 122 F2d 555.

The clean hands maxim does not operate punitively. Eristavi-Tchitcherine v Lasser (CA5 Fla) 164 F2d 144.

The courts apply the maxim "not by way of punishment for extraneous transgressions, but upon considerations that make for the advancement of right and justice." Keystone Driller Co. v General Excavator Co. 290 US 240, 78 L ed 293, 54 S Ct 146.

16. As to relation to subject matter of, or parties to, suit, see §§ 142-144, infra.

17. New York Football Giants, Inc. v Los Angeles Chargers Football Club, Inc. (CA5 Miss) 291 F2d 471; Katz v Karlsson, 84 Cal App 2d 469, 191 P2d 541; Otto v Pierce, 118 Colo 123, 194 P2d 331, 4 ALR2d 536 (suit in equity for annulment of marriage); Dunscombe v Amfot Oil Co. 201 Ky 290, 256 SW 427; McClanahan v McClanahan, 79 Ohio App 231, 34 Ohio Ops 549, 72 NE2d 798; McKee v Fields, 187 Or 323, 210 P2d 115.

Equity will not ordinarily aid a complainant who has been guilty of any reprehensible conduct, relating to the matter in controversy, which violates the fundamental conception of equity jurisprudence. Jones v Bodley, 28 Del Ch 191, 39 A2d 413.

Equity will deny relief to one guilty of unlawful or inequitable conduct in the matter in issue. Camp v Camp, 196 Okla 199, 163 P2d 970.

"Equity will not lend its aid in any manner to one who has been guilty of unlawful

or inequitable conduct in a transaction from which he seeks relief, nor to one who has been a participant in a transaction the purpose of which was to defraud a third person, to defraud creditors, to defraud the government, nor to a party to a transaction whose purpose is violative of public policy." Rust v Gillespie, 90 Okla 59, 216 P 480.

One who, though not in possession of sufficient positive and conclusive evidence to establish the fact, became convinced that an application for a patent upon which the Patent Office had declared an interference with another application of which he was the owner, was perjured but failed to bring the facts in his possession to the attention of the Patent Office and instead procured an outside settlement of the interference proceedings by which he acquired the fraudulent application, turned it into a patent, and barred the other parties from ever questioning its validity, is barred by the doctrine of clean hands in equity from relief in a suit against the other parties to the settlement for alleged infringements of his patents and violation of the settlement agreement. Precision Instrument Mfg. Co. v Automotive Maintenance Machinery Co. 324 US 806, 89 L ed 1381, 65 S Ct 993, reh den 325 US 893, 89 L ed 2005, 65 S Ct 1189.

18. Bishop v Bishop (CA3 Virgin Islands) 257 F2d 495, cert den 359 US 914, 3 L ed 2d 576, 79 S Ct 578 (unfair and dishonest conduct).

A court of equity will not tolerate unfairness, inequitable conduct, or corruption in a complainant, however strong and clear his equitable right against the other party may be. Craft v McConoughy, 79 Ill 346; Funck v Farmers' Elevator Co. 142 Iowa 621, 121 NW 53; Kentucky Wagon Mfg. Co. v Ohio & M. R. Co. 98 Ky 152, 32 SW 595; McVey v Brendel, 144 Pa 235, 22 A 912; Hale v Hale, 62 W Va 609, 59 SE 1056.

and "bad motive."¹ Within the purview of the maxim, the hands of the litigant are rendered unclean by conduct which is "condemned and pronounced wrongful by honest and fair-minded men."² "Oppressive bargainers," it is said, "are outcasts in a court of equity."³ The maxim is applicable whenever the complainant's claim is tainted by his own fraud or misrepresentation, although his conduct need not be fraudulent to bar him.⁴ Indeed, equitable relief will be refused although the complainant's conduct may not have been such as to preclude him from recovering damages.⁵

Relief will be denied where it appears that the right upon which the complainant relies has grown out of a wrong,⁶ a breach of duty,⁷ or a violation

19. *Barnes v Barnes*, 282 Ill 593, 118 NE 1004, 4 ALR 4.

Annotation: 4 ALR 70 et seq.

20. *National F. Ins. Co. v Thompson*, 281 US 331, 74 L ed 881, 50 S Ct 288.

"Unclean hands" is descriptive of a class of suitors to whom a court of equity as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable—that is, morally reprehensible as to known facts. *Clinton E. Worden & Co. v California Fig Syrup Co.* 187 US 516, 47 L ed 282, 23 S Ct 161; *Manhattan Medicine Co. v Wood*, 108 US 218, 27 L ed 706, 2 S Ct 436; *Stevens-Davis Co. v Mather*, 230 Ill App 45; *Vulcan Detinning Co. v American Can Co.* 72 NJ Eq 387, 67 A 339.

A court of equity acts only when and as conscience commands; and if the conduct of the complainant is offensive to the dictates of natural justice, then whatever may be the rights he possesses and whatever use he may make of them in a court of law he will be held remediless in a court of equity. *Deweese v Reinhard*, 165 US 386, 41 L ed 757, 17 S Ct 340.

1. The court refuses aid equally where the party's conduct has been unconscionable by reason of a bad motive and where the result in any degree induced by his conduct will be unconscionable either in the benefit to himself or the injury to others. *Keystone Driller Co. v General Excavator Co.* 290 US 240, 78 L ed 293, 54 S Ct 146; *National F. Ins. Co. v Thompson*, 281 US 331, 74 L ed 881, 50 S Ct 288; *Duncombe v Amfot Oil Co.* 201 Ky 290, 256 SW 427; *Russell Petroleum Co. v Walker*, 162 Okla 216, 19 P2d 582; *Larscheid v Kittell*, 142 Wis 172, 125 NW 442.

2. *New York Football Giants, Inc. v Los Angeles Chargers Football Club, Inc.* (CA5 Miss) 291 F2d 471; *Katz v Karlsson*, 84 Cal App 2d 469, 191 P2d 541.

As a general principle, any wilful act in respect to the matter in suit which would be regarded as wrongful by fair-minded men is sufficient to bring a party within the ambit of the clean hands maxim. *Boretz v Segar*, 124 Conn 320, 199 A 548.

3. *Kraemer Hosiery Co. v American Federation*, F. F. H. W. 305 Pa 206, 157 A 588.

4. *New York Football Giants, Inc. v Los Angeles Chargers Football Club, Inc.* (CA5 Miss) 291 F2d 471 (stating that maxim applies where complainant's conduct is fraudulent and deceitful as to controversy in issue); *Schaeffer v Sterling*, 176 Md 553, 6 A2d 254.

The court will leave a party where his fraudulent undertaking has placed him. *O'Gasapian v Danielson*, 284 Mass 27, 187 NE 107, 89 ALR 1159.

If the complainant's conduct is shown to have been "fraudulent, illegal, or unconscionable," he will be dismissed and the doors of the court will be closed to him. *Duncombe v Amfot Oil Co.* 201 Ky 290, 256 SW 427.

Equity will not come to the aid of a party who has induced another to act to his detriment, even though the misrepresentations were innocently made. *Kackley v Webber*, 310 Ky 285, 220 SW2d 587, 9 ALR2d 500.

It has been held that under the "unclean hands" doctrine, misconduct which will bar an action in equity does not necessarily need to be fraudulent; it is enough that the party seeking relief has been guilty of inequitable conduct in the very matter about which affirmative relief is sought. *Godwin v Gerling*, 362 Mo 19, 239 SW2d 352, 40 ALR2d 1250.

5. *Shikes v Gabelnick*, 273 Mass 201, 173 NE 495, 87 ALR 1339, holding that a court of equity does not lend its aid to parties who themselves resort to unjust and unfair conduct.

6. *Bein v Heath* (US) 6 How 228, 12 L ed 416; *Re Estate of Ives*, 248 NC 176, 102 SE2d 807, 72 ALR2d 278; *Rust v Gillespie*, 90 Okla 59, 216 P 480.

Annotation: 4 ALR 44.

7. *Carpenter v Providence Washington Ins. Co.* (US) 4 How 185, 11 L ed 931.

Annotation: 4 ALR 83 et seq.

Relief will not be accorded to one who has not only failed to perform conditions upon which he obtained the execution of a contract,

of law.⁸ A court of equity will not adjust differences between wrongdoers,⁹ at least where the parties are in pari delicto,¹⁰ nor will it assist in the enforcement or abrogation of an illegal or immoral contract or transaction,¹¹ lend its aid to the division of profits or property which have been derived from an illegal agreement,¹² or afford relief against the evil consequences thereof.¹³ A complainant will not be permitted to take advantage of his own wrong¹⁴

but plainly never intended to or had the means to perform them. *Huggins v Daley* (CA4 W Va) 99 F 606.

8. *Chippas v Valltos*, 74 App DC 338, 123 F2d 153; *Strand Amusement Co. v Owensboro*, 242 Ky 772, 47 SW2d 710.

Annotation: 4 ALR 80.

One who was a participant in an unlawful transaction by which he lost his money will not be accorded relief by injunction to impound money or by recognition of a lien. *Baxter v Deneen*, 98 Md 181, 57 A 601.

9. *Ohio Oil Co. v Sharp* (CA10 Okla) 135 F2d 303; *Batesville Truck Line, Inc. v Martin*, 219 Ark 603, 243 SW2d 729; *Humphreys-Mexia Co. v Arseneaux*, 116 Tex 603, 297 SW 225, 53 ALR 1147; *Kennedy v Lonabaugh*, 19 Wyo 352, 117 P 1079.

Annotation: 4 ALR 80; 120 ALR 475 (illicit sexual relations as precluding right of either party to recover money paid or property transferred to the other).

Equity will not as a general rule hear a complainant stultify himself by complaining against acts in which he participated or of which he has shown his approval by sharing in the benefits. *Trounstone v Remington Rand*, 22 Del Ch 122, 194 A 95.

The court will determine the question as to whether the complainant is free from taint before considering the question as to whether he has been wronged. *Humphreys-Mexia Co. v Arseneaux*, 116 Tex 603, 297 SW 225, 53 ALR 1147.

10. § 141, *infra*.

11. *Flack v Warner*, 278 Ill 368, 116 NE 202; *Miller v Miller* (Ky) 296 SW2d 684, 65 ALR2d 589; *Berman v Coakley*, 243 Mass 348, 137 NE 667, 26 ALR 92; *Cameron v International Alliance, T. S. E.* 118 NJ Eq 11, 176 A 692, 97 ALR 594; *Rock v Mathews*, 35 W Va 531, 14 SE 137.

A court of equity will leave parties asserting rights founded upon an illegal and void contract in the situation in which they have thereby placed themselves and deny relief from or under the contract. *Smith v Smith*, 255 Wis 96, 38 NW2d 12, 14 ALR2d 914.

The court will not assist either party to an illegal transaction, but will leave them where they have chosen to place themselves. *International Coal & Min. Co. v Industrial Commission*, 293 Ill 524, 127 NE 703, 10 ALR 1010.

An agreement which has been made in consideration of the suppression of a criminal prosecution will be neither enforced nor abrogated by a court of equity. *Berman v Coakley*, 243 Mass 348, 137 NE 667, 26 ALR 92.

12. *Kennedy v Lonabaugh*, 19 Wyo 352, 117 P 1079.

Annotation: 4 ALR 80.

The Highwayman's Case is the classic example. See *Langley v Devlin*, 95 Wash 171, 163 P 395, 4 ALR 32.

A party to an illegal common-law marriage may not maintain an action for equitable division of property acquired by the other party thereto through their joint efforts and expenditures during the illicit relationship, notwithstanding the parties' belief in the validity of the marriage, where no partnership or other joint venture antedated the illegal marriage relationship and there was no other legal basis for the claim. *Smith v Smith*, 255 Wis 96, 38 NW2d 12, 14 ALR2d 914.

13. *Berman v Coakley*, 243 Mass 348, 137 NE 667, 26 ALR 92.

14. *Deweese v Reinhard*, 165 US 386, 41 L ed 757, 17 S Ct 340; *Pope Mfg. Co. v Gormully*, 144 US 224, 36 L ed 414, 12 S Ct 632; *Carrington v The Ann C. Pratt* (US) 18 How 63, 15 L ed 267; *Bishop v Bishop* (CA3 Virgin Islands) 257 F2d 495, cert den 359 US 914, 3 L ed 2d 576, 79 S Ct 578; *Ohio Oil Co. v Sharp* (CA10 Okla) 135 F 2d 303; *Batesville Truck Line, Inc. v Martin*, 219 Ark 603, 243 SW2d 729; *Commercial Nat. Bank v Burch*, 141 Ill 519, 31 NE 420; *Duncombe v Amfot Oil Co.* 201 Ky 290, 256 SW 427; *Burton v Marshall* (Md) 4 Gill 487; *Cedar Springs v Schlich*, 81 Mich 405, 45 NW 994; *Holland v Duluth Iron Min. & Development Co.* 65 Minn 324, 68 NW 50; *Redmond v Dickerson*, 9 NJ Eq 507; *International Land Co. v Marshall*, 22 Okla 693, 98 P 951; *Scranton Electric Light & Heat Co. v Scranton Illuminating Heat & P. Co.* 122 Pa 154, 15 A 446; *Montgomery v Kerr*, 46 Tenn (6 Coldw) 199; *Clay v Williams*, 16 Va (2 Munf) 105.

Equity will not permit one to rely on his own wrongful act as against those affected by it, but who have not participated in it, to support his own asserted legal title or to defeat a remedy which, except for his misconduct, would not be available. *Deitrick v Greaney*, 309 US 190, 84 L ed 694, 60 S Ct

or claim the benefit of his own fraud or that of his privies.¹⁵ Furthermore, a party will not be relieved from the consequences of his own fraud or wrong¹⁶ or be given the aid of equity to right his own wrong.¹⁷ Aid will be refused to either of the parties to a fraudulent transaction;¹⁸ and a litigant who complains of inequitable conduct on the part of another will not be accorded relief if he has perpetrated the same wrong.¹⁹

On the other hand, the maxim in question is said not to affect all "sinners"²⁰ or to embrace general iniquitous conduct,¹ and not to comprehend all "moral infirmities," the reason being that courts of equity are not primarily engaged in the moral reformation of the individual citizen.² Moreover, the maxim refers to wilful misconduct and not merely negligent misconduct.³ Delinquencies which have had no injurious consequences are held not to defeat a suit.⁴ Authorities may also be found to the effect that the conduct of the

480, reh den 309 US 697, 84 L ed 1036, 60 S Ct 611.

15. *Ford v Buffalo Eagle Colliery Co.* (CA4 W Va) 122 F2d 555.

48 W Va LQ 172.

Complainants who seek the benefit of a contract which has been obtained by their fraud or the fraud of one of them can have no standing in a court of equity. *Kitchen v Rayburn* (US) 19 Wall 254, 22 L ed 64.

16. *Wheeler v Sage* (US) 1 Wall 518, 17 L ed 646; *Galloway v Finley* (US) 12 Pet 264, 9 L ed 1079; *Cross v Farmers Elevator Co.* 31 ND 116, 153 NW 279, 4 ALR 13.

A court of equity will not come to the aid of one who, in the practice of one fraud, has become the victim of another, but will regard one who has been thus cheated as having cheated himself. *Metzger v Metzger*, 338 Pa 564, 14 A2d 285, 129 ALR 683.

Persons who, for speculative purposes, have attempted to keep afloat worthless stock of a corporation will be left to pursue a remedy at law. *Randolph v Quidnick Co.* (*Jencks v Quidnick Co.*) 135 US 457, 34 L ed 200, 10 S Ct 655.

17. *Boretz v Segar*, 124 Conn 320, 199 A 548.

18. *Bein v Heath* (US) 6 How 228, 12 L ed 416; *Bishop v Bishop* (CA3 Virgin Islands) 257 F2d 495, cert den 359 US 914, 3 L ed 2d 576, 79 S Ct 578; *Batesville Truck Line, Inc. v Martin*, 219 Ark 603, 243 SW2d 729; *Burton v McMillan*, 52 Fla 228, 42 So 879; *Schaeffer v Sterling*, 176 Md 553, 6 A2d 254; *Rust v Gillespie*, 90 Okla 59, 216 P 480.

Annotation: 4 ALR 79.

A claim arising out of a fraudulent transaction may not be made the basis of suit. *Kitchen v Rayburn* (US) 19 Wall 254, 22 L ed 64; *Picture Plays Theatre Co. v Williams*, 75 Fla 556, 78 So 674, 1 ALR 1.

19. *International News Service v Associated*

Press, 248 US 215, 63 L ed 211, 39 S Ct 68, 2 ALR 293.

Annotation: 4 ALR 92 et seq.

Equity will refuse its aid to a suitor who has himself been guilty of the same inequitable conduct which he denounces in others. *Manhattan Medicine Co. v Wood*, 108 US 218, 27 L ed 706, 2 S Ct 436; *Edward Thompson Co. v American Law Book Co.* (CA2 NY) 122 F 922.

20. *Harris v Harris*, 208 Ala 20, 93 So 841; *McClure v Wilson*, 238 Mo App 824, 185 SW2d 878.

1. § 142, *infra*.

2. *Parris v John W. Manning & Sons*, 284 Ky 225, 144 SW2d 490; *Duncombe v Amfot Oil Co.* 201 Ky 290, 256 SW 427; *Price v Ridler* (Mo) 373 SW2d 59 (saying that the maxim does not apply to every unconscientious act or to all inequitable conduct); *Wantulok v Wantulok*, 67 Wyo 22, 214 P2d 477, 223 P2d 1030, 21 ALR2d 572 (saying that the doctrine of clean hands is not rigid, but has its limitations; that it does not apply to every unconscientious act of a party or operate to repel all sinners from a court of equity, and will not be allowed to work injustice or wrong or aid one to acquire property to which he has no right).

The fact that a woman was too ready to marry from mercenary motives will not debar her or the child of the marriage from relief based on fraudulent representations made to her to induce her to contract such marriage. *Piper v Hoard*, 107 NY 73, 13 NE 626.

3. *Eresch v Braecklein* (CA10 Kan) 133 F2d 12.

4. *Parris' Admr. v John W. Manning & Sons*, 284 Ky 225, 144 SW2d 490; *Love v Robinson*, 161 Miss 585, 137 So 499, 78 ALR 608.

As to a situation where wrongful conduct

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complainant must, if relief is to be denied him, have been wrong in a legal sense as well as in a moral view.⁵

§ 139. — Secret knowledge, and ability of plaintiff to prevent harm.

The maxim, "he who comes into equity must come with clean hands," may be invoked where it appears that the defendant is in an injurious or prejudicial situation which he could not have avoided, because of lack of knowledge, and that the complainant, knowing of the defendant's ignorance, could have prevented the situation from arising.⁶ Relief will be denied where the complainant seeks to take advantage of a forfeiture which has resulted from mistake or misunderstanding on the part of the defendant, the evidence showing that the complainant, having knowledge of the defendant's misconception or misunderstanding, failed to inform him thereof.⁷ However, in some situations, the wrong of the complainant must have been founded upon actual knowledge, tortious conduct which is based upon imputed knowledge or notice not being such as to preclude relief.⁸

§ 140. — Where motives in bringing suit, or its purposes or objects, are improper.

It is generally held that relief may be barred if the fact is established⁹ that the complainant, in instituting the suit, has been influenced by bad or improper motives.¹⁰ Where the purpose or object of the suit is to accomplish something which will produce an inequitable or unconscionable result, equity will not grant affirmative relief.¹¹ The court may deny relief and dismiss the

does not injure or prejudice the defendant, see § 144, *infra*.

5. *Dering v Earl of Winchelsea*, 1 Cox Ch Cas 318, 29 Eng Reprint 1184, 2 Bos & P 270, 126 Eng Reprint 1276.

Annotation: 4 ALR 49.

6. *Taylor v Brown (US)* 5 Cranch 234, 3 L ed 88.

See *Cook v Marks*, 302 Mich 55, 4 NW2d 465, 140 ALR 1429, holding that a husband does not come into equity with clean hands in a suit seeking a decree determining his ownership, and delivery to him, of nontransferable United States savings bonds issued in the name of himself and wife, which he had entrusted to the latter, as against a person who made a loan to her upon security of an invalid attempt to pledge the bonds; and, he having refused to do equity, relief will not be granted to him.

7. *Duncombe v Amfot Oil Co.* 201 Ky 290, 256 SW 427.

8. The fraud of an agent will not render the hands of the principal unclean within the meaning of the equitable maxim, however much it may affect his legal rights. *Vulcan Detinning Co. v American Can Co.* 72 NJ Eq 387, 67 A 339. *Annotation*: 4 ALR 61.

9. *Curtin v Benson*, 222 US 78, 56 L ed 102, 32 S Ct 31.

Where it does not appear that a suit was prosecuted in furtherance of the improper motive charged, the relief prayed for by the party accused of the inequitable conduct should not be denied on the ground that because thereof he is in court with unclean hands. *Upchurch v Anderson (Tenn)* 52 SW 917.

10. *Peltzer v Gilbert*, 260 Mo 500, 169 SW 257; *Cook v Chapman*, 30 NJ Eq 114.

Annotation: 4 ALR 61.

Self-interest does not necessarily make a party's hands unclean. For example, a court of equity is not justified in denying redress to a taxpayer suing to prevent the paying out of money for the construction of a bridge, the contract for which was made in defiance of a municipal charter, by the fact that he was the owner of a toll bridge, the value of which will probably be diminished by the new bridge to be constructed. Such a complainant has the same right to prevent the misuse of public money upon an illegal contract for a second bridge as if his private interests were less. *Chippewa Bridge Co. v Durand*, 122 Wis 85, 99 NW 603.

11. *Monaghan v May*, 242 App Div 64, 273 NYS 475, mod on reh on other grounds 242 App Div 733, 274 NYS 243.