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THE ADOPTION OF THE PRINCIPLES OF EQUITY JURISPRUDENCE INTO THE ADMINISTRATION OF OUR COMMON LAW.

THIRD AND CONCLUDING ARTICLE.

CONTRIBUTION BETWEEN SURETIES. The rules of law in relation to contribution between sureties, under which an action of assumpsit may be brought by one of several sureties who has paid the debt for which all were bound, against his co-sureties to recover from them their proportional share of the amount paid, have been wholly imbibed from the doctrines of equity jurisprudence.

This right of contribution was originally established in equity, as having its foundation in principles of natural justice and equity, since, in cases of suretyship, as all are equally bound, the payment of the debt by one of the obligors is productive of a loss by him, incurred for the joint benefit of all, which it is but just that all should contribute to share.[1] Any other rule would give favorite sureties the opportunity to collude with creditors in such a manner as to throw the whole burden of the debt or engagement upon the other sureties, to their own discharge.[2]

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[1] Dering *vs.* Earl of Winchelsea, 1 Cox, 318; S. C. 2 Bos. & Pull. 270.

[2] Story's Eq. Jur. § 493.

The equitable right of contribution between sureties having been established for these reasons, was not considered as founded upon any contract, express or implied, but upon the principle that "equality is equity," which equity it was the duty of courts of chancery to establish and protect. Under the operation of the rule thus established, therefore, if a surety paid a demand for which co-sureties were bound with him, either upon its becoming due without suit, or after it had been put in action and a judgment recovered, he might maintain a bill in equity against his fellow-sureties to recover that contributory share which each, upon the principles of equity was bound to furnish.[1]

And it made no difference whether the sureties were bound by the same or separate instruments,[2] or whether the surety seeking contribution was aware of the existence of co-sureties at the time of his entering into the contract,[3] provided only that the engagements of the different sureties were for the same principal and for the performance of the same undertaking.[4] And as an extension of the principle upon which the jurisdiction of equity rested, if one or more of the sureties became insolvent, the paying surety was entitled to receive from the remaining solvent sureties, contribution towards the payment of the entire debt, the insolvent surety not being included in the estimate;[5] and if in any case one of the sureties deceased, a bill for contribution could be maintained against his representatives.[6]

Courts of law soon recognized the above principles of equity and supported actions by sureties against *their principals*, which could previously be maintained only in equity, and also permitted actions

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[1] Dering *vs.* Earl of Winchelsea, 1 Cox Reps. 318; S. C. 2 Bos. & Pull. 270; S. C. 1 White & Tudor's Leading Cases, 60; 4 Johns. Ch. 334.

[2] Dering *vs.* Earl of Winchelsea.

[3] Craythorne *vs.* Levinburne, 14 Ves. 163.

[4] Coope *vs.* Twyman, 1 Turner *vs.* Russell, 426.

[5] Peter *vs.* Rich, 1 Ch. Reps. 34; Hole *vs.* Harrison, 1 Ch. Cases, 246; S. C. Finch, 203.

[6] Primrose *vs.* Bromley, 1 Atk. 90.

between co-sureties for money paid by a part of their number on account of their guarantied engagement.[1]

This recognition was not founded upon any notion of the existence of an *implied contract*, but was repeatedly declared to be deduced solely from the maxim of the courts of chancery that in such cases "equality is equity;" and the principle was enforced by means of that formal implication of *promises*, which about this time began to come into favor in legal tribunals, and to be exercised in those cases in which money was legally or equitably due, although the circumstances of particular cases might entirely negative and disprove any such actual promises.[2]

The jurisdiction thus taken by courts of law was, and at present is, more confined in some respects than its correspondent and original in equity; at least in England, where, it would seem, no notice can be taken of the insolvency of any of the sureties,[3] nor an action maintained against the representatives of a deceased surety.[4]

In the United States this restraint is not retained, and an action at law would undoubtedly be sustained in cases of insolvency among the sureties, and contribution enforced according to the number of sureties remaining solvent,[5] and an action could also be maintained against the representatives of a deceased surety, by reason of the obligation undertaken at the time the contract of suretyship was made, and which upon the death of the party, evidently devolves, both at law and in equity upon those who succeed to his rights of property, and upon whom his other obligations rest.[6] There is certainly no valid reason for preventing courts of law from allowing the insolvency of one or more sureties to be shown, to determine the amount recoverable in a contributory action against the rest; and it is an anomalous rule that would prevent a claim completely

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[1] Cowell *vs.* Edwards, 2 Bos. & Pull. 268; Browne *vs.* Lee, 6 Barn. & Cress. 697.

[2] Cowell *vs.* Edwards, 2 B. & P. 268; 1 Saund. 264, n. (*a.*)

[3] Cowell *vs.* Edwards, Browne *vs.* Lee, supra.

[4] Primrose *vs.* Bromley, 1 Atk. 90.

[5] Harris *vs.* Ferguson, 2 Bailey, 397, 401.

[6] Batchelder *vs.* Fisk, 17 Mass. 464; Bradley *vs.* Burrell, 3 Denio, 62; Malin *vs* Bull, 13 Serg. & Rawle, 441.

established at law, against a debtor, from descending upon his personal representatives.

USES AND TRUSTS. The passage of the statute of uses, and subsequently the statute of wills, was the occasion of the introduction into the common law of a system of estates in land, and methods of conveying estates in land, which had been before unknown to legal tribunals.

Under the common law, no estates in land could be created without the notoriety of transfer evinced by the solemn ceremony of livery of seisin, which livery might be evidenced by parol, or by the record of the livery of seisin enrolled upon the charter of feoffment, but no instruments in relation to the conveyance of lands, unless purporting to be actual present deeds of conveyance, and accompanied by livery of seisin, were of any effect in the transmutation of title to real estate.[1] Neither could estates in land, to take effect at future times, or upon given contingencies, be limited by the grantor of real property, except in a very few instances, according to the strict rules of law in relation to contingent remainders, which were liable to be defeated by feoffments made and recoveries suffered by the persons possessing the interests previous to the future and contingent estates.[2] Nor under the old limited system of devising by custom, was any indulgence extended to dispositions of land by last will and testament, but all such bequests were obliged to be conformed to the rules of law in relation to other conveyances.[3]

But under the system of uses, as it grew up previous to the reign of Henry the Eighth, whether that system was introduced by the English ecclesiastics, from the Roman law, for the purpose of evading the statutes of mortmain, or invented by the laity, either to avoid the confiscations attendant upon the fluctuating victories in the prevalent civil wars, or simply for the facilities which uses afforded for devises and family settlements, estates were permitted

[1] Preamble to Statute of Uses, 1 Gr. Cruise, 347, § 2.

[2] 4 Kent, 291.

[3] Spence's Eq. Jur. Court of Chancery, vol. 1, 470.

to be established, limited and conveyed, entirely contrary to the rules of the common law, and in a manner unknown to that ancient system.

In a conveyance of land from A to B, to the use of C, while an estate in B was created, which was the only estate produced by the conveyance that the common law could recognize,[1] the Court of Chancery recognized the creation of another estate in C, who by the terms of the conveyance was evidently intended to have all the beneficial interest in the land, designated as the right to its "use;" which estate in C, as admitted and protected by the Court of Chancery at an early period in the history of uses, was a right to receive all the rents and profits of the land, to demand of B, the trustee, that he should execute and convey the legal estate and the legal title to whoever C should request that it might be transferred, and to compel B, in case of a disseisin and ouster of C from the enjoyment of the rents and profits, to re-enter or bring his action for the recovery of the estate.[2] Under this system of uses, as established under the sanction and by means of the Court of Chancery, it was of course necessary that the legal estate granted to the person who was to stand seised to the uses declared, should conform in all things to the legal rules in relation to the creation of estates at law. But a legal seisin of a legal estate having been once established in the feoffee, the estates which were subsequently, by the same conveyance, limited upon the seisin of the trustee as uses, being rights or trusts in conscience only, and the creatures of the Court of Chancery merely, might be declared to enure in any way that would transfer the right in trust and conscience, and therefore might be so limited as to create estates in the beneficiaries, entirely regardless and irrespective of the rules of *law* necessary to be observed in the creation of *legal* estates. Not only could trust estates be created in different persons, at different times, according to the common law rules in relation to remainders, as in the case of a conveyance to the use of one beneficiary for life, remainder to another in fee, but estates of freehold for life or in

[1] 1 Gr. Cruise 337, § 3.

[2] 1 Gr. Cruise, 337–8, § 6 and 7; Bac. Read. Stat. Uses, 10.

fee, might be limited after the expiration of terms for years;[1] estates in fee might be conveyed without the use of the word "heirs;"[2] estates might be created to spring up and attach in the future, as in the case of a grant to the use of a man and such woman as he should afterwards marry;[3] estates might be granted so as to change from one person to another, upon the happening of some future event,[4] as in the case of a grant to the use of a certain person and his heirs, until another person should pay him a certain sum of money, and then to the use of that latter person and his heirs forever;[5] estates in use might be conveyed by any species of deed or writing, and the transfer gave the grantee a right to demand the assistance of the Court of Chancery in protecting his interests.[6]

And as this method of conveying use estates was allowed, uses became of course devisable, although *lands* were not;[7] and conveyances might be made to a trustee, to hold to such uses as the grantor should by last will and testament appoint, which appointment, when made, operated in equity as a valid transfer of the interest in the use. Lord Bacon observes, upon the practice of conveying to uses, that one of its reasons was "because persons acquired by that means a power of disposing of their real property by will, which enabled them to make much better provision for their families than they could otherwise have done."[8]

Such was the system of uses, and such its varying diversities from the common law rules and common law limitations, when by the statute of uses,[9] enacted in consequence of the grievances alleged to be produced by the practice of conveying to uses, and intended entirely to destroy the whole system, it was declared by the Parliament of England that whenever, at that present time, or thereafter, any person should be seised or possessed of any corporeal or incorporeal hereditaments, to the use of any other person, by rea-

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[1] 4 Kent, 293.
[2] 1 Gr. Cruise, 343, § 32; 4 Kent, 293.
[3] 1 Gr. Cruise 343, § 33.
[4] 4 Kent, 293.
[5] 1 Gr. Cruise 343, § 34.
[6] 1 Gr. Cruise 342, § 29.
[7] 1 Gr. Cruise 344, § 36; 4 Kent, 293.
[8] Bac. Read. 20; 1 Coke's Reps. 123.
[9] Stat. 27 Henry 8, ch. 10.

son of any conveyance or agreement, in every such case the person to whose use the seisin or possession should be holden, should be deemed and taken for all intents, purposes, and constructions of law, to be actually seised of a legal estate in the same manner as he was previously possessed of an estate in the use, trust, or confidence, and should be deemed or adjudged to have the actual possession of the land, in the same manner as he was entitled to the previous use or trust thereof.[1]

The intention of this statute evidently being wholly to abolish uses and to make all persons previously or thereafter possessed of use estates the legal owners of the land, and seised thereof in every respect, "after such manner, quality, form and condition as they had before, in or to the use, confidence or trust that was in them," its effect evidently would be, and was, to introduce within the cognizance of courts of law, those use estates and limitations, unknown and contrary to their rules, but which had grown up as equitable estates and limitations under the liberal doctrines of chancery jurisprudence, and were now transferred and changed at a blow, by the supreme law of the land, into legal estates and interests, which must thereafter be recognized and protected by common law tribunals.

Under the operation of the statute, therefore, estates of freehold might be limited upon estates for years, as in the case of a conveyance by *A* to *B* to the use of *C* for years, remainder to *D*, in fee, or to *B* and his heirs to the use of *C* for life, and at the expiration of one year from his death, to the children of *C* forever;—these limitations, although directly contrary to the rules of the common law, were yet allowed and took effect by virtue of the statute, at the time designated, as actual vested estates in possession.[2]

Fees might be made to exist upon fees, and spring up, to the destruction of the previous estate, upon the happening of some contingency, as in the case of a shifting use, in which an estate

[1] Stats. at Large, 27 Hen. 8, c. 10; 1 Spence's Eq. Jur. 464; 1 Gr. Cruise, 348; 4 Kent's Com. 294.

[2] 1 Spence's Eq. Jur. 481–2.

might be limited to *A* and his heirs, with a proviso that if *B* should pay *A* one thousand pounds at a given time, then the use to *A* should cease and vest in *B* in fee,—upon the occurrence of the contingency and the payment of the one thousand pounds, the legal estate would shift from *A* and pass absolutely to *B*.[1]

Springing uses might be declared, to arise upon a future event, no previously existing estate being created to support them, which uses would vest as legal estates at the time appointed, the use in the mean time resulting to the grantor in the conveyance.[2] And as before the statute of uses, when a feoffment to uses was made, the feoffor might reserve a power either to himself or some other person to revoke the uses declared in that feoffment and appoint the feoffees to stand seised to new uses, which appointments being matters of conscience, the feoffees were compelled by chancery to fulfil,[3] so after the statute of uses, courts of law concluded that in conveyances to uses, powers might be reserved to the grantors, to revoke the uses declared, thereby destroying the legal estates previously created, and to appoint and declare new uses to other persons, and of different natures, which would be immediately executed in the appointees, and the new estates be legally vested in them by the operation of the statute.[4] Whenever such a reserved power of revocation and appointment was exercised, the limitations and estates originally created, instantly ceased and the new uses immediately arose to the persons in whose favor the power of appointment was exercised, which uses were exercised by the statute, from the seisin of the original feoffees to uses, from whom the possession passed instantaneously to the appointee under the power.[5]

And, as another instance of the effect of the statute, in the conversion of equitable estates into legal, it may be stated, that, as under the system of uses and trusts before the statute, when the owner of land, for valuable consideration contracted to sell it, or to grant a lease, by what was termed a bargain and sale, although there was no conveyance, and no words of inheritance, yet the Court of Chancery converted the seller into a trustee for the buyer, and

[1] 4 Kent, 296. [2] 4 Kent, 298. [3] 1 Gr. Cruise, 343, § 34.
[4] 1 Gr. Cruise, 364, § 6. [5] 1 Gr. Cruise, 364, § 7.

considered him as seised to the buyer's use, which trust he was bound to execute; and as, also, when a person in consideration of marriage, or out of regard to his near kindred, entered into an agreement to settle his estate for the benefit of an intended husband or wife, or their issue, or for the benefit of one or more relatives, which agreement was considered a covenant to stand seised, the Court of Chancery converted the covenantor into a trustee for the objects of his bounty and considered him seised as such;[1] so, when the statute of uses was passed, the legal estate in all these cases, since they came within the operation of the statute, passed directly from the seller or covenantor, into the purchaser or donees under the covenant, and the conveyances were effected without the necessity of any enrolment, registration, or livery of seisin whatever.[2]

And as contracts of bargain and sale were valid, if in writing, without being sealed or acknowledged, or it would seem even when made orally, the effect of the statute would have been to allow the absolute transfer of estates in land by simple parol agreement, unwritten, unsigned, unsealed and unrecorded, if the Legislature had not, in the same year of the passage of the statute of uses,[3] provided for the enrolment of bargains and sales, and enacted that no lands, tenements or hereditaments, should pass from one person to another whereby an estate of *inheritance* or *freehold* should be made by reason of any bargain and sale, except the same bargain and sale should be made in writing, sealed and enrolled within six months after its date. This statute in a measure prevented the introduction of the secret method of transferring legal estates which had been allowed in the transfer of equitable estates, but as the statute applied only to estates of inheritance and freehold, it did not affect bargains and sales for terms of years; which, although not made in conformity with this statute, operated by virtue of the statute of uses, to vest seisin of the estate for years in the bargainee, who being once thus seised was capable of receiving a *release*, which enlarged his estate, and the *lease and release* operated by force of law as a total conveyance of the fee; which effectual ope-

[1] 1 Spence's Eq. Jur. 452–3. [2] 1 Spence's Eq. Jur. 476. [3] 27 Hen. 8, ch. 16.

ration of this method of conveying caused it to become the universal mode of assurance of the realm of England.[1]

EXECUTORY DEVISES. But although the effect of the statute of uses was such that the above mentioned equitable estates and interests were transferred into the law, and made the subjects of legal consideration and protection, yet, inasmuch as the intention of the act was "to restore the good ancient common law which had been in a manner subverted by abusive and erroneous uses," and as one of the professed objects of the statute was to destroy the system of devising lands then enforced through the medium of uses,[2] it was declared that the statute, by uniting the use to the legal estate, had prevented the practice of devising by means of conveyance to uses, and entirely abolished the system then in operation.[3]

The inconveniences, however, arising from this total destruction of the right of disposition of property by will, which right, under the auspices of the Court of Chancery, had grown to be so customary, and so indispensable to the interests of society; were so severely felt, that in the thirty-second year of the reign of Henry the Eighth, five years after the passage of the statute of uses, it was enacted that interests in lands might be disposed of by last will and testament in writing, duly executed;[4] this statute, thus again making a will of lands a legal method of alienation, after a lapse of five hundred years, the limited system of devising by custom, and the equitable practice under the system of uses, having been for that period the only systems under which posthumous dispositions of real property could be made.[5]

In cases arising upon wills, after the passage of this statute, the subject of devises having been so long and so exclusively within the jurisdiction of the Court of Chancery, the rules of that court were naturally regarded in the construction of testamentary dispositions,[6] many of them being gradually introduced and admitted as

[1] 1 Spence's Eq. Jur. 476, 477.
[2] 1 Spence's Eq. Jur. 468.
[3] 1 Spence's Eq. Jur. 468.
[4] 32 Hen. 8 c. 1, explained by 34 and 35 Hen. 8 c. 5.
[5] 1 Spence's Eq. Jur. 469.
[6] 1 Spence's Eq. Jur. 469.

principles of law, in relation to devises; and this liberal allowance which was given to the exercise of the power of free disposition on the part of the testators, was the occasion of the introduction into the law, of a new description of estates, limited by devise, contrary to the rules of conveyance at common law, and assimilated in a great degree to those previously described equitable estates which were recognized and allowed to exist as legal estates, under the operation of the statute of uses.[1] By means of these *executory devises*, which struggled gradually into existence, and were cautiously admitted to be valid, fees might be limited upon fees, the estate upon given contingencies to change and go over to some other devisee, without the necessity of a resort to the assistance of the statute of uses; as in a devise to A for life, remainder to C in fee, provided however, that if D, within three months after the death of A, shall pay one thousand dollars to C, then to D in fee; this is an executory devise to D, and upon the performance of the condition the estate will vest absolutely in him in fee.[2] And in the case of a devise to the "*heirs*" of a person then living, to take effect after his death, or a devise to a person to take effect at a certain time after the testator's death, or a devise to a person who shall do a certain act within a given number of years; the fee, although given to commence in the future, is yet, in order to carry out and favor the intention of the devisor, considered as a valid gift which will take effect according to the limitation.[3] And an estate for years may be limited over after an estate of freehold, as in a devise to A for life, then to B for ten years, remainder to C in fee.[4]

Executory devises being considered as *substantive* gifts directly to the persons entitled to the estates limited, it was found necessary to apply directly to the limitation of estates by will, the rule against perpetuities,[5] and that rule as established in the cases of the *Duke of Norfolk*,[6] and *Thelluson* vs. *Woodford*,[7] was that no

[1] 4 Kent's Com. 264, 265, 266.
[2] 4 Kent, 268; 10 Mod. Reps. 419.
[3] 4 Kent, 269.
[4] 4 Kent, 270.
[5] 1 Spence's Eq. Jur. 471–2.
[6] 3 Ch. Cases, 1 Pollexfen's Reps. 223; 2 Ch. Reps. 229.
[7] 4 Vesey, 227; 11 Vesey, 112.