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

Second Article.

Penalties and Forfeitures. The powers of courts of equity to relieve against the amount due on bonds for a larger sum of money, given to secure the payment of a smaller, constituted a very old head of chancery jurisdiction. The principle upon which they were assumed seems to have been, that as the object and intention of the parties to such instruments was simply and primarily the security of the actual sum of money due and to be paid, that object was obtained, and the wishes and intentions of the parties at the time of making the contract, fully satisfied, by the payment of the money due with interest, even although not paid strictly as stated in the condition of the instrument, without the necessity of a forfeiture in the nature of a punishment for prior non-performance according to the strict letter of the condition.[1]

This principle as applied at the present day in courts of equity, may be stated to be, that wherever a penalty is inserted merely to secure performance of a collateral object, the latter is considered the principal intent of the instrument, and the penalty only accessory, and therefore intended only to secure the due performance of the condition, on the payment of the damages actually incurred by

[1] Reynolds *vs.* Pitt, 19 Ves. 140.

its non-performance. In the pursuance of this principle, relief will be granted in all cases coming within the rule, and bonds decreed to be delivered up and canceled, upon the payment of the damages equitably due.[1]

There were early endeavors made to introduce the principle thus received in equity, into the practice of courts of law, which struggles seem to have been unsuccessful.[2] It was said by *Lord Mansfield*, that in the reign of *Henry the Eighth* Sir Thomas More summoned the Judges to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest and costs; and when they said they could not relieve against the penalty, he swore by the body of God he would grant an injunction."[3]

Courts of law, however, seem to have been approaching the reception of the liberal doctrines of equity upon the subject.[4] When the Act of Parliament was passed in the fourth year of the reign of Queen Anne, by which it was enacted[5] that whenever actions should be brought upon bonds, if payment had been made before the commencement of the action, of the principal and interest due by the condition of said bonds; such payment, although not made strictly according to the condition of the defeasance, might yet be pleaded in bar of the action, and be as effectual for that purpose, as if the money had been paid at the day and place stipulated for, and had been so pleaded; and also, if in any such action, the defendant should bring into court the principal money and interest due, and such costs as should have been expended in any suit at law or in equity upon the bond; the money thus brought into court, should be taken to be in full satisfaction and discharge of the bond, and the court in which the action should be brought, might give judgment accordingly.

This statute, passed but a short time before the statute of *George the Second*, in relation to actions on mortgages, and similar to it in

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[1] Story's Eq. Jur. § 1313; Sloman *vs.* Walter, 1 Bro. 418; Skinner *vs.* Drayton, 2 Johns. Ch. R. 535.

[2] Bonafores *vs.* Rybot, 3 Burr. 1370.

[3] Wyllie *vs.* Wilkes, Doug. 501.

[4] Bonafores *vs.* Rybot, 3 Burr. 1370.

[5] Statutes at Large, 4 Anne, ch. 16.

character, was the original of the introduction of equitable doctrines in relation to penalties and forfeitures into the common law, which has at the present day reached to the extent of the principle above stated, now equally recognized at law and in equity, as determining the sum for which judgments shall be rendered in actions upon penal bonds; in which actions, courts of law will regard the penalty as inserted only to secure the performance of the condition, and will give judgment only for the sum stated in the condition, with interest by way of damages for failure of exact and strict performance at the time stated.[1] The principle gradually extended itself to all cases in which actions were brought upon bonds, although the conditions were for the performance of any other act than the payment of money.[2] In some of the United States, statutes expressly regulate the proceedings in actions on bonds with penalties, and provide that judgments shall be rendered only for the amount equitably due,[3] but it is apprehended that these statute enactments are no more than declaratory of the common law of this country at the present time. It is, however, carefully to be borne in mind that this jurisdiction does not extend to relief against sums expressed in any agreement as payable upon the non-performance of specified conditions, when it is not evident that the agreement was intended *merely* as security for the payment of the money, or the performance of the condition. Whenever an agreement, however made and authenticated, is that in case of the failure of one party to perform a certain act, the other party shall receive a certain sum as a just and proper recompense for the injury sustained, in this case neither equitable nor legal tribunals will interfere to prevent the parties from exercising the just and reasonable right of fixing their own measure of damages; and the rules for distinguishing between the two classes of cases, and the difficulties encountered in the determination, are not peculiar to either jurisdiction.[4] But, in order to secure to the parties the right of fixing the damages

[1] Wyllie *vs.* Wilkes, Doug. 501. [2] Story's Eq. Jur. § 1314.

[3] Mass. Rev. Sts. of 1836, ch. 100 § 9, etc. etc.

[4] 2 Story's Eq. Jur. § 1318; Skinner *vs.* White, 17 Johns. 369; Lowe *vs.* Peers, 4 Burr. 22; Astley *vs.* Welton, 2 Bos. & Pull. 346.

to be paid, in the event of any non-performance of the agreement, it must appear that the contract itself is of such a nature that the damages sustained by its infraction will be undetermined and uncertain, unless estimated and agreed upon by the parties; for when this *is not* the case, no stipulations of the parties that the sum agreed to be paid upon failure of performance shall be considered as liquidated damages and not as a penalty, will avail to prevent relief being extended against the forfeiture.

Thus, in a modern case, where the defendant agreed to act as a comedian for the plaintiff, during four seasons, at a certain sum for each night's acting, and the agreement contained a clause, that if either party should violate the agreement, or neglect to fulfill it or any stipulation therein in relation to conformity to all the rules and regulations of the theatre, such party should pay the other the sum of one thousand dollars, to which sum it was agreed that the damages sustained by any such omission, neglect or refusal to fulfill and conform, should amount; and which sum *was declared by the parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.* Upon an action brought upon the agreement, to recover the sum stipulated, the breach alleged being the defendant's refusal to act the second season, Tindal, C. J., declared that, notwithstanding the express and unqualified language of the parties, yet the agreement was one which made a large sum of money become payable in consequence of a neglect to perform services valued at a very small sum, or of a failure to perform very unimportant acts; and to hold that the former should not be considered a penalty, appeared to be a contradiction in terms, the case being precisely that in which courts of equity had always relieved, and against which courts of law, in modern times, had endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement. And, therefore, notwithstanding the terms of the contract, judgment was entered for the actual damages as determined by a jury; showing that the equitable doctrine of relief against penalties and forfeitures is fully received and enforced at law.[1]

[1] Kemble *vs.* Farren, 6 Bing. 141.

IDIOTS AND LUNATICS. The change of the law, in relation to the contracts of idiots and lunatics, is an instance where an absurd and artificial rule, aided by the astuteness of judges, and the narrow and technical reasoning of the age in which it was established, for a time prevailed over the natural and acknowledged principles of equity and law; but only to yield again to the more liberal doctrines which it had displaced. It has always been properly considered a part of the law of nature, that the contracts of persons deprived of their mental and reasoning faculties should be treated as invalid.[1] The essential element of every contract—the consent of the reason—is entirely wanting in engagements assumed by such unfortunates. This principle was admitted and declared by the ancient writers upon the common law,[2] and until the time of Edward the Third, the plea of insanity was a sufficient defence to an action on any contract, whether undertaken by a sealed instrument, or under a parol engagement. But between the reign of that prince and the time of King Henry the Sixth, courts of law adopted the rule that a man of full age should not be allowed to stultify himself, and for the reason that a lunatic could not know what acts were committed by him during the continuance of his insanity, and consequently could not plead to them in his sane moments, a plea of insanity was not permitted to bar actions instituted upon contracts entered into with that deliberation and consideration which sealed instruments evidenced.[3]

This maxim, although effecting a slight restraint upon the exercise of the equitable jurisdiction of the court of chancery in such cases, was not materially destructive of the jurisdiction which that court had always entertained, on the ground of fraud, to set aside contracts entered into by idiots or lunatics; and many actions in equity were therefore allowed for the purpose of nullifying such

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[1] De Jure Belli, Grotius, B. 2, ch. 11, § 5; 1 Story's Eq. Jur. § 223.

[2] Bracton, Lib. 3, ch. 2, § 8; Fleta, Lib. 2, ch. 56, § 19, and Lib. 3, ch. 3, § 10; Britton, c. 28, fol. 66; 2 Black. Com. 291.

[3] Beverly's Case, 4 Coke, 126; Co. Litt. 247; 2 Black. Com. 291–2; 1 Story's Eq. Jur. § 225; Cro. Eliz. 398.

engagements;[1] and in a very short time, the naturally just principles of equity upon this subject, in a great measure regained their operation in the courts of law,[2] although the effect of the maxim that "a man shall not be permitted to stultify himself," is still visible in the decisions of the English courts.[3] In America, the rule that a party shall not disable himself, has never been admitted as forming a part of legal jurisprudence,[4] being justly regarded as in defiance of natural justice and the universal practice of the civilized world.[5] And although the protection which municipal jurisprudence has considerately thrown around those unfortunate beings who, by the visitation of providence are disabled from protecting themselves, is founded upon the clearest principles of natural justice, and cannot now be limited as a principle of any particular court or jurisdiction, yet this protection having for a time been displaced from its full operation in the tribunals of the boasted common law, the subject could not be omitted, as unworthy of consideration in this connection.

FRAUDS. A large part of equity jurisdiction consists of actions entertained on the ground of fraud, either actual or constructive.[6] Wherever fraudulent transactions are shown to have been perpetrated, courts of equity will interfere, and by the application of those remedies which such courts only can administer, will endeavor to place the parties in precisely the same situation as if the transactions had not occurred. This jurisdiction has belonged to courts of equity since the earliest period of our juridical annals, and seems to have been assumed concurrently with courts of law, not on account of any peculiar principles of equity in relation to frauds and fraudulent agreements, but on account of the inadequacy of ordinary legal tri-

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[1] 1 Fonbl. Eq. B. 1, ch. 2, § 2; 1 Story's Eq. Jur. § 226.

[2] Yates *vs.* Boen, 2 Strange, 1104.

[3] Baxter *vs.* Earl of Portsmouth, 5 B. & Cr. 170; Faulder *vs.* Silk, 3 Camp. 126; Browne *vs.* Joddrell, 1 Mood. & Malk. 105, and note.

[4] Somes *vs.* Skinner, 16 Mass. 348; Webster *vs.* Woodford, 3 Day, 90; Mitchell *vs.* Kingman, 5 Pick. 431.

[5] 1 Fonbl. Eq., B. 1, ch. 2, § 1.

[6] 1 Story's Eq. Jur. § 184, 185, and 258.

bunals to afford plain and complete remedies in cases of this nature. Fraud is in nearly all cases, cognizable, to a certain extent, at law; and courts of law repudiate and punish fraudulent transactions so far as the peculiar nature of the remedies administered in those courts, will permit.

Indeed, it might well abate somewhat from the admiration with which the common law branch of our jurisprudence has always been regarded, if it could be truly said, that its tribunals refuse to apply their remedial process, such as it is, to the promotion of those most obvious objects of every government and all law, the punishment and suppression of deceit and fraud, and the enforcement of sound and vigorous principles of public policy.

As one instance, however, in which peculiar doctrines of equity in relation to this branch of its jurisdiction, have made their entrance into the administration of courts of law, it may be remarked that *Marriage Brokage Contracts*, in which needy fortune hunters agree to afford compensation for assistance in obtaining wealthy and advantageous marriages, were not always void at law, and cases are reported in which actions have been maintained upon such agreements.[1] But courts of equity at a very early period began to interfere to invalidate such bargains, and the principle upon which they proceeded was soon allowed to operate in common law courts, and was sanctioned by the house of Lords in England, so that contracts of this nature are treated as well by courts of law as in equity tribunals, as destructive of every true principle upon which marriage should be contracted, and in violation of the rules of morality and public policy, and therefore so completely void that even when fully executed they may be relieved against, and money actually paid upon them, recovered back.[2]

Lost Instruments. Originally, no remedy was given at law, in the event of the loss or destruction of deeds or bonds. In such cases no *profert* of the instruments could be made, without which the pleadings were fatally defective.[3] A court of equity was neces-

[1] Grisley *vs.* Lother, Hobart's Reps. 10; Hall *vs.* Potter, 3 Levinz, 411.

[2] Story's Eq. Jur. § 260, 261, and note; Boynton *vs.* Hubbard, 7 Mass. 112.

[3] Reeve's Hist. Eng. Law, vol. 3, p. 189; Co. Litt. 35–6; 1 Story's Eq. Jur. § 81.

sarily resorted to, which took jurisdiction, received evidence of the contents of the missing instruments, and administered relief.[1]

Such was also the case with lost bills of exchange and promissory notes; the nature of negotiable paper requiring that, upon its loss, actions should be maintained thereon, only in a court competent to demand and receive proper indemnity and security to the parties liable thereon, against loss or damage by reason of its subsequent re-appearance in the hands of a bona fide holder, for valuable consideration.[2]

This equitable principle of affording relief in such cases, was adopted by courts of law, and actions were allowed upon absent instruments under seal, profert being excused by an averment of the loss or destruction; and at present, parol evidence to prove the contents of missing deeds, is equally admissible at law and in equity.[3]

Bills of exchange, and notes representing simple contract debts, no profert of them was ever necessary, and the reason for the interposition of equity in cases of the destruction of instruments of that character, did not arise except where the bills or notes were negotiable; since judgment would be given thereon at law, upon mere proof of the loss or destruction.[4] But where the instrument was negotiable, and simply proved to be lost, courts of law declined to interfere with the jurisdiction of equity, on account of their inability to require the necessary indemnity,[5] and in England they seem to have gone to the extent of refusing relief in all cases in which the instruments were negotiable, whether lost before or after becoming due, on the ground that the acceptor or maker is entitled as well to the delivery up of the instrument, to evidence its payment, as entitled to be protected against the demands of bona fide holders, becoming such before the bill became due; the vouchers required in the former case, and the indemnity necessary in the latter, being

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[1] Story's Eq. Jur. § 81, and cases cited.

[2] Messop *vs.* Eadon, 16 Ves. 430; 1 Story's Eq. Jur. § 85 and 86.

[3] Read *vs.* Brooman, 3 Term 153; Totty *vs.* Nesbith, 3 Term 153, note.

[4] Walmsley *vs.* Child, 1 Ves. 345; Glynn *vs.* Bank of England, 2 Ves. 38.

[5] Pierson *vs.* Hutchinson, 2 Camp. 211.

capable of proper adjustment only in the forum of an equity tribunal.[1]

In America, however, courts of law have declined jurisdiction only in the case where a negotiable instrument has been lost before becoming due, and no sufficient evidence is offered of its destruction.[2] When this is the case the party must resort to equity, and upon giving proper security and the payment of costs, relief will be granted; but in all cases where the instruments were unnegotiable when lost,[3] or lost after maturity, these facts may be shown in an action at law, and a recovery obtained, the record of the judgment being a sufficient voucher of payment in any future action against the maker, endorser or acceptor. The general rule may be stated to be, that whenever the party sought to be charged has a right to demand indemnity, the suit must be brought in equity, but in all other cases the remedy may be pursued at law. The practice of requiring indemnity has never been adopted to any extent into the common law either of England or America, although in some of the States of the Union statutes provide for such emergencies, authorizing courts of law to receive indemnity and to allow recoveries upon lost negotiable instruments.[4] In those States where any holder of negotiable paper is made subject to all the equities existing between the original parties, the necessity for indemnity and the consequent resort to chancery jurisdiction are unknown.

COMPENSATION OR SET-OFF. The practice now existing, both in courts of law and equity, by which the party defendant to any action may set-off against the claim of the plaintiff any valid demand existing in his own favor, judgment being rendered only for the balance due after deducting the amount of such demand, may be

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[1] Hansard *vs.* Robinson, 7 B. & Cres. 90.

[2] Rowley *vs.* Ball, 3 Cowen, 303; Pintard *vs.* Tackington, 10 Johns. 104; Rogers *vs.* Miller, 4 Scam. 333; Thayer et al. *vs.* King, 15 Ohio, 242.

[3] Hough *vs.* Barton, 20 Vermont, 455; Dessen *vs.* Wheeler, 6 Blackf. 485; Dean *vs.* Speakman, 7 Blackf. 317; Mobile Bank *vs.* Tillman, 12 Ala. 214.

[4] Smith et als. *vs.* Rockwells, 2 Hill's N. Y. Reps. 482; Reynolds *vs.* French, 8 Vermont, 85.

referred to an equitable source, although so soon adopted by courts of law, that it is difficult to discover many traces of its exclusive exercise by courts of chancery.

There can be no doubt that the practice was originally adopted into English equity jurisprudence from the Roman law, although never to that extent in which it existed in that code, where the existence of a cross-demand operated *proforis vigore* to extinguish to its own account the claim of the other party,[1] while in the English law the exercise of the right to set-off was at the discretion of the party entitled to it, who might use it or not, at his option, the mutual debt not being extinguished by their co-existence, but only when actually set-off against each other in an action.[2]

The necessity for a practice that would allow compensations of this nature, similar to that prevailing in the civil law and existing to some extent in courts of equity, was first severely felt by common law jurisdictions in cases of suits brought by assignees in bankruptcy, in which the debtor was deprived of the advantage of a counter-demand by him upon the bankrupt, on the faith of which his own liability might perhaps have been incurred. To supply this deficiency, it was enacted in the year 1793, by Parliament, and shortly after re-enacted,[3] that where mutual credits had existed between bankrupts and other persons at any time before the bankruptcy, the account between the parties should be stated by the commissioners of bankruptcy, and one debt set against the other; and by another statute it was further enacted, that wherever mutual debts existed between the parties to any action, one debt might be set against the other, whether the action was brought by or against the debtors themselves or their representatives.[4]

These statutes operated to enlarge the jurisduction of courts of law, and to declare the principles of the law in relation to the right of set-off, in which condition they were permanently to remain; and although courts of equity, by reason of their peculiar powers in the

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[1] Pothier on Obligations, 599.

[2] Story's Eq. Jur. § 1440.

[3] Stat. 5 Geo. 2, c. 10, § 28.

[4] Stats. 2 Geo. 2, ch. 22, and 8 Geo. 2, ch. 24, § 5.

adjustment and allowance of accounts, are able to enforce compensatory rights in a greater number of cases and in cases of greater complexity than can be adjudicated in courts of law, yet the latter tribunals, in all cases in which those rights can be allowed by them, permit their exercise in the fullest and freest manner. In most of the United States, the right is regulated by express statute enactments.

ASSIGNMENT OF RIGHTS OF ACTION. It was a rule of the common law, that rights of action could not be transferred from the persons entitled thereto, to any other persons, so as to enable them to sue and recover thereon.[1] The reason of this rule was the prevention of litigation, and the multiplicity of suits and contentions that would arise if mere *choses in action* could be assigned. *Lord Coke*, said it was one of the maxims of the common law that no right of action should be transferred, "because under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth."[2]

This maxim was so strictly enforced and productive of such inconveniences that courts of equity interfered and gave effect to assignments of such interests in favor of the assignee, on the ground that the assignment of the right operated as a declaration of trust, which authorized the assignee to make use of the assignor's name to recover the debt, or reduce the property into possession.[3] The technical rule of law was the more easily disregarded in equity, since it was founded upon an apprehension of the danger of increasing litigation and maintaining champertous contracts, the prevention of which evils being a common object of equity jurisdiction, its tribunals could therefore give effect to assignments in a manner requiring that they should be made in the purest good faith, and with the most honest intentions.[4] Subject therefore to the requirements that every such

[1] Co. Litt. 214 a. [2] Co. Litt. 214 a.

[3] Viner's Abr. tit. Maintenance; Wright *vs.* Wright, 1 Ves. 411; Thomas *vs.* Freeman, 2 Vern. 563.

[4] Chitty on Bills of Exchange, ch. 1, page 8.

transaction should be entered into bona fide and with no intention of violating any rules of public policy established for the prevention of litigation, and subject to the restrictions imposed by those rules, which were equally regarded in both jurisdictions, the rights of an assignee of a *chose in action*, were early protected, and he was allowed to bring his bill in equity to obtain them.[1] Courts of law seem to have recognized this equitable interest of an assignee of a right of action, as early as the latter part of the seventeenth century, and we find it declared by a common law judge, that if a person covenants not to assign either at law or in equity, the covenant is broken at law, by an equitable assignment, "for as the assignee has an equity it shall be no exile to the courts of common law;"[2] and an agreement to assign a right of action is soon admitted to be a sufficient consideration to maintain an action upon a promise, at first, upon the ground that such an assignment might be made without maintenance, by means of a letter of attorney enabling the assignee to proceed in the name of the assignor, and then upon the ground of a general right of assignment.[3] We next find courts of law permitting actions to be brought upon such assignments for the benefit of the assignee, although still adhering to the formal rule that every such action must be brought in the name of the original party to the contract and not in the name of the assignee.[4] And although the equitable principle was so far allowed a legal operation as to authorize a defendant in a suit brought in the name of the assignor for the assignee's benefit, to set-off a debt due him from the person beneficially interested;[5] yet the principle was not for a time carried so far as to recognize fully the assignee's interest, or to protect him from the effect of a release or any other acts, admissions or declarations of the assignor, although made after the assignment and notice thereof to the debtor.[6]

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[1] Story's Eq. Jur. vol. 2, § 1940 and note.

[2] Kingdom *vs.* Jones, Skinner 6, 7.

[3] Loder *vs.* Cheslyn, Siderfins 212; Barfill *vs.* Leigh, 8 Term Reps. 571.

[4] Bauerman *vs.* Radenius, 7 Term Reps. 663.

[5] Cases cited in Winch *vs.* Keeley, 1 Term Reps. 619.

[6] Bauerman *vs.* Radenius, 7 Term 663, cited infra.

The exception to the strict rule of the common law, arising from the adoption of the doctrines of the law merchant in relation to promissory notes and bills of exchange, contributed to increase still more the freedom of assignments of this nature, and to decrease the fears entertained concerning the effect of such agreements, in increasing the danger of litigation. The demands of commerce and commercial intercourse could not sustain the inconveniences arising from the restraint imposed by the common law rule upon that transfer of instruments and evidence of debts, so necessary for the purpose of business transactions; and the custom of merchants, by which the endorsement of a bill of exchange, drawn in a foreign country, vested the legal as well as equitable interest in the endorsee, was admitted into the common law at a very early period, and was followed by the adoption of the same rule in relation to inland domestic bills of exchange,[1] and finally to promissory notes,[2] which have been gradually withdrawn from the operation of the common law rule so completely, that a simple endorsement of such instruments vests in the assignee from that moment a legal right in his own name against the maker or acceptor, without the necessity of any previous notice to him of the transfer.[3]

The principles of the law in relation to assignments other than of negotiable instruments, as varied by the decrease of the fear of encouraging litigation, and the increase of the influence of the commercial law, have not extended so far as to remove the necessity of bringing actions upon such assigned contracts in the name of the original party; but subject to this formal restriction, courts of law take full notice of the interest of assignees, and so far as the structure of their own organization will permit, protect such interests, in most cases, in a completely effectual manner. If the assignment is assented to by the debtor at the time of its execution, or if he at any time promise to pay it, the assignee may maintain

[1] Chitty on Bills, 10.

[2] Clerk *vs.* Martin, 2 Ld. Raymond, 757, and 1 Salk, 759; Statute of 3 and 4 Anne, ch. 9, In relation to promissory notes.

[3] Story on Promissory Notes, § 6.