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AN ESSAY UPON THE JURISDICTION ASSUMED BY  
COURTS OF EQUITY UPON THE GROUND OF ACCI-  
DENT.

It is unfortunate that in all the treatises and all the cases upon the jurisdiction of equity upon the ground of "accident," there is nowhere to be found a single correct definition of the word:

Its meaning, according to most common usage, is well defined in 1 Repertoire de Jurisprudence, 41, as an event "in which the will of man has no part."

In 1 Domat, 261, it is defined to be an event "which does not depend upon the will of him to whom it happens."

The latter definition, as will appear in the further course of these remarks, is most proper in this connection, and is sufficiently sanctioned by common usage to be legitimate.

A few remarks upon the definitions found in our books *will not* be altogether useless. A very loose definition, generally adopted by early writers, and derived from the old division of equity jurisprudence into "fraud, accident, and trust," is thus expressed by Lord Cowper in the *Earl of Bath vs. Sherwin*, 10 Mod. R. 1: "By *accident*," said his Lordship, "is meant where a case is distinguished from others of a like nature by unusual circumstances." This is evidently intended to include the signification of the word "mistake," which is quite distinct from "accident," and so treated

by all later writers. The adoption of this definition, and its subsequent rejection, is but an illustration of a general truth, that upon an imperfect acquaintance with either persons or things we first notice resemblances only, but upon a more thorough knowledge we distinguish differences.

Another definition is that of Mr. Jeremy, according to which an accident is "an occurrence in relation to a contract, which was not anticipated by the parties when the same was entered into, and which gives one of them an undue advantage over the others in a court of law."

Mr. Justice Story justly remarks that it is wrong to confine the meaning of the term to cases that happen in relation to contracts. "By the term 'accident,' " he says, "is here intended not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts, or omissions as are not the result of any negligence of the party."

Both of these definitions omit the *essential* quality of an accident, viz: absence of intention. Moreover, accidents though generally are not necessarily unexcepted. The fall of a house may be accidental, yet have been long expected by all acquainted with its ruinous condition.

Mr. Justice Story's definition is especially objectionable, as excluding accidents which happen from negligence—an error which, as we shall see further on, might be productive in some cases of serious consequences. It is true that equity will not relieve a party from the effects of an accident occasioned by his own gross negligence or folly, but, according to the universal use of the word, an accident can unquestionably so happen.

We have commented at length upon the meaning of the word, because we regard a correct use of words as being at the bottom of all sound learning, either in law or any other science.

In connection with this very word *accident*, the case of *Viscount Canterbury vs. the Attorney-General*, 1 Phill. 306, furnishes a striking illustration of the truth of this remark. In that case there was a question "whether the protection given by St. 6 Ann.

ch. 31, and 14 Geo. 3 ch. 78, to a party, in whose house or on whose estate 'a fire shall accidentally begin,' extends to fires which are occasioned by the negligence of the owner or his servants, or whether it is confined to fires arising from *pure accident, in the limited sense of the word.*" The Lord Chancellor, practically adopting Mr. Justice Story's error upon the subject, uses the following singular language: "He," (referring to 1 Blacks. Com. 431,) "thus states it as his opinion, 'that for a fire in a dwelling-house, originating in the negligence of himself or servant, the master is not responsible.'" . . . . The learned author (Blacks.) does not explain *how this construction of the act is to be reconciled with the words "shall accidentally begin."* Whether Mr. Blackstone's doctrine is correct we will not undertake to decide; but certainly it is no contradiction in terms to say that "a fire may accidentally begin" from the negligence of the owner or his servants.

Having, we trust, sufficiently dwelt upon the importance of avoiding false notions of the meanings of words, we will now inquire in what cases equity will relieve from the effects of accidents. In doing so, however, it is necessary to remember that the foundation of all equity jurisdiction is the original want of adequate remedy at law; and, further, that, when it is said that equity will relieve in certain cases of accidents, the principle is always to be held in subordination to such other general principles of equity, as "*In æquali jure melior est conditio possidentis,*" or "*Vigilantibus et non dormientibus jura subveniunt,*" &c. We would further remark, in explanation of the mode in which we propose to treat the subject, that we will, wherever possible, give the cases from which we deduce our principles, in accordance with Lord Bacon's maxim, "that knowledge drawn freshly and in our view out of particulars knoweth the way best to particulars again."

It seems to us that the principle of the maxim, "*Actus Dei nemini facit injuriam,*" extends as well to those accidents which happen by the agency of man (but, in accordance with our definition, without the volition of the party seeking relief) as to accidents which owe nothing to man's agency. For a man ought no

more to be held accountable for his own involuntary agency or the agency, whether voluntary or involuntary, of another man, than for accidents which are purely *Actus Dei* or acts of Providence ; and so courts of equity have practically, though not avowedly, construed the maxim.

There are four ways (with which we are acquainted, and possibly others which do not occur) in which a man may be injured by an accident, if left to the rules of law :

I. He may have a legal right and, by accident, lose his remedy at law.

II. He may, by accident, according to the rules of law, be deprived of the right itself.

III. There may be, by accident, an omission, either by the party seeking relief or by another, of some circumstance necessary to vest a legal right, but not going to the essence thereof.

IV. He may, by accident, incur, according to the rules of law, some liability which it is inequitable for him to bear.

Under the first head fall two classes of cases, the first of which is where a man has a good defence to a suit at law, which he is, by an accident, prevented from making. In such a case, as well as where prevented by fraud or mistake, equity will grant a new trial.

The second class is by far the most numerous, and is where a man accidentally loses a written instrument. To render clear the cases on this head, it is necessary to anticipate by stating that in England there is a distinction made between cases of lost negotiable instruments, and those of lost instruments not negotiable.

In the case of the *East India Company vs. Bodham et al.* 9 Ves. 465, the bill alleged the accidental loss of a bond, and was accompanied by an affidavit to that effect. Payment was decreed upon condition of complainant's giving a suitable bond of indemnity. The grounds of this decree were: first, that the deed could not be pleaded at law without profert; secondly, that courts of law could not require suitable indemnity to be given to the defendant.

In *ex parte Greenway*, 6 Ves. 811, and *Davis vs. Dodd*, 4 Price,

176, the jurisdiction was, upon the latter ground, extended to the case of a lost bill of exchange. In the latter case, it was said by Richards, Chief Baron: "It does not become me to say whether the defendant has or has not any remedy at law; but even though he should have such remedy, he has also a remedy here; and if he had commenced an action at law, the defendant might have restrained him by injunction from proceeding; and for this obvious reason, that a court of law could not compel him to give security, which a court of equity would hold he is entitled to."

In *Mossop vs. Eadon*, 16 Ves. 480, the principle was denied to hold in the case of a lost promissory note not negotiable.

The case of *Hansard vs. Robinson*, 7 B. & C. 90, was an action at law upon a bill of exchange lost after it was overdue, and the plaintiff was non-suited. This case is cited in Smith's Equity as over-ruling the case of *Mossop vs. Eadon*, and there is strong reason for the opinion. But the English courts have taken a different view.

The case of *Ranny vs. Crowe*, 1 Exch. 167, 10 Jurist, 715, was an action upon a lost bill of exchange, payable to order, and unendorsed, and it was held, as in *Hansard vs. Robinson*, that the plaintiff could not recover at law.

The case of *Wain vs. Bailey*, 10 Ad. and El. 613, was assumpsit upon a lost note, not negotiable, and the plaintiff recovered.

In *Clay vs. Crowe*, 18 Eng. Law and Eq. R. 514, the distinction is said to be between instruments, originally negotiable, whether they have lost that characteristic or not, and those which were never negotiable. But there seems to be no rational distinction between the case of a negotiable instrument not transferable for want of endorsement, or over-due, or actually destroyed, and that of a promissory note not negotiable. From the *East India Company vs. Bodham*, and from *ex parte Greenway*, and from the other cases, we deduce three reasons for the jurisdiction of equity: first, in cases of lost instruments under seal, the former necessity of making profert at law; secondly, the inability of courts of law to require suitable indemnity; thirdly, the advantage of binding

the conscience of the party by an affidavit of the loss. The last two of these cases apply to the case of *Mossop vs. Eadon* as fully as to the *East India Company vs. Bodham* or *Hansard vs. Robinson*. This position is also sustained by the high authority of Mr. Justice Story, and by the general current of American decisions.

It may be laid down, then, as a general rule, without exception, that in case of the loss of any deed, which cannot be given in evidence at law without being pleaded, or of any other instrument for the payment of money, whether negotiable or not, equity will grant relief. But the bill must be accompanied by an affidavit of the loss, and must contain an offer of indemnity, probably in all cases, certainly in cases of the loss of instruments not under seal.

Wherever a deed can be given in evidence at law without being pleaded, its loss is not, by itself, sufficient ground for relief in equity. "For," (to use the words of Lord Hardwicke in *Whitfield vs. Fausset*, 1 Ves. 392-3,) "if there is no more in the case, though the party may be entitled to the discovery of the original existence and validity of the deed, courts of law may afford just relief, since they will admit evidence of the loss and contents of the deed, just as courts of equity will do."

But where such a loss would perpetuate a defect in title, as where a conveyance to a purchaser has been accidentally burned, the vendor may be compelled to reconvey: 1 Story's Eq. § 84; Adams' Eq. 403; citing *Bennett vs. Ingoldsby*, Finch, 262; and Sug. on Pow. 98.

On the contrary, in the case of *Hoddy vs. Hoard*, 2 Carter's Ind. R. 474, the Court said: "that they knew of no principle of equity jurisprudence by which a grantor can be required to execute a second deed where one previously executed has been lost or destroyed while in the possession of the grantee."

But in the case of *Owen et al. vs. Paul*, 16 Alab. R. 130, it was held that a vendee, who has, by accident, lost his deed, may compel a reconveyance.

So, also, it was held in *Plummerville vs. Baskerville*, 1 Ired. Eq. R. 252. But in this case there was the additional ground of

equity jurisdiction that the deed was lost before registration, and could not be set up until registered.

Indeed there can be no doubt of the doctrine. Of course an affidavit of loss is required.

II. Where, by an accident, according to the rules of law, a man would lose his legal right.

Where a lease contains covenants to repair within a certain time and, in case of default, a right of re-entry, if the lessee is delayed beyond the time by unavoidable accident, equity will relieve him from the effects of his delay: Adams' Eq. 365. The rule being, as stated in *Harris vs. Bryant*, 4 Russ. 89, that "a court of equity will relieve against the effects of an express covenant, where *strict* performance of the condition is prevented by accident."

So if an apprentice fee of a specific sum be given, and the master afterwards becomes bankrupt or dies, equity will decree an apportionment: 1 Story's Eq. § 472; *Newton vs. Rouse*, 1 Vern. 460; for the apprentice has a legal right to the instruction of his master, and though equity cannot prevent the loss of the right, yet it will decree compensation.

So in the case of *Davis vs. Wattier*, 1 Sim. & St. 463, a testator having directed that an annuity should be paid out of his personal estate, in the course of the cause it was ordered that a sum of five per cent. stock should be set aside to answer the amount. But, by an act of Parliament, this was converted into four per cent. stock, and thus became insufficient, and the deficiency was decreed to be made up out of the residuary fund, although it had been distributed.

So in the case of *May vs. Bennett*, 1 Russ. 370, which was of the same nature, the deficiency was decreed to be made up either by the sale from time to time of the appropriated stock, or out of the residuary fund.

III. Where, by accident, there is an omission either upon the part of the party claiming relief, or of another of some circumstance necessary to vest a legal right, but not going to the essence thereof.

Thus, where covenants have been contained in a lease that lessor will renew on request made within a specified time, and the lessee is

delayed beyond the time by unavoidable accident, he may have relief in equity : Adams' Eq. 270.

So, also, in the case of *Hatchett vs. Pattle*, 6 Madd. R. 4, in which Mr. Pattle purchased a *rente viagere* for two lives, one of which was his wife's, and it was stated that she was to hold during her life, and afterwards he was to dispose of the annuity, together with all arrears. By the happening of the French Revolution the annuity was not paid for many years before her death, and it was held that he was not entitled to the arrears thus caused. In this case, to vest a legal title to the arrears in the wife, it was necessary for her to reduce them into possession ; and as this was prevented by unavoidable accident, the arrears were decreed to her representatives.

So in the case of a trust or a power coupled with a trust, which either by accident or design (which, according to our definition, would be an accident as to the beneficiary) is either defectively executed or not executed at all, equity will grant relief to the beneficiary, both upon this ground of "accident," and upon that of the maxim, "that equity looks upon that as done which ought to be done:" 1 Story's Eq. § 98.

So, also, in the case of the defective execution of mere powers caused by unavoidable accident or mistake. But this principle is restrained by the maxim, "*In æquali jure melior est conditio possidentis.*" Therefore, though in such case equity will relieve parties claiming upon a good or a valuable consideration, as wife, child, creditor, or purchaser, it will not in general relieve mere volunteers. But though equity will relieve a defective execution, it will not relieve a non-execution. But wherever there is a clear intention to execute, and any act indicative of such intention, it will be considered a case of defective execution : 1 Story's Eq. § 94 ; *Bath vs. Montague*, 3 Ch. Cas. 68, cited in Sug. on Pow. ch. 6, § 2 ; 2 Lomax' Dig. ch. 14, §§ 12, 13 ; *Chapman vs. Gibson*, 3 Bro. C. C. 229 ; *Coventry vs. Coventry*, 10 Mod. R. 464.

It has been said that in case of defective execution of powers caused by unavoidable accident, equity will relieve without making any exception of the case of volunteers : *Bath vs. Montague*, 3 Ch.

Ca. 68. But it has nowhere been so decided, and Mr. Sugden very properly doubts whether the doctrine is correct. All the cases, except those of fraud, proceed on the ground either of accident or mistake, and it is difficult to see why equity should go further in one case than the other. Both affect the party seeking relief in precisely the same manner, and in both, unless he grounds his claim upon the superior equity of a good or valuable consideration, the maxim, "*In æquali jure melior est conditio possidentis*," ought to apply: 1 Story's Eq. § 95, Acc.

IV. Where, by an accident, according to the rules of law, a man would incur a liability which it would be inequitable for him to bear.

Thus, in the case of *Croft vs. Lindsey & Colville*, 2 Freem. 1, an administrator being in possession of several houses, and much more than sufficient to pay debts and legacies, paid them as they were demanded; and, afterwards, by the fire of London several of the houses were destroyed, which rendered the assets insufficient to meet outstanding claims, and then a debt on a bond being claimed, equity granted relief.

On the whole, then, we may lay down the four following propositions as covering all the cases cited, and restrained only by other principles of equity:

I. Where a man has a legal right but, by accident, loses his remedy at law, equity will relieve.

II. Equity will not suffer a man to be deprived of his right by unavoidable accident.

III. Where there is, by accident, an omission either by the party seeking relief or another of some circumstance necessary to vest a legal right, but not going to the *essence* thereof, equity will relieve.

IV. Equity will not suffer a man, by unavoidable accident, to incur a liability which it is inequitable for him to bear.

Many cases found in the text-books, under the head of "accident," are omitted here as not properly belonging to it; as, for instance, the cases of deeds suppressed or destroyed by the defendant, 1 Story's Eq. § 84, in which the courts proceed on the principle of "*in odium spoliatoris*;" or, the cases mentioned in section ninety-