ANNOUNCEMENT

The Review takes pleasure in announcing the election to the Editorial Board of the following members of the Second Year Class: William B. Arnold, Robert Brigham, Edward H. Bryant, Jr., Samuel Finestone, B. Graeme Frazier, Jr., Albert Maurice Hoyt, Jr., Joseph Gray Jackson, William F. Kennedy, E. Scott Lower, Jr., Joseph Matusow, John W. Murphy, Milton M. Propper, Ernest Scott, Kendall H. Shoyer and Charles A. Wallace.

NOTES

The Requisite Medium in a Tender of Performance of an Obligation to Pay Money—It is notorious that legal tender forms only a small part of the currency that it is customarily used in business today in discharging monetary obligations. This medium of payment is essentially impractical in making payments for large sums, or at great distances, or after banking hours, because of its relative scarcity, its bulk, and its attribute of passing from hand to hand without endorsement and conferring on any bona fide purchaser for value an indefeasible title. Yet, in the absence of a specification in the contract of the medium of payment, it is settled law that monetary obligations, if the obligee so insists, can be performed only by the payment of what Congress has prescribed as legal tender, and the tender of anything else is insufficient to put the other party in default.

1 See note, What money is legal tender, 31 A. L. R. 246 (1923); 3 Willis-ton, Contracts (1920) § 1813. For the definition of legal tender according to the English law, see Benjamin, Sale (6th ed. 1920) 884.
2 Currency is used in this note to mean whatever circulates conventionally on its own credit as a medium of exchange, and therefore includes bank notes, government securities, certificates of deposit and certified checks. Pilmer v. Branch of State Bank, 16 Iowa 321, 329 (1864); Griswold v. Hepburn, 63 Ky. 20, 33 (1865). It excludes the idea of depreciated money. Swift v. Whitney, 20 Ill. 144, 146 (1858). Money will be used as a generic term including legal tender and other currency. 2 Bouvier, Law Dictionary (1914) 2238, 18 R. C. L. 1266.
3 See McMahon v. Sloan, 12 Pa. 229, 232 (1849), and cases there cited.
4 Vick v. Howard, 136 Va. 101, 116 S. E. 465 (1923). And see Juliard v. Greenman, 110 U. S. 421 (1883); Pearlstein v. Novitch, 239 Mass. 228, 131 N. E. 853 (1921). There are several other well-established rules of law which mitigate the strictness of this rule, under special circumstances. If the parties in their contract specify some other medium than legal tender, then of course legal tender cannot be insisted on. See the cases above. Other currency constitutes a good tender, unless specifically objected to as not being legal tender, and an acceptance of any currency constitutes a complete discharge, provided it
The strict traditional view on this point is well voiced, in an early Pennsylvania case, by Justice Gibson:

"However unconscionable, the motive may be, [a party] might openly reply, 'I only exercise a right I reserved by the contract, and although your notes could answer my ends as well as specie, yet for the purpose of defeating the contract altogether, I require payment in coin [legal tender], because I know you cannot procure it.'"

The difficulty with this rule of law, that where a contract provides for a payment of so many dollars the payee reserves the right to insist on legal tender, is that it no longer coincides with the real intention of the parties in most contracts made in the modern business world. What the parties actually intend by payment, is the turning over of a certain amount of currency, the recognized equivalent of a certain value expressed in terms of legal tender, as a standard.

The harshness of this doctrine has been somewhat alleviated by the development in several jurisdictions of an apparently anomalous rule that, where the person making payment has good reason to believe that the legal medium will not be insisted on, if the payee objects on that ground, the other party must be given a reasonable opportunity to acquire legal tender. This rule is applied where there has not been a technical waiver, and where the obligor's belief does not rest on facts that would constitute a basis for an estoppel. Of course in either of the latter cases there would be no need of an opportunity to present legal tender, and therefore no occasion to invoke the rule. It is essentially an equitable treatment of the problem, but it has been applied is as represented. Corbit v. Bank of Smyrna, 2 Har. 235 (Del. 1837); Ware v. Street, 2 Head 609 (Tenn. 1859). Cf. City of San Juan v. St. John's Gas Co., 195 U. S. 510 (1904). As to whether the acceptance of negotiable instruments constitutes a complete discharge, where they are not eventually paid, see note, 10 L. R. A. (n. s.) 510, especially 526 et seq. (1907). It is generally held that a refusal of tender on any other ground, waives the right to object on the ground that it is not legal tender. Polglass v. Oliver, 2 C. & J. 15 (Eng. 1831); Beatty v. Miller, 47 Ind. App. 494, 94 N. E. 897 (1911); 2 WILLISTON, CONTRACTS (1920) § 743, 3 ibid. § 1819. And of course it is general contract law that if the obligee waives performance, or prevents it, or is guilty of an anticipatory breach, tender is not necessary. 2 WILLISTON, op. cit. § 676. In regard to prevention by the defendant of a presentation of legal tender by the plaintiff, see especially Servel v. Jamieson, 255 Fed. 892 (C. C. A. 9th. 1919).

The only grounds for the doctrine advanced by the cases are fairness, the desire to avoid a harsh decision, or the necessity of preventing a "sharp business trick."
in law actions for damages as well as in suits in equity for specific performance. It has been applied almost exclusively where the plaintiff’s belief is based on the defendant’s acts or failure to act, but there are at least dicta that it may be applied where the plaintiff’s belief is founded on business custom. Its application has been practically confined to cases in which time is not of the essence of the contract. Apparently the first expression of this doctrine was in an early New Jersey equity case, an action for specific performance of a contract for the sale of land, brought by the vendee. The plaintiff testified that the defendant had said that he would not insist on legal tender, but this was denied by the defendant. The chancellor found that at least the defendant had given the plaintiff some basis for believing that he need not tender legal money, and that if he subsequently did insist on it, he would have to allow a reasonable time after the date set for payment in order to procure it. In evaluating this decision, it must be borne in mind that equity is not inclined to construe time as being of the essence of a contract, especially where it is not so specified, and also that if the plaintiff’s evidence was believed, there had been a waiver of strict performance by the defendant, or, at any rate, a basis for a plea of estoppel. A recent Arkansas

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<td>10 Cheney v. Libby, 134 U. S. 68 (1890); Skinner v. Stone, 144 Ark. 353, 222 S. W. 360 (1920); Pickle v. Auble, 4 N. J. Eq. 315 (1843).</td>
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<td>11 In Blablock v. Clark, 137 N. C. 140, 49 S. E. 88 (1904), it was held that where it was the custom of a particular business to make payments in some other medium than legal tender, if the obligor is present at the appointed place with the proper amount of the customary currency, and the other party does not appear, the first party can be said to have been &quot;ready, willing and able&quot; to perform his obligation. Whether, if the defendant had been present and objected to this medium, the plaintiff would have been entitled to an extension of time, is a somewhat different question. See Stein v. Schapiro, 145 Minn. 60, 175 N. W. 54 (1920), annotated in 8 A. L. R. 1268 (1920), in which the court said that neither the custom of the parties nor of the business could force the obligee to accept anything but legal tender, though &quot;it might well be&quot; that the course of dealing or custom might have given the plaintiff a reasonable time to produce and tender legal money. Cf. Hughes v. Knott, 138 N. C. 103, 50 S. E. 586 (1905).</td>
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| 14 An early decision, Bass v. White, supra note 9, was apparently the next case to take up the point. This was an action for damages for breach of contract. On the date set for payment the defendant obligee requested a check and did not mention legal tender, but the plaintiff protested the amount demanded. Finally the plaintiff agreed to the amount set by the defendant, but the latter suddenly refused a check and insisted on legal tender, which the plaintiff could not then procure as it was after banking hours. The defendant refused an offer of legal tender on the next business day. The court said that as it was the custom of business men in New York City to make payments by check, if a check was refused after business hours, the plaintiff should have been allowed until the next business day to tender specie. Unfortunately the
case affords a very clear instance of the application of the rule. The plaintiff, who was suing for specific performance of a contract to convey land, had originally offered to buy certain timber on the defendant's land. The defendant refused this proposition, but offered to sell the land with the timber to the plaintiff. The latter wrote accepting the offer unconditionally, and suggesting that if the other would forward the deed together with a draft for the purchase price, he would pay the draft. The defendant, finding that he had not made a very good bargain, without prior notice insisted on legal tender. The court held that under such circumstances he was obligated to allow a reasonable time to procure this medium. A recent Tennessee case reduces to a minimum the acts of the payee which will justify the other party in claiming an extension of time in which to secure legal tender. In that case the plaintiff was to pay $25 down, and $1600 the next day on delivery. In affirming a lower court decision in favor of the plaintiff, the court said:

"The defendant had taken a check the previous day without question, and had paid [a certain] difference in money. The plaintiffs had every reason to believe that the defendant would take the checks [in payment of the rest] and the evidence shows that he would have done so but for the fact that he was seeking to avoid his contract. The checks of course were not legal tender, and the fact that the defendant accepted a check the previous day was not such an act as would compel him to accept the check tendered, but he should have given the plaintiffs a reasonable opportunity to procure money and tender it."

Such being the tenor of the decided cases in this matter, the recent decision of the Supreme Court of the United States bearing on this point cannot fail to have an important effect on the future development of this phase of the law of tender. The action, in this case, was for damages for breach of contract. The defendant had agreed to sell a pickle factory, its equipment, and the goodwill of the business, and the plaintiff had agreed to pay $500 on the signing of the agreement, a check for which was acknowledged in the agreement, and on the date set for conveyance he was to pay $2500 and to give his note for the balance. The defendant had also agreed to transfer the stock of pickles then on hand, at a specified rate, for which amount case is not fully reported, and though the court does speak of business custom as a basis for an extension of time, the decision could equally well have been rested on waiver or apparent waiver. These two early cases are introduced to show how the anomalous doctrine that is being discussed, apparently first was announced in cases that might have been as well decided on other grounds.

17 Farris v. Ferguson, supra note 9.
18 Compare the opinion of Holmes, J., quoted infra p. 437.
19 Simmons v. Swan, 48 Sup. Ct. 52 (1927).
the plaintiff agreed to give his note payable on demand, and secured by a mortgage on the premises. Time was specified to be of the essence of the contract. The defendant accepted a check for the $500 payment. The plaintiff's evidence was to the effect that on the day set for conveyance, he went to the appointed place, but could not determine the defendant's whereabouts until two o'clock in the afternoon, when the latter telephoned that he would not arrive until three o'clock (the closing hour of the banks), and as a matter of fact he did not arrive until five o'clock. An hour or so later, when all the papers were ready, the plaintiff tendered a certificate of deposit for the $2500. The defendant, apparently wishing to evade his contract, insisted on legal tender, saying of the certificate of deposit, "Well, if I haven't got to take it I am not going to take it; and I will simply say good-night, gentlemen." He then walked out. The district court directed a verdict for the defendant, which was affirmed in the circuit court of appeals,9 one judge dissenting. The Supreme Court reversed the judgment and held that the district court erred in directing a verdict in this case. Mr. Justice Holmes said in giving the opinion of the court:

"It will be noted that the contract contemplated that the first payment should be by check, and the defendant had sent the plaintiff a letter . . . asking for a 'check in full for the pickle stock' for which by the agreement he was to receive a note; the amount as it turned out being nearly fifteen thousand dollars. In such circumstances and in view of the way business is done at the present day, it might be found to have been natural and reasonable to suppose that a certificate of deposit from a well-known solvent bank in the neighborhood would be enough. It seems likely that it would have been except for the defendant's desire to escape from his contract. If without previous notice he insisted upon currency that was strictly legal tender instead of what usually passes as money, we think that at least the plaintiff was entitled to a reasonable opportunity to get legal tender notes, and as it was too late to get them that day might have tendered them on the next. But the jury might find also that the defendant's behavior signified a refusal to go farther with the matter and therefore the plaintiff was not called upon to do anything more."

In reversing a directed verdict, the court is deciding that there were "facts in evidence which if unanswered would justify men of ordinary reason and firmness in affirming" the various points which the plaintiff is bound to maintain.20 In this case, the question before

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20 11 F.(2d) 267 (C. C. A. 1st, 1926), commented upon in (1926) 26 Col. L. REV. 1040.

21 5 Wigmore, Evidence (2d ed. 1923) §2494, quoting Brett, J., in Bridges v. Ry. Co., L. R. 7 H. L. 213 (1874). The federal cases give the court, if any-
the court was whether there was such evidence (a) that the plaintiff tendered performance in accordance with the terms of the contract, or (b) that the defendant waived strict performance, or prevented it or was guilty of an anticipatory breach, or (c) that the plaintiff had reason to believe that strict performance was not necessary and therefore should have been granted an extension of time in which to acquire legal tender and that an anticipatory breach removed the necessity of such further tender. The court decided that "at least" there was satisfactory evidence as to (c).

Considering the evidence as to the first of these two points, and omitting business custom which the court judicially notices, it is submitted that though relevant it is not of sufficient weight to justify a positive finding. The acceptance of a single check for the payment of earnest money is hardly the basis for a belief that the obligee will waive his right to legal tender as to the payment of a much larger sum to be paid on conveyance of the property. Certainly no other case has gone that far. The expression of a willingness to accept a check instead of a note payable on demand seems of even less weight. The effect of the decision seems to be to raise a presumption of fact in favor of finding the obligor's belief that legal tender would not be required to have been reasonably founded. Considering present busi-

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See 2 WILLISTON, CONTRACTS (1920) § 676.

2. This doctrine had been announced at least once before in the federal courts, in Cheney v. Libby, supra note 10. However, that case was a suit in equity in which there was an abundance of evidence of prevention, if not of fraud. In considering the principal case in the circuit court of appeals, Cheney v. Libby was not mentioned even by the dissenting judge.

2. Farris v. Ferguson, supra note 9, is the only case that approaches the principal case, in finding a reasonable basis for the belief that legal tender will not be required, on such slight evidence. In that case, the parties to the contract were farmers of long acquaintance, living in the same small town. The obligee accepted a check for the purchase money and even returned a certain excess in cash. The next day, without notice, he insisted on legal tender. It is submitted that the obligor in that case had more reason to be misled into thinking that the legal medium would not be insisted on, than the plaintiff in Simmons v. Swan. Furthermore the court in its decision emphasized the fact that time was not of the essence of the contract, which is another respect in which that case differed from the instant case. Cheney v. Libby, supra note 10, is a much more conservative statement of the rule. The opinion asserts that the receipt of payments by check at various times over a period of four years would naturally induce the obligor to believe that legal tender would not be insisted upon, and would justify his asking for an extension of time in which to acquire it. See also Pershing v. Feinberg, 203 Pa. 144, 52 Atl. 22 (1902).

2. The term presumption is a troublesome one. It is here used to mean that "the court permits the jury to take for granted the existence of facts presumed upon data which lack that probative value usually required to justify such a finding." Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, (1920) 68 U. of Pa. L. Rev. 307, 312.
ness custom, it gives to the slightest evidence on this point a weight that it does not possess strictly. On this basis, the strict rule as to the obligee's right to insist on legal tender is relaxed, by giving the obligor a reasonable extension of time in which to procure and tender the necessary medium of payment.\textsuperscript{25} Though this decision turns on a point of evidence, the case apparently represents, in its necessary effect, the most advanced statement of the doctrine involved.\textsuperscript{26} It presents some solution to the practical problem of legal tender, and, from the point of view of policy, it does not limit the Supreme Court to what Judge Anderson, the dissenting judge in the circuit court of appeals, calls \textsuperscript{27} "a rule of law entirely inconsistent with modern business practises."

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\textbf{DIVISION OF PROPERTY ACCUMULATED DURING MARRIAGE VOID AB INITIO—}Suppose that a woman lives with a man in the \textit{bona fide} belief that she is lawfully married to him. By her labor, or otherwise, she assists the supposed husband in the accumulation of property. In fact, the marriage is absolutely void, as distinguished from merely voidable. Is the woman, upon discovering the illegality of the relationship, entitled, either in law or in equity, to have a share of the property so accumulated? The term "putative marriage" is given to the relation described in the statement of the question. It is a marriage which is contracted in good faith by one or both of the parties, but which is, notwithstanding, invalid on account of some impediment. The term characterizes a marriage void from the beginning, as distinguished from a marriage which can be annulled by judicial decree.\textsuperscript{4}

It is generally accepted that, at the common law, no rights as wife can be acquired under a void marriage.\textsuperscript{2} Therefore, the woman cannot claim dower in the man's property,\textsuperscript{3} and is not entitled to alimony.\textsuperscript{4}

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\textsuperscript{25} It is submitted that the court's decision, that there was sufficient evidence of an anticipatory breach to go to the jury, might be seriously questioned. The implication of the defendant's words and acts was that he would accept legal tender, but nothing else, because he did not have to. See 3 \textsc{Williston}, \textit{op. cit. supra} note 1, § 1324. However, it is not useful to pursue this inquiry under a discussion that is chiefly interested in the requisite of legal tender.

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\textsuperscript{26} The doctrine appears never to have been applied before in an action at law for damages, involving a contract in which time was specified to be of the essence. It also proceeds, on slighter evidence than any other case, to submit the issue, to quote Anderson, \textit{J.}, dissenting in the circuit court of appeals, "to the conscience and intelligence of the jury." See note 23, \textit{supra}.

\textsuperscript{27} II \textsc{F. (2d)} at 269.
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\textsuperscript{2} See 13 \textsc{R. C. L.} 993, and 11 \textsc{A. L. R.} 1104 (1921).

\textsuperscript{3} Carpenter v. Smith, 24 Iowa 200 (1868); Jenkins v. Jenkins, 2 Dana 102 (Ky. 1834); Price v. Price, 124 N. Y. 589, 27 N. E. 383 (1891).

\textsuperscript{4} Barfield v. Barfield, 139 Ala. 290, 35 So. 884 (1904); Cropsey v. Ogden, 11 N. Y. 228 (1854); Smith v. Smith, 5 Ohio St. 32 (1855).

\textsuperscript{5} Hazard v. Hazard, 197 Ill. App. 612 (1916); Lopp v. Lopp, 43 Mich. 287, 5 N. W. 317 (1880); Collins v. Collins, 80 N. Y. 1 (1880).
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This being the rule, the question then is: Has the putative wife any other rights in the property acquired during the period of cohabitation? The recent case of *Fung Dai Ah Leong v. Lau Ah Leong* answers this in the negative.

Opposed to the holding of the *Ah Leong* case are decisions in California, Kansas, Louisiana, Oklahoma, Texas, and Washington. Because of the seeming justice of the affirmative view of the question, it becomes important to ascertain whether the decision in the *Ah Leong* case is supportable. For the purposes of discussion, the jurisdictions in which the courts grant relief must be divided into two classes, to wit, those where community property statutes prevail, which embrace California, Louisiana, Texas, and Washington; and those which have no such statutes, into which category fall Kansas and Oklahoma. It will be remembered also that all of these states, except Louisiana, are governed by the common law, except as modified by statute, as is Hawaii.

The question presented to the Hawaiian Supreme Court seems to have arisen first in the United States in the cases of *Smith v. Smith*, a Texas decision, and in the Louisiana case of *Patton v. Philadelphia*. In each, an equitable division of the property was decreed in favor of the putative wife, but the courts were there dealing with the rights acquired by the putative wife under the Spanish and Mexican law, which existed in those jurisdictions at the time the marriages were contracted, and the holdings were put expressly on that ground. Louisiana has followed the doctrine of the Spanish law consistently, but only because the principles of that body of law in regard to putative marriages were specifically made a part of the Louisiana Code. Nevertheless, some reliance is made on Louisiana cases by the supporters of the conclusions there reached.

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*Supreme Court of Hawaii, No. 1729, decided May 6, 1927.*

*Schneider v. Schneider, 183 Cal. 335, 191 Pac. 533 (1920); Werner v. Werner, 59 Kan. 399, 53 Pac. 127 (1898); McCaffrey v. Benson, 40 La. Ann. 103, So. 393 (1888); Krauter v. Krauter, 79 Okla. 30, 190 Pac. 1088 (1920); Barkley v. Dumke, 99 Tex. 621, 87 S. W. 1147 (1905); Knoll v. Knoll, 104 Wash. 110, 176 Pac. 22 (1918).*

*See 31 C. J. 12, § 1074.*

*Haw. Rev. Laws (1925) § 1.*

*1 Tex. 621 (1846).*

*1 La. Ann. 98 (1846).*

*In McCaffrey v. Benson, supra note 6, at 15, the Louisiana court said, in part: "But as Article 117 of our Code has been taken literally from Article 201 of the Code Napoléon, we have directed our investigation to the construction of the Article which has prevailed under that system. Our researches have led us to the conclusion that, where both the parties to a marriage, subsequently declared null, were in good faith, one of the civil effects was the legal community or partnership of acquets and gains which results from a lawful marriage; and that the relative rights of the parties must be tested under the same laws which govern the community rights *inter sese* of lawfully married spouses." The same views are expressed by Duranton (2 Droit Français, 344, § 368) and by Laurent (2 Droit Civil, 646, § 510).*
In Texas, however, a different problem is presented. Influenced, evidently, by the principles of the law of Texas before the common law was introduced, the judges in this state always displayed a favor toward the Spanish law on the question at hand. Thus, in an early case, the Chief Justice of the Supreme Court said by way of dictum:

"I have not considered the strong claim which the defendant, independently of her rights as lawful wife, might have urged to a community share of the property. She was his wife de facto. By her labors and toils, she contributed to the accumulation of the estate. . . . Their gains were the result of their joint industry, thrift and economy, and she is reasonably entitled to a share of the proceeds."

This decision involved a distribution of the estate of a decedent under the community property laws. The marriage was lawful. This case and the language were considered in the later case of *Routh v. Routh*, where the problem again was the distribution of an estate under the community property laws. In this case the plaintiff was the lawful, undivorced wife of the decedent. The latter had contracted a second marriage with the defendant, who was unaware of the impediment. In holding that the applicant was entitled to share in the property, because she was the lawful wife of the decedent, the court said:

"The answer showing the second marriage . . . raised no equities against the plaintiff, nor did it establish, as against her, any legal right which could be asserted by the second wife against her."

The defendant had contended that she was entitled to share also, which would have diminished the lawful wife's share. In short, under the common law, community property statutes confer no rights upon an invalid marriage. The exact significance of this decision was brushed aside by the intermediate Court of Civil Appeals, in the same state, in a later case, in which it was decreed that the putative wife is entitled to a "community interest" in the property jointly acquired during the time the woman lives with the man as his wife, and this interest can be asserted against the lawful wife. This doctrine was later affirmed by the Supreme Court of Texas. In affirming the doctrine, the court frankly admitted that the rule in common law jurisdictions is contrary, but insisted that by virtue of the community property laws, the common law rule was abrogated.

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12 Carroll v. Carroll, 20 Tex. 731, 742 (1858).
13 57 Tex. 589 (1882).
14 Morgan v. Morgan, 1 Tex. App. 315, 21 S. W. 154 (1892).
That community property laws do away with the necessity of a valid marriage in creating community property rights has been denied by authority, and by opinion. The reasoning seems to be that community property statutes are in derogation of the common law, and should therefore be strictly construed. The sole object of the statutes is to create equality between the husband and wife as to property rights, and unless the statutes specifically provide that community interests follow a void marriage, the common law necessity for a valid marriage ought still to obtain. There is no intimation in the cases that the community property statutes do so provide. But, on the other hand, it is true that the community property laws in the American states are derived from the laws of Spain. Attracted by the theory of these statutes, the courts in other states where they obtained, applied it to the situation of the putative wife, thus accomplishing what was evolved in Texas from an erroneous dictum, and what required a specific statute in Louisiana. For this result, Texas cases were relied on, the courts either ignoring or being unaware of the background of those cases, or invoking an "analogy" to community property statutes. This is, in effect, to destroy the principle that rights as spouse are dependent on a valid marriage without statutory aid.

An attempt has been made to show, in this review of the authori-
ties, that the relief granted by the courts, even in the community
property states, with the exception of Louisiana, cannot properly be
based upon the community property statutes. This is, in fact, con-
ceded by reliance on "analogies." The question is thus refined to
whether there exist in the rules of equity jurisprudence any principles
which can be applied to justify the decisions which are contrary to
the Ah Leong case. The classification made at the beginning of the
discussion can now be discarded, and all the jurisdictions, excepting
again Louisiana, may be dealt with as common law jurisdictions. The
courts adopting the "putative wife" doctrine have searched for sup-
porting reasons beyond analogies to community property laws. In
this regard it has been said:

"In such cases, by attempting to enter into the marriage con-
tract, they agreed, as far as they had the power to agree, that
they would live together as husband and wife, and that all the
property that they might thereafter acquire should be community
property and belong to them in equal portions. Such is the mean-
ing of the contract they attempted to make under our law. How,
then, can it be said that the property acquired in pursuance of
such shall belong to one of the parties more than to the other?" 23

In the first place, community property rights do not result from the
contract, 24 and hence do not depend upon the intention of the parties.
Those rights are superimposed upon the marriage solely by statutory
enactment, 25 they being merely a statutory incident to a lawful status.
If the author of the excerpt above quoted meant that the rights given
the putative wife resulted from the contract entered into, it seems per-
tinent to inquire just how any contract was formed when by hypoth-
esis the whole relation was void ab initio?

Another ground for the conclusion has been sought in the theory
of partnership or quasi-partnership. 26 In Krauter v. Krauter, 27
McNeill, J., said:

"What as a matter of right and of equity would become of
this property that was jointly accumulated by the parties? Would
a court of equity decree it to be the property of one to the exclu-
sion of the other? We do not think so, and while it may be true
that the relation between the parties could not strictly be termed
a partnership, but [sic] it might be termed a quasi-partnership."

Worth, etc., Co. v. Robertson, 103 Tex. 504, 121 S. W. 202 (1910).
26 Werner v. Werner, Krauter v. Krauter, both supra note 6; Buckley v.
Buckley, 50 Wash. 213, 96 Pac. 1079 (1908).
27 Supra note 6.
It is hardly susceptible of argument that there is no partnership agreement, either express or implied. Certainly there is no such relationship according to the common law conception of marriage. Moreover, were the division of the property made on this basis, it seems as though some regard ought to be had to the respective contributions of the spouses, their extravagance or economy, and other equally important factors in the division of partnership assets. Still the courts seem to direct no attention to this consideration, and divide the property equally.28

It has been suggested that the distribution of the property acquired during the cohabitation should be decreed on a quasi-contractual basis, on the theory that the results of the labors of the putative wife contribute to the acquisition of the property.29 On this point, it is of primary importance to keep in mind that it is a distribution of the property which is being sought. In the ordinary case of husband and wife, such a theory would not seem to create any purely equitable interest in the property which the husband accumulates, because the extent of the wife's labors would be confined to household duties and services. If anything, the theory might give rise to a legal claim against the husband or his estate, yet this has been denied by most of the authorities.30

The final ground for decreeing a distribution of the property is the inherent justice of the putative wife's claim. Let us see first if the innocent woman is utterly without remedy at the common law. If, by fraud and deceit, a man who is incompetent to marry induces a woman to marry and cohabit with him, he is liable to her in a tort action for deceit, if she acted in good faith.81 Moreover, if the putative husband takes possession of, and enjoys the benefits of, or disposes of the property of the supposed wife, she, having acted in good faith, may compel him to account therefor.82 These remedies somewhat mollify the injustice, if there be any. But is the mere justice or injustice of a particular case enough to give equity jurisdiction?


29 "The rights of the putative wife are, in my opinion, correctly made to rest upon the recognition in equity of the results of her labor as contributing to the acquisition of the property." Judge Tarlton in his lectures at the University of Texas. See 1 Tex. L. Rev., supra note 17 at 471.

30 Payne's Appeal, 65 Conn. 397, 32 Atl. 948 (1895); Murchison v. Green, 128 Ga. 339, 57 S. E. 709 (1907); McDonald v. Flemming, 12 B. Mon. 285 (Ky. 1851); Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 (1888); Crosey v. Sweeney, 27 Barb. 310 (N. Y. 1858). But see Higgins v. Breen, 9 Mo. 493 (1845).

31 Blossom v. Barrett, 37 N. Y. 434 (1868); Morrill v. Palmer, 68 Vt. 1, 33 Atl. 829 (1895), and note, 33 L. R. A. 411 (1897).

In answering this question, the words of Lord Redesdale are appropriate:

“There are certain principles on which courts of equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of equity have, in this respect, no more discretionary power than courts of law. They decide new cases as they arise by the principles on which former cases have been decided; but the principles are as fixed and certain as the principles on which the courts of common law proceed.”

There was a time in the early history of equity when it was thought that the conscience of the chancellor was the only guide and that whatever seemed to him to be just might be accomplished by his decree. The danger of this conception of equity soon became apparent. Different chancellors had different ideas of justice—which of course left equity without any chart or compass by which to steer its course. As a result, the original conception was abandoned and definite rules and principles were substituted for the indefinite conscience of the chancellor. There seems to be no principle in the rules of equity propounded by the courts of this country or England which justifies the cases opposed to the Ah Leong case. Certainly one would not expect to find such a principle under the common law idea of the marriage relation, and, as pointed out before, even the courts which have granted a division to the putative wife have frankly stated that it would not do to look to the common law jurisdictions for any supporting rules. Therefore the entire doctrine of the right of a putative wife to have a distribution of the property accumulated during the cohabitation seems to rest upon a judicial adoption of the laws of Spain and Mexico on the point. If a court of equity has power to absorb, by its own ipse dixit, the principles of any other body of law, when it deems the rules of the common law or equity defective, it is a reversion to the state where the indefinite conscience of the chancellor is the only guide for equity jurisprudence. If that were a sound proposition, there would be little need for legislatures in a reformation of the harshness of the common law. Such a reversion is particularly dangerous where the devolution of property is concerned, as it is here. The conclusion is, therefore, that the decision in the Ah Leong case is sound, and that any interference with the laws of devolution and descent, regardless of the justice or injustice in the eyes of the chancellor, must come from the legislature.

J. A. G.

23 Bond v. Hopkins, 1 Sch. & L. 412, 428 (Eng. 1802).
24 See, for example, Morgan v. Morgan, supra note 14.
DISCRIMINATORY LEGISLATION UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE—A recent decision \(^1\) by Chief Justice Cardozo justifies a study of certain basic principles underlying a proper understanding of that provision of the Constitution of the United States which declares that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” \(^2\)

That provision has received two different constructions, (1) that the privileges and immunities comprehended therein are those which are in their nature fundamental and inherent in all free governments. This is the older view which found expression in *Corfield v. Coryell*.\(^3\) (2) The other view, which is probably the one commonly accepted today, is that the privileges and immunities of a citizen of one state to be enjoyed by him in another are only such as are enjoyed in the second state by its own citizens. In other words, under this latter view, the purpose of the clause under consideration is conceived to be the removal from citizens of one state of the disabilities of alienage in the several states, so that discriminatory legislation aimed by a state against the citizens of other states is the evil sought to be prevented.\(^4\)

*Smith v. Loughman* \(^5\) is an example of the kind of discriminatory state legislation that has been declared unconstitutional under the provision in question. The New York State Tax Law imposed a tax upon transfers by will or intestate succession and provided one scheme of taxation of transfers by residents, and another for non-residents.\(^6\) The transfer tax, when applied to resident decedents, was subject to certain deductions and exemptions, and there were gradations of the amount of the tax dependent both upon the amount of the estate and the relationship between the decedent and the donee. There were no

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\(^2\) Art. IV, § 2.

\(^3\) 4 Wash. C. C. 371, 380 (C. C. Pa. 1825).

\(^4\) "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminatory legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision of the Constitution has tended so strongly to constitute the citizens of the United States one people as this." Paul v. Virginia, 8 Wall. 168, 180 (1868). For a discussion of this subject see Howell, *The Privileges and Immunities of State Citizenship*, (1918) 36 Johns Hopkins Univ. Studies No. 3; Meyers, *The Privileges and Immunities of Citizens in the Several States*, (1903) 1 Mich. L. Rev. 286, 364.

\(^5\) *Supra* note 1.

\(^6\) The rates were the same for both residents and non-residents until 1925, when the special rates for the latter were adopted. N. Y. Ann. Cons. Laws (Supp. 1926) c. 61, Art. 10-A. Similar statutes have been adopted in California, Connecticut, Kentucky and Virginia.
similar provisions relative to the property of non-resident decedents passing in the same manner. The tax in such a case was to be at a flat rate of three per cent. upon the clear market value of the property or interest transferred, less deductions therefrom for a proportionate share of the debts and expenses of administration, or, at the option of the executor or administrator, at a flat rate of two per cent. if he waived such deductions.

One Mary Smith, a resident of the state of Connecticut, devised to her children a parcel of real estate in the city of New York. Since the testatrix was a non-resident of the state of New York, the State Tax Commission assessed a tax of $589.98 on the transfer of these shares. If the testatrix had been a resident of New York, the tax would only have been $94.90.

The New York Court of Appeals held that this discrimination could not be reconciled with the "privileges and immunities" clause, reversed the order of the Appellate Division of the State Supreme Court, and annulled the determination of the State Tax Commission. Chief Justice Cardozo declared that there was "a hostile discrimination," an "inequality that is purposed and pervasive," and found that by the Tax Law, "an act that in any case is one and the same—the transfer of a parcel of real estate by will—is subjected to burdens of taxation that differ fundamentally, and not occasionally or in points of detail, according as the doer of the act is a citizen of one State or another." 8

It is to be observed that in form the distinction made by the New York statute is between residents and non-residents, whereas Article IV, Section 2, speaks of citizens, "but a general taxing scheme such as the one under consideration, if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other states," 9 and will stand or fall accordingly.

The principle, which is enunciated by this case and others, that a state may not establish varying codes of law, one for its own citizens, and another, governing the same conduct, for citizens of sister states, is more easily stated than applied. The many qualifications to the rule make the "privileges and immunities" clause difficult of application, because they leave no precise test.

Thus it is said that "one may not press this principle to a drily

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1 The executrix elected to pay the flat rate of two per cent.

2 245 N. Y. at 493, 157 N. E. at 755. The court reversed Smith v. Loughman, 220 App. Div. 790, 222 N. Y. S. 902 (1927), which upheld the statute on the authority of People v. Loughman, 220 App. Div. 549, 222 N. Y. S. 96 (1927). In the latter case the court held that the discrimination imposed by the statute was only apparent since the practical result of the statute, in its general effect, was not, and was not intended to be, unreasonably or unfairly discriminatory against non-residents. The court emphasized the fact that the statute achieved a much desired result in simplifying procedure and proof, in avoiding delay, and in lessening the expense to all parties involved.

logical extreme,” and that “literal and precise equality in respect to this matter is not attainable; it is not required. . . . At times, the character of the act may be so affected by the residence of the actor as to call for varying regulation with a view to the attainment in the end of a truer level of equality.” For example, non-residents resorting to the courts of a state may be compelled to give security for costs. Such a result is regarded only as an apparent discrimination which as a practical matter does not place a heavier burden upon the non-resident but restores the “equilibrium by withdrawing an unfair advantage,” and therefore is not such a discrimination as to be declared violative of Article IV, Section 2.

In one case non-resident stockholders in a Connecticut corporation paid a heavier tax than resident stockholders. Here again the inequality was declared to be only apparent because residents were taxed in other ways. In another case it was claimed that to apply the apportionment formula fixed by the inheritance tax statutes of New Jersey would result in a greater burden on non-residents than on residents, but the Supreme Court of the United States held the statute valid, saying: “Inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a

10 Smith v. Loughman, 245 N. Y. at 493, 157 N. E. at 755. This thought was expressed by Mr. Justice Holmes in Noble State Bank v. Haskell, 219 U. S. 104, 110 (1910), a case which involved the Fourteenth Amendment.
12 See Canadian Northern Ry. Co. v. Eggen, 252 U. S. 553 (1920). In this case the court upheld a Minnesota statute which provided that “when a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action is barred by lapse of time, no such action shall be maintained in this state unless the plaintiff be a citizen of the state who has owned the cause of action since it accrued.” The plaintiff, a citizen of South Dakota, was denied the benefit of the Minnesota statutory period although his action was barred under the Canadian statute of limitations where the action arose. The court said, at 562: “. . . the constitutional requirement is satisfied if the non-resident is given access to the courts of the state upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in this court, to determine the adequacy and reasonableness of such terms. A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.”
13 Travellers’ Ins. Co. v. Conn., 185 U. S. 364 (1902). In Chalker v. Birmingham & N. W. Ry. Co., 249 U. S. 522, 526 (1919), the court held as discriminatory and unconstitutional a Tennessee statute which imposed a tax of $25 for the privilege of doing railroad construction work if the chief office of the company was in the state, and $100 if it was not. The court expressed itself as follows: “The power of a state to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any state enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several states.”
In Shaffer v. Carter the Oklahoma income tax statute permitted residents to deduct from their gross income all losses. Non-residents could deduct only those losses incurred within the state. The complaint of discrimination was dismissed by pointing out that residents were taxed on all their income while non-residents were only taxed on property owned and business carried on within the state.

"In these and like cases," says Chief Justice Cardozo, "the difference in treatment, whatever it may have been, was made necessary by conditions inseparably interwoven with differences of residence, and was proportioned to the necessity. Only for this was it upheld." It is therefore quite obvious that the courts exercise a wide discretion in determining whether there is a general and hostile discrimination incompatible with the "privileges and immunities" clause, or whether there is a mere "apparent" discrimination which may be upheld though "occasionally and incidentally" individuals may suffer. Whether a given statute uses its discrimination to establish measure and proportion, its discords as a means to harmony, is necessarily a question of opinion. No precise and inflexible rule which will apply with unerring exactitude in this class of cases is possible.

To recur for a moment to Smith v. Loughman, it is interesting to observe that although the New York statute in that case imposed a heavier burden on the non-resident, yet in some instances, because of the graduated tax applicable to residents, it actually placed a lower burden on the non-residents than on the residents. Of this result the court said:


15 252 U. S. 37 (1920). But in Travis v. Yale & Towne Mfg. Co., supra note 9, a New York income tax statute was held to be unconstitutional under the "privileges and immunities" clause because it allowed exemptions to residents with increases for married persons and dependents but allowed no equivalent exemptions to non-residents. See (1920) 29 Yale L. J. 799, (1920) 20 Col. L. Rev. 457.

16 245 N. Y. at 492, 157 N. E. at 756. For illustration, the tax on a legacy of $5,000 to a father, mother, husband, wife or child is $100 for a non-resident, and for a resident nothing; on a legacy of $10,000, $200 for a non-resident, and for a resident $50; on one of $25,000, $1,000 for a non-resident and for a resident $650; on one of $100,000, $2,000 for a non-resident and $1,650 for a resident; on one of $250,000, $4,000 for a non-resident, and $4,600 for a resident. On the other hand, the tax on a legacy of $500 to a friend is $10 for a non-resident, and nothing for a resident; on one of $10,000, $200 for a non-resident and $500 for a resident; on one of $100,000, $2,000 for a non-resident, and for a resident $5,750.

17 245 N. Y. at 492, 157 N. E. at 755. The court further said: "A special burden laid upon the members of a group as the price of a given act does not cease to be discrimination because a special privilege is granted in connection with another and unrelated act. One who wishes to do the first may never wish to do the second."
"Whether these inequalities will balance one another in the long run as applied to non-residents generally, we can do little more than guess. What is certain is that the inequalities will not balance, but will inevitably persist, whenever certain classes of non-residents—e. g., children or parents—are compared with like classes of residents. What is also certain is that non-residence without more has been made the basis for the divergent burdens of one class and another. . . . The exactions for the two classes have different operation as to each, not by accident, but of set purpose. At times heavier and at times lighter, they are never the same." 10

N. L. E.

"Conflict" of Statutes of Limitations in Actions for the Recovery of Land Fraudulently Acquired—Western codes have two groups of statutes of limitations. One group comprises actions for the recovery of real property; the other, civil actions other than for the recovery of real property. Situations arise in which it is difficult to ascertain which sort of statute should be applied. If the length of time which has elapsed since the plaintiff's cause of action has accrued is greater than that of the short-term statute, and less than that of the long-term statute, upon the determination of which statute applies will hinge the success or failure of the action. This precise question was raised in a recent Oklahoma case, Tomlin v. Roberts.1 The plaintiff brought an action to recover land which was based upon the cancellation of conveyances declared to be procured by fraud. It was held that the cause was barred by a two-year statute affecting actions "for relief on the ground of fraud," a subdivision of the code provision affecting "civil actions other than for the recovery of real

10 "It must be constantly borne in mind . . . that the privileges and immunities spoken of as secured to the citizens of the several states are not absolutely secured. In thus referring to them, it is meant simply that, with regard to the exercise of such privileges and immunities, the several states cannot constitutionally discriminate in favor of their own citizens as against the citizens of other states; whereas, in respect to certain classes of privileges that are not secured by the clause, the states are at full liberty to discriminate as they see fit. In general it may be said that such discriminatory legislation on the part of any state is permissible in the following cases: (1) with respect to the exercise of public rights, such as the enjoyment of political and quasi-political privileges and the utilization of property in which the state has a proprietary interest; (2) in the legitimate exercise by a state of its police power; (3) with respect to corporations of other states. The rights which the citizens of each state are entitled to share upon equal terms with the citizens of other states are, generally speaking, private or civil, as opposed to public rights; but with respect to these also there are certain limitations to the extent to which equality of treatment may be demanded." Howell, The Privileges and Immunities of State Citizenship, supra note 4 at 320.

1 258 Pac. 1041 (1927).
NOTES

property.”  Two judges, dissenting, contended that a fifteen-year statute, controlling “actions for the recovery of real property, or for the determination of any adverse right or interest therein,” should have been applied. The theory of the majority was that the suit was merely an equitable action for rescission. The minority considered that the nature of the action was determined by its ultimate purpose, the recovery of the land.

The opposing views of the members of the court in the principal case are embodied in other conflicting decisions. The leading case is Murphy v. Crowley. The plaintiff, suing in equity, claimed the defendant procured conveyances by fraud from the grantor who had since died. The court said:

“This is really an action for the recovery of real estate, and the plaintiff is no worse off because the fraud was committed on him, nor the defendant in any better situation, than if the latter had innocently bought and entered upon an imperfect title.”

Citing other California cases, the court observes:

“It seems to be established by these cases that, although the main ground of the action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show as matter of law that he is entitled to the possession of the property and a part of the relief asked is that his title to the land be quieted, the action is in reality for the recovery of real property and is not barred except by the five years’ limitation.”

In an earlier California case, where a statute provided “Actions other than those for the recovery of real property can be commenced as follows . . . fraud, within three years,” the court said:

“We think that this provision has no relation to an equitable proceeding to set aside a fraudulent deed of real estate when the effect of it is to restore the possession of the premises to the defrauded party. In such a case the action is substantially an action for the recovery of real estate; indeed it is literally.”

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4 In accord with the principal case are Melchers v. Peters, 17 Ohio App. 1 (1920); Foy v. Greenwade, 113 Kan. 206 Pac. 232 (1922); McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404 (1883); Morgan v. Morgan, 10 Wash. 90, 58 Pac. 1054 (1894). Contra: Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820 (1903); Empire Ranch and Cattle Co. v. Zehr, 54 Colo. 185, 129 Pac. 828 (1912); Tilton v. Bader, 181 Iowa 473, 164 N. W. 871 (1917); Names v. Names, 48 Neb. 701, 67 N. W. 751 (1896). See (1926) 1 Wash. L. Rev. 212.
5 Supra note 4.
And in an Iowa case:

"The mere fact that a litigant alleges and must prove fraud in order to establish his title does not render the action other than one for the recovery of real property."

The gist of the cause of action in such a case is that the complainant claims the property and prays that the title thereto be established in him. The allegation and evidence of fraud are merely incidental to the relief granted.

On the other hand, in a similar action the court said:

"The action must be classed as one for relief upon the ground of fraud. . . . The action cannot be classed as one to recover real estate within the ten years limitation statute, although the result might be in case of a favorable termination of it for the plaintiff to restore to her a portion of the lands quit-claimed to the defendant. To do this she must have the deed which she executed set aside, and for this purpose it is necessary to show that it was fraudulently obtained from her. The alleged fraud of the defendant is the basis of the plaintiff's action . . . [and] . . . we are bound to hold under the authorities that the three years limitation applies to this case. The fact that it might result in the recovery of real property is not sufficient to except it therefrom."

The Kansas court in holding that the shorter limitation applies remarked:

"An action to recover property has no standing until the matter of title is disposed of." 

The court noted that it was essential to look behind the mere form of the action to the real issue involved. By doing this it finds that the substance of the action is for relief on the ground of fraud.

So the Minnesota court said:

"The cross action which the defendants have in effect instituted by their answer, while as respects its ultimate purpose, it is an action for the recovery of real property, is an action in which the recovery is sought as a consequence of relief upon the ground of fraud. Unless relieved from the fraud, the defendants will have no standing to recover the property, as without this relief the legal title will remain in the plaintiff. . . . The gist and essence of the cross action is, then, relief from the fraud.

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1 Tilton v. Bader, supra note 4.
2 Morgan v. Morgan, supra note 4 at 107.
3 Foy v. Greenwood, supra note 4 at 119.
4 McMillan v. Cheeney, supra note 4 at 521.
and fraudulent conveyances (by means of which the plaintiff acquired his title) so as to put the defendant in a position to recover the property. The cross action is then essentially one for relief on the ground of fraud."

From this brief survey, it is clear that in the code states the courts differ as to the basis for the application of the various limitations statutes. Some think the form of action determines which statute should be applied, while others think that the nature of the ultimate relief sought should be the determinant. There appears to be, however, another possible solution of the problem.

When an action is brought to recover land, and the plaintiff is forced first to seek the aid of the court to cancel or set aside deeds in order to establish his right to the property, the appeal is necessarily to the equitable jurisdiction of the court. Pomeroy says:

"There are certain species of equitable remedies which have become well established and familiarly known, and which are commonly designated by the term "equitable remedies" . . . . A familiar example is the relief of rescission and cancellation. A court of equity entertains a suit for the express purpose of procuring a contract or conveyance to be cancelled, and renders a decree conferring in terms that exact relief."

Statutes of limitations are not binding on courts of equity in cases of essentially equitable jurisdiction, and the lapse of time, however long, where there is reasonable excuse for the delay, will not deprive a party of his remedy. Therefore, the courts would seem to be free to apply the equitable doctrine of laches to cases of rescission and cancellation, and to withhold relief only when the parties have slept on their rights. Since the abolition of forms of actions in code states has not altered the substantive rights of the parties, nor changed the fundamental principles of law and equity, no objection can be seen to the substitution of the doctrine of laches for the inflexible statute of limitations.

J. B.

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23 De Witt v. Hays, 2 Cal. 463 (1853); Young v. Vail, 29 N. M. 324, 222 Pac. 912 (1924); Cole v. Reynolds, 18 N. Y. 74 (1858); Draper v. Brown, 115 Wis. 361, 91 N. W. 1001 (1902).