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# SOME ASPECTS OF JUDICIAL DISCRETION

FREDERICK G. MCKEAN\*

Judicial discretion is one of the most important elements of judicial power. Without it judges would be reduced to automatons or robots and become creatures of routine rather than magistrates; while law itself would petrify into a system of inflexible dogmas and cease to be a social science. In view of its importance, many attempts have been made to define this legal concept, the classic definition being that of Lord Mansfield, who concluded that "Discretion when applied to a Court of Justice, means *sound Discretion guided by Law*. It must not be arbitrary, vague and fanciful, but legal and regular."<sup>1</sup> A more terse and succinct phrasing is that of Jessel, M. R., who declared that "a judicial discretion \*\*\* means a discretion founded on sufficient reasons."<sup>2</sup> The factual influence is stressed in a more modern opinion which states that judicial discretion is "a legal discretion founded upon conditions which call for judicial action as distinguished from mere individual personal view or desire."<sup>3</sup> Chief Justice Marshall's *dictum* that judicial discretion is one employed "in discerning the courses prescribed by law,"<sup>4</sup> expresses the office of the subject of these notes, in terms of its objective. Professor Kantorowicz contributes an interesting observation by suggesting that: "Discretion is not opposed to rules as is usually said; it is an intuitive way of finding rules: 'those inarticulate major premises,' which must be general if they are to serve as *major premises for judicial decisions*."<sup>5</sup> Those who have studied the evolution of the equitable concept of "conscience", may notice a very interesting parallelism with the subject of this paper, insofar as both must be grounded upon some law and must be supported by evidence and reason.<sup>6</sup> At the same time, it is a matter of every-day observation that appellate courts lean toward supporting the decisions of lower courts, even when the *ratio decidendi* is deemed erroneous, wherever the results are considered correct, and customarily will decline to reverse on the ground of error, unless such error is material, and, in addition, is harmful in its results.

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<sup>1</sup>Rex v. Wilkes, 4 Burr. 2527, 2539 (Eng. 1770).

<sup>2</sup>In re Durham, 16 Ch. D. 623, 635 (Eng. 1881).

<sup>3</sup>Matter of Superintendent of Banks, 207 N. Y. 11, 15 (1912).

<sup>4</sup>Osborn v. The Bank of the United States, 9 Wheat. 738, 866 (U. S. 1824).

<sup>5</sup>Kantorowicz, Some Rationalism about Realism, 1934 Yale L. Journ. 1240, 1244.

(The cognate subject of the solution of jural problems in jurisdictions where applicable precedents are lacking, has been discussed in my paper, "The Law of Laws" 1930 U. of Pa. L. Rev. 950).

<sup>6</sup>Cf. McKean, Canon Law in American Jurisdictions, 1935 Dickinson L. Rev. 74, 84-87.

Consequently, an exercise of discretion which is not unreasonable will not be deemed reversible although the members of the upper court should be of the opinion that the power might have been exercised in a more judicious fashion than that which had been employed by the tribunal whose action is reviewed.<sup>7</sup> Of course dubbing an exercise of discretion "not unreasonable" is "damning it with faint praise", for it does not imply unqualified approval; but, after all, it is better for the satisfactory administration of justice according to law that a correct decision of a case be sustained despite unprejudicial errors, than that needless pedantry should protract litigation in an instant case and entail consequent delay which might occasion the infliction of irreparable injury. "Time is of the essence of modern life."

"Sound legal discretion", is the phrase frequently employed when approving a ruling of a lower court. The expression imports guidance by law, reason and evidence, and at the same time implies an appreciable latitude of choice of methods. One class of guides comprises the constitutional maxims evolved from or recognized in Magna Carta, and their derivatives developed in English-speaking countries, such as the opportunity for a hearing and other principles epitomized in the pregnant phrase "due process of law". Another category embraces time-tested cosmopolitan principles grown up in jurisprudence such as *cessante ratione legis, cessat ipsa lex*, and *de minimis non curat lex*. In short, judicial discretion must be exercised in accordance with well-established rules of law;<sup>8</sup> and should always be employed in such manner as to subserve substantial justice so far as possible under the circumstances of the cases in which it is applied.<sup>9</sup> Failure to meet with these requisites constitutes that form of prejudicial error which is technically phrased "abuse of discretion", (literally misuse or ill-use), denoting a transcending of the limits of sound discretion or a neglect of a duty to exercise the same. The expression does not necessarily imply arbitrary, whimsical or capricious rulings, but may import the overlooking or neglect of some vital factor apparent from the record of a case or from judicially noted facts. It is surmised that the expression originated in the days when "abuse" signified "mistake". A courtly judge in the Middle West feeling that the phrase is unnecessarily severe substitutes the euphemism "judicial indiscretion". Very frequently an "abuse of discretion" is the result of an effort to speed the progress of a sluggishly presented controversy, and should be treated leniently, except where manifestly (or at the most probably) injurious in contemplation of law. As a corollary to the familiar

<sup>7</sup>*Mexican Central Railway Company v. Pinkney*, 149 U. S. 194, 201 (1893); *Bennett v. Bennett*, 208 U. S. 505 (1908); *Elzas v. Elzas*, 183 Ill. 132 (1889); *Fessenden v. Fessenden*, 32 Ohio App., 16, 19, 20 (1928); *In re Durham*, note 2 supra, at p. 639.

<sup>8</sup>*National Theatres v. Foundation Film Corp.*, 266 Fed. 208, 210 (C. C. A. 2nd. 1920); *Everson v. Casualty Co. of America*, 208 Mass. 214 (1911); *Spofford v. Railway Co.*, 66 Me. 26, 48 (1876).

<sup>9</sup>*Butler v. Strickland*, 15 Ga. App. 193 (1914); *De Forg v. Railroad Co.*, 178 Mass. 59 (1901).

presumption that public officials do their duty, there is a rebuttable presumption that trial courts exercise their legal discretion judiciously in the discharge of their duties. It naturally follows that every reasonable intendment should be in favor of such a presumption, for a trial court possesses first-hand knowledge of the setting which furnishes an important part of the background of its rulings. This principle is well illustrated by Stephens' rule to the effect that: Evidence may be given in any proceeding of any fact in issue, and of any fact relevant to any fact in issue, provided that the judge may, in his discretion, exclude evidence of facts which though relevant, appear to him *too remote to be material* under all the circumstances of the case.<sup>10</sup>

As previously remarked, a neglect or oversight of duty may be deemed an abuse of discretion. For illustration, a failure to make a needed finding of fundamental facts, or to make a proper deduction therefrom is accounted a flagrant abuse of discretion.<sup>11</sup> In short, judicial inertia is so discountenanced that very frequently mandamus lies to compel the exercise of discretion.<sup>12</sup> Were there no such means of compelling the exercise of discretion, an important objective of that function (which is the expediting of legal business), might be frustrated. How else could trial courts be required to hear and determine cases? At the same time, it is almost self-evident that mandamus does not extend to controlling the discretion of courts in matters in which no tribunal could intelligently dictate to or even advise another.<sup>13</sup> Courts of justice have inherent power to keep the trial of issues within due bounds, consistent with the demands of justice and fair play, and thus avoid the social mischief of protracted litigation straying into remote by-paths and cluttering up a record with immaterial or unnecessarily cumulative matter. This inherent power gives rise to a judicial duty to keep the course of a trial firmly in hand and to halt irrelevant digression. Inasmuch as it is practically impossible to formulate precise general rules which do not admit of circumvention or evasion, the performance of such duty is of necessity entrusted in a considerable degree to the good sense of the trial judge. In other words, courts as agencies of organized society are charged with an imperative obligation to conduct their business with reasonable efficiency and dispatch, and the powers entrusted to them in order that they may effect this purpose, necessarily authorize the judicious

<sup>10</sup>Railway Co. v. Hall, 232 U. S. 94 (1914); Earl v. Times-Mirror Co., 185 Cal. 165 (1926); State v. Isaacson, 114 Conn. 567, (1932); Gas Company v. Smith, 109 Md. 186 (1909); Reed v. Nashua Buick Co., 84 N. H. 156 (1929); accord.

<sup>11</sup>Foy's Election, 228 Pa. 14, 19, 20 (1910).

<sup>12</sup>Ex parte Bradsteet, 7 Peters 634, 650 (U. S. 1833); In re Burtis, 13 Otto 238 (U. S. 1881); Hudson v. Parker, 156 U. S. 277, 288, (1895); Ex parte Wagner, 249 U. S. 465, 471 (1919); San Joaquin v. Superior Court, 98 Cal. 602 (1893); State v. Judges, 34 La. Ann. 1114 (1882); King v. Justices, 4 Ad. & El. 695 (Eng. 1836); Queen v. Deputies, 15 Q. B. 671, 674 (Eng. 1850); Queen v. Brown, 7 El. & B. 757 (Eng. 1857).

<sup>13</sup>In re Parsons, Petitioner, 150 U. S. 150 (1893).

employment of appropriate means requisite for the attainment of this objective. It is thus apparent that procedure, "the machinery of the law as distinguished from its product", is an important element of the jurisdiction of a case, which latter "consists in the right to hear and determine it, and embraces, not only its merits, but the proceedings which are necessary to enable the court possessing such jurisdiction to bring it to a final determination".<sup>14</sup> Where a court of justice has exercised its discretion, or estimation of the circumstances, in procedural matters, such as: motions for change of venue;<sup>15</sup> the revisions or setting aside of orders before a jury is sworn or a judgment given;<sup>16</sup> postponement of a trial;<sup>17</sup> amendment of pleadings;<sup>18</sup> rulings upon challenge of a juror;<sup>19</sup> order of proof;<sup>20</sup> determination of the competency of a witness;<sup>21</sup> rulings on evidence;<sup>22</sup> regulation of the manner and extent of cross-examination;<sup>23</sup> re-opening of a case to receive additional evidence;<sup>24</sup> or the amendment or alteration of a record;<sup>25</sup> the discretion involved is deemed so wide that it will not be questioned by an upper court, except where found to be clearly and palpably opposed to reason, improperly exercised, or violative of established law governing the rights of the parties.

Somewhat similar principles regulate the right to a grant or refusal of extraordinary remedies such as mandamus or quo warranto. Mandamus lies where a duty sought to be enforced is plain and non-discretionary and the situation exigent.<sup>26</sup> As applied to courts, this category includes such cases as breach of duty to take jurisdiction, and hear and determine a cause of action;<sup>27</sup> or failure to proceed with a hearing.<sup>28</sup> Generally speaking, the grant or refusal of a writ of mandamus is regarded as discretionary as distinguished from a writ of right. This is not an absolute discretion, but one regulated and controlled by legal rules; and while exercise of such discretion is reviewable,<sup>29</sup> an appellate court cannot, by writ of mandamus, compel a court below to decide a matter before it in a

<sup>14</sup>Sanford v. Sanford, 28 Conn. 6, 14 (1859) Storrs, C. J.

<sup>15</sup>State v. Mooney, 10 Iowa 506 (1860).

<sup>16</sup>Breedlove v. Nicolet, 7 Pet. 413, 432 (U. S. 1833).

<sup>17</sup>Winklemeir v. Daiber, 92 Mich. 621 (1892).

<sup>18</sup>Ryan v. Scanlon, 117 Conn. 428, 435 (1933).

<sup>19</sup>Holt v. United States, 218 U. S. 245, 248 (1910).

<sup>20</sup>Jarvis v. Bell, 296 Pa. 568, 576 (1929).

<sup>21</sup>Dickson v. Waldron, 135 Ind. 507 (1893).

<sup>22</sup>Gas Company v. Smith, 109 Md. 186 (1909).

<sup>23</sup>Ripley v. Taft, 253 Mass. 490 (1925).

<sup>24</sup>Central Nat. Bank v. National Metropolitan Bank, 31 App. D. C. 391, 17 L. R. A. (N. S.) 520 (1908).

<sup>25</sup>Nelson v. Philadelphia Rapid Transit Co., 314 Pa. 27 (1934).

<sup>26</sup>Lane v. Hoglund, 244 U. S. 174 (1917).

<sup>27</sup>Queen v. Brown, note 12 supra.

<sup>28</sup>King v. Justices, note 12 supra.

<sup>29</sup>Gas Light Co. v. Common Council, 78 N. Y. 56 (1879); 6 Bac. Abridgment, (E) p. 443 (1876 Amer. ed.).

particular way.<sup>30</sup> Employing variant phraseology, the writ lies to enforce a ministerial duty (one in which nothing is left to discretion) where there is a clear legal right; but not to dictate a course of discretion, although such a writ may lie to compel an exercise of discretion.<sup>31</sup> Outside of these limits, courts empowered to issue writs of mandamus have a discretion to refuse such a writ to compel the doing of an idle act; to give a remedy which would work a public injury or embarrassment; or to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.<sup>32</sup> So equitable are the principles involved in dealing with this important form of process, that it has been accounted a writ "of grace".<sup>33</sup> It follows that mandamus will not issue where there is doubt of its necessity or propriety;<sup>34</sup> will be refused where laches in applying for it is deemed to be of controlling weight;<sup>35</sup> and will not be granted unless and until a plaintiff has established that its issuance is requisite and necessary to secure the ends of justice or to subserve some just and legal purpose.<sup>36</sup> Here, as well as in all other situations which call for the exercise of magisterial power, border-line cases require careful discernment of the difference between matters of substance and "colorable glosses".

Today the purview of most ancient common law writs, including the writ of quo warranto or action in the nature of a quo warranto, is largely governed by considerations of public policy and by the statutory limitations of local legislation. The prototype of such enactments anent quo warranto is the famous statute 9 Anne, c. 20, (1710), which has been set forth *in extenso* in Judge Roberts' admirable compilation, *British Statutes in Pennsylvania*; and is deemed to be of such practical importance that many commentators have discussed the act referred to, when dealing with its derivatives. As a general proposition, an award or refusal of quo warranto rests in the sound discretion of a court empowered to issue such a writ; and judgment thereon will be affirmed unless there is an unmistakable abuse of discretion.<sup>37</sup> Among the factors accounted worthy of consideration when exercising discretion in dealing with this form of remedy are public policy;<sup>38</sup>

<sup>30</sup>In *re* Parsons, Petitioner, note 13 *supra*.

<sup>31</sup>*Hudson v. Parker*, 156 U. S. 277, 288 (1895); *San Joaquin v. Superior Court*, 98 Cal. 602 (1893).

<sup>32</sup>*United States v. Derr*, 289 U. S. 352, 360 (1933).

<sup>33</sup>*Simonton v. City of Pontiac*, 255 N. W. 608, 613 (Mich. 1934).

<sup>34</sup>*Independent Brewing Co. v. Colonial Trust Co.*, 273 Pa. 12 (1922).

<sup>35</sup>*State v. Myers*, 128 Ohio St. 568 (1934).

<sup>36</sup>*Tolbert v. Railroad Company*, 126 Md. 569 (1915).

<sup>37</sup>*People v. People's Gas Light Co.*, 205 Ill. 482 (1903); *State v. School District No. 10*, 85 Minn. 230 (1902); *State v. Nohle*, 16 N. D. 168 (1907); *Com. v. Arrison*, 15 S. & R. 127 (Pa. 1827); *Cum. v. Sommer*, 309 Pa. 447 (1932); *Watkins v. Venable*, 99 Va. 440 (1901); *State v. McGeary*, 69 Vt. 461 (1897).

<sup>38</sup>*Marian v. Beard*, 259 Mich. 183 (1932).

the nature of the interest of a relator;<sup>39</sup> equities, such as laches or fraud;<sup>40</sup> and the balance of convenience or injury.<sup>41</sup>

The exceedingly important branch of the law of remedies, which is known in our system of law as equity jurisprudence, has this in common with the law of extraordinary remedies—that, as a general rule, it is only available in cases where the form of relief sought is a *sine qua non* to the procurement of adequate redress.<sup>42</sup> For the most part, "equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion\*\*\*of the chancellor."<sup>43</sup> One of the most important of equitable remedies is the writ of injunction whose origin, according to Lord Bathurst, is attributable to an extension of the writ of prohibition of Waste.<sup>44</sup> It is sometimes classed with the category of extraordinary remedies. The transcendent powers of this drastic remedy are not to be used heedlessly, oppressively, capriciously or improvidently;<sup>45</sup> where there is a complete remedy at law by which an injury can be fully compensated in damages;<sup>46</sup> or where there is merely consequential and incidental injury.<sup>47</sup> On the other hand, the remedy is not to be denied whenever essential to protect property rights or the rights of persons against irreparable injury;<sup>48</sup> which is emphatically the case wherever no certain pecuniary standards exist for the measurement of unlawful damage done or threatened.<sup>49</sup>

<sup>39</sup>People v. Healy, 230 Ill. 280 (1907); State v. Cairns, 305 Mo. 333 (1924).

<sup>40</sup>State v. School District No. 10, note 37, supra; Com. v. Turnpike Co., 153 Pa. 47 (1893).

<sup>41</sup>Watkins v. Venable, note 37 supra.

<sup>42</sup>It is believed that there is no need to discuss exceptional situations where courts of law and equity have coordinate jurisdiction otherwise than by referring to the case of Driscoll v. Smith, 184 Mass. 221 (1903), which reminds us that where an action of law lies, but the remedy would not be as practical and efficient as in equity, it is not adequate.

<sup>43</sup>Walters v. McElroy, 151 Pa. 549, 557 (1892).

<sup>44</sup>Goodeson v. Gallatin, 2 Dick. 455 (Eng. 1771).

<sup>45</sup>Frost v. City, 181 Cal. 22; Milton Dairy Co. v. Gt. Northern Ry. Co., 124 Minn. 239 (1914); Attorney General v. Crown Laundry Service Inc., 116 N. J. Eq. 40 (1934); Stamp v. Board of Supervisors, 252 N. Y. Supp. 303 (1931); Chartiers Block Co. v. Mellon, 152 Pa. 286 (1893); Becker v. Lebanon St. Ry. Co., 188 Pa. 484 (1898); Funk v. Inland Power & Light Co., 1 Pac. (2d) 872 (Wash. 1931).

<sup>46</sup>Winslow v. Fleischner, 110 Ore. 554, 563 (1924); Turnpike Road v. Steam Company, 5 Pa. Co. Ct. 354 (1888).

<sup>47</sup>Moore v. City, 70 Ga. 611, 615 (1883); Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 177 (1924).

<sup>48</sup>Champton Refg. Co. v. Commission, 286 U. S. 210, 238 (1932); Mobile & O. Ry. Co. v. Zimmern, 206 Ala. 37 (1921); Baldocchi v. Four-Fifty Sutter Corporation, 18 Pac. (2d) 682 (Cal. 1933); Schavoir v. Leather Co., 104 Conn. 472 (1926); Banby v. Kraskow, 107 Conn. 109 (1927); Dick v. Sears-Roebuck Co., 115 Conn. 122 (1932); Nat. Ins. Co. of the U. S. v. Myers, 140 Ill. App. 392 (1908); Summerfield Co. v. Prime Furniture Co., 242 Mass. 149 (1922); Doane v. Allen, 172 Mich. 686 (1912); Ruty v. Huelsenbeck, 109 N. J. Eq. 273 (1931); Hard v. Blue Points Co., 156 N. Y. Supp. 465 (1915).

<sup>49</sup>Cleveland v. Martin, 218 Ill. 73, 87 (1905); Philadelphia Ball Club Inc. v. Lajoie, 202 Pa. 210, 216 (1902).

Within these limits the granting or withholding of the remedy of injunction is seldom a matter of absolute right, and is usually a matter of "grace" or discretion.<sup>50</sup> To a considerable extent the exercise of this function of discretion is based upon fact findings, much of which may be intuitive or inarticulate, but none the less sound. Naturally we find that the discretion of a trial court in granting or dissolving an interlocutory injunction will not be interfered with by an appellate court except upon a showing of palpable abuse.<sup>51</sup> When it comes to the moulding of decrees in injunctive proceedings, the general objective of equity is "to use practical precautions" to protect a plaintiff against positive and wrongful invasion of his rights by a defendant, without curbing lawful activity on the part of the defendant.<sup>52</sup> Frequently this is best achieved by a process of "reasoning from life," in preference to *a priori* reasoning from abstract conception. An excellent illustration of judicious employment of practical precautions, wherein sound discretion was exercised is afforded by the case of *Schwartzbach v. Oneonta Light & Power Co.*<sup>53</sup> In that case there was damage caused by the overflow of land, due to the dam of the defendant company. On the one hand, there was presented a question of public safety, for surely, to mention only one of many perils, a community shrouded in darkness would be an Alsatia for criminals. On the other side there jutted the consideration that a flooding of land is a taking thereof.<sup>54</sup> The equities were balanced by granting an injunction against the trespass and suspending the enforcement of the writ for a fixed period of time within which the defendant could have an opportunity of abating the injury. Discretion as to the grant of injunctions is exercised in accordance with established law and rules of equity;<sup>55</sup> is guided by the substantiality of the interest sought to be protected;<sup>56</sup> will frequently lead to a refusal of the relief petitioned for, where such equities as an innocent mistake of the defendant or laches on the part of a plaintiff are involved, or where the conduct of the defendant is not unconscionable;<sup>57</sup> and, will sometimes be guided by considerations of the balance of convenience or of injury.<sup>58</sup>

It is often the case that judges attach different weights to competitive principles which cannot, as yet, be weighed in any definite scale. This phenomenon is frequently the cause of dissenting opinions, as well as those which commentators

<sup>50</sup>*Meccano Ltd. v. John Wanamaker*, 253 U. S. 136 (1920); *Vulcan Detinning Co. v. St. Clair*, 315 Ill. 40 (1924); *Strobeck v. McWilliams*, 42 N. D. 30 (1919).

<sup>51</sup>*Furniture Manufacturer's Assn. of Grand Rapids v. Grand Rapids Guild of Exhibitors*, 268 Mich. 685 (1934).

<sup>52</sup>*Summerfield Co. v. Prime Furniture Co.*, note 48 supra.

<sup>53</sup>129 N. Y. Supp. 384 (1911), modified in 207 N. Y. 671 (1912).

<sup>54</sup>*Pumpelly v. Green Bay Co.*, 80 U. S. 166, 178 (1871).

<sup>55</sup>*United States v. Republic Oil Co.*, 8 Fed. Supp. 897 (D. N. J. 1934).

<sup>56</sup>*Dick v. Sears-Roebuck & Co.*, note 48 supra, at page 127.

<sup>57</sup>*Banby v. Krasow*, note 48 supra, at page 115.

<sup>58</sup>*Ontjes v. Bagley*, 250 N. W. 17, 20 (Iowa 1933).



designate as "*contra*". Sometimes these differences are occasioned by different concepts of public policy. It is conceivable that a passing fad, or the propaganda of an aggressive *bloc*, may be mistaken for an enlargement of the boundaries of knowledge; and, on the other hand, there may be a failure to recognize a change in social or physical conditions which demands application of the time-tested rule of logic, *cessante ratione legis, cessat ipsa lex*. Sometimes the heresy of yesterday becomes the orthodoxy of today, and, conversely the orthodoxy of yesteryear, becomes "the fighting faith" of the present.

Since the time of its introduction into Anglo-Saxon jurisprudence, the remedy of specific performance of contracts, has ordinarily been treated as a question of discretion, whether it is advisable to interfere and give a remedy unknown to the common law, or whether it would be more judicious to remit the parties to the assertion of their rights in a court of common law.<sup>59</sup> This form of relief is not demandable as an absolute right; but its grant or refusal rests entirely in sound judicial discretion limited, of course, by other principles of equity with especial reference to the circumstances of the particular case so as to avoid unnecessary harshness or oppression.<sup>60</sup> The limitations imposed by established usage, just referred to, must be honored wherever a reign of law is deemed wiser and more wholesome than an attempted beneficent despotism. An important consideration established by equitable principle and usage is the position of the plaintiff. Accordingly he will not be granted a decree unless he, the party seeking relief, can do complete justice,<sup>61</sup> nor will a petitioner for specific performance of a contract be given an advantage for which he had not bargained.<sup>62</sup> Likewise it would be considered an unwarrantable exercise of discretionary power to overlook laches<sup>63</sup> or any other equities which might lead a chancellor to the belief that injustice might be done by the grant of a decree of specific performance.<sup>64</sup> At the same time it must not be overlooked that when it appears that a valid contract has been entered into, is in its nature and circumstance, not unreasonable, and an action for damages would not insure adequate relief, a decree of specific performance will be of course, and not merely of grace.<sup>65</sup> Furthermore, in the absence of evidence to the contrary appearing of record, it will be presumed that a decree of specific performance, if rendered.

<sup>59</sup>Scott v. Alvarez [1895] 2 Ch. 603, 615. (Eng.).

<sup>60</sup>Haffner v. Dobrinski, 215 U. S. 446 (1910); Anderson v. Anderson, 75 Kan. 117, 123 (1907); Offutt v. Offutt, 106 Md. 236, 241 (1907); Banaghan v. Malaney, 200 Mass. 46, 49 (1906); Bartley v. Lindabury, 89 N. J. Eq. 8 (1918); Ramsay v. Gheen, 99 N. C. 215 (1888); Friend v. Lamb, 152 Pa. 529, 533 (1893); Humphrey v. Brown, 291 Pa. 53, 60 (1927).

<sup>61</sup>Omerod v. Hardman, 5 Ves. Jr. 722, 734 (Eng. 1801); Calhoun v. Brewster, 1 N. B. Eq. Rep. 529, 534 (Can. 1898).

<sup>62</sup>Rees v. Marquis of Bute, [1916] 2 Ch. 64, 74 (Eng.).

<sup>63</sup>Schulter v. Gentilly Terrace Co., 164 La. 663 (1927).

<sup>64</sup>Humphrey v. Brown, 291 Pa. 53, 60 (1927); Barrett v. Forney, 82 Va. 269 (1886); Radcliffe v. Warrington, 12 Ves. Jr. 326, 334 (Eng. 1806).

<sup>65</sup>Anderson v. Anderson, 251 Ill. 415 (1911); Hall v. Warren, 9 Ves. Jr. 605, 608 (Eng. 1811).

was granted not arbitrarily, but under the exercise of sound, reasonable judicial discretion.<sup>66</sup> And, as is probably the case with all situations which arise for the exercise of a court's discretion, while the grant or refusal of specific performance must not work injustice, at the same time it should not be violative of accepted analogies,<sup>67</sup> and at all times should "discern\*\*\*between shadow and substance."<sup>68</sup>

Toward the end of the last century, the father of the case-system of teaching law found, as the result of painstaking and brilliant research that the equitable remedy of "discovery is not an original product of English soil. Its name, indeed, is English but the thing itself is entirely foreign. It was borrowed by the Court of Chancery, directly from the English ecclesiastical courts—indirectly from the civil and canon law."<sup>69</sup> A bill of discovery is of grace or discretion and not of course; otherwise it could be availed of as an engine of oppressive inquisition or be utilized as a probe to gratify the impertinent curiosity of the gossip, or the unscrupulous inquisitiveness of the blackmailer or unfair competitor.<sup>70</sup> At least so far back as the year 1415 the House of Commons protested against the examination and oath of parties to litigation in equity as being in accord with "the form of the civil law and the Law of Holy Church in subversion of the common law."<sup>71</sup> These protests were renewed from time to time, and made such deep impression upon students of English law that the framers of American Constitutions have been careful to include guarantees that the papers of citizens should be secure against unreasonable searches and seizures. "It is contrary to the first principles of justice to allow a search through \* \* \* records relevant or irrelevant in the hope that something will turn up," said the late Mr. Justice Holmes speaking for the Supreme Court of the United States.<sup>72</sup> While chancellors are vested with wide discretionary powers as to the grant or refusal of discovery,<sup>73</sup> it is fairly obvious that they are in duty bound to exercise such inquisitorial powers with great caution. They may refuse the remedy for reasons of State,<sup>74</sup> or because the defendant is a bona fide purchaser,<sup>75</sup> will refuse to permit "fishing",<sup>76</sup> but, in proper cases, will assist a plaintiff to obtain material evidence

<sup>66</sup>King v. Gsanter, 23 Neb. 795, 801 (1888).

<sup>67</sup>Cf. cases cited in note 60 supra. Cf. also, Shimer v. Morris Canal & Banking Co., 27 N. J. Eq. 364; Goring v. Nash, 3 Atk. 186 (Eng. 1744); Burgen v. Wheat, 1 Eden, 177, 214 (Eng. 1759); Scott v. Alvarez, note 59, supra.

<sup>68</sup>Cf.: Cruthers v. Donahue, 85 Conn. 629 (1912); Willey v. Bowden, 14 Ga. App. 379 (1914); State v. McGeary, 69 Vt. 461 (1897).

<sup>69</sup>Langdell, Discovery under the Judicature Acts, 1897 Harv. L. Rev. 137, 138.

<sup>70</sup>Cf.: Wesley v. Eells, 177 U. S. 370 (1900); Cullison v. Bossom, 1 Md. Ch. 95 (1847); Reynolds v. Burgess Sulphite Fibre Co., 71 N. H. 332 (1902).

<sup>71</sup>Rot. Parl. 84 (3 Hen. V, pt. 2, 46, No. 23)—Holmes' translation. (This objection is said to have been pressed with great frequency, according to 1 Bouvier L. Dict. 1058 (3d ed.)).

<sup>72</sup>Federal Trade Commission v. American Tobacco Company, 264 U. S. 298, 306 (1924).

<sup>73</sup>Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U. S. 689, 696, 697 (1933).

<sup>74</sup>Worthington v. Scribner, 109 Mass. 487 (1872).

<sup>75</sup>Zollman v. Moore, 62 Va. 318 (1871); Pilcher v. Rawlins, L. R. 7 Ch. 259, 269 (Eng. 1872).

<sup>76</sup>Cullison v. Bossom, note 70 supra; Town of Franklin v. Crane, 80 N. J. Eq. 509 (1912); D'Wolf v. D'Wolf, 4 R. I. 450 (1850).

relevant to his own case.<sup>77</sup> The process is classed as auxiliary, but it is surmised that there may be occasions when counsel employ it as a tactical move toward forcing settlement by an obstinate opponent. Equality is equity, consequently a chancellor, within the limitations imposed by law and equity, is fully empowered to probe the conscience of a defendant as to withheld evidentiary matters relevant to the plaintiff's case, provided that due care is taken to avoid inquiry into matters pertaining to the case of the defendant.<sup>78</sup> To a considerable extent, the balance of convenience or of injury, is an important factor to be considered when exercising discretion as to the grant or refusal of discovery.<sup>79</sup> In a few words, an award or denial of this powerful and important remedy rests upon settled principles of equity; and while in the sound discretion of a chancellor a decree of discovery may issue in aid of a legal or equitable claim or defense, it will never be granted in opposition to positive law or equity.

It may have been observed that the subject of these notes is often a considerable tax upon the powers of observation and discernment of a judge or chancellor, no matter in what branch of jurisprudence it may arise. Further demonstration of this fact may be found in pursuing its applicability to the equitable remedy of the cancellation and rescission of instruments and agreements. In this class of cases, a prayer for relief is addressed to "the equitable consideration" of a court<sup>80</sup> and when granted as legitimate relief, the decree is based upon the ancient principle *quia timet*;<sup>81</sup> not as a matter of absolute right *ex debito justitiae*, but in the discretion of the court, "guided by principles which have been evolved in the course of adjudication."<sup>82</sup> An important principle which has grown up in general jurisprudence is the practice of civilized courts of justice to intervene, whenever the balance of justice is disturbed by wrong-doing or by the threat of it, and restore, as far as possible the *status quo*.<sup>83</sup> In accordance with this fundamental principle, the conscience of a chancellor is opposed to granting the cancellation or rescission of agreements or other instruments where the parties cannot be placed in *statu quo*; unless, in his estimation of the circumstances (commonly termed conscience or discretion), such a remedy be demanded by clear and strong equity.<sup>84</sup> It naturally follows that the relief of rescission, cancellation and delivery up of deeds or agreements, is not a

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<sup>77</sup>Reynolds v. Burgess Sulphite Fibre Co., note 70 supra; Hurricane Telephone Co. v. Mohler, 51 W. Va. 1 (1902); Lyell v. Kennedy, 8 App. Cas. 217, 224 (1883).

<sup>78</sup>Lesser v. Henry, 50 Pa. Super Ct. 440 (1912); Hurricane Telephone Co. v. Mohler, note 77 supra; Lyell v. Kennedy, note 77 supra.

<sup>79</sup>Sinclair Refining Co. v. Jenkins Petroleum Process Co., note 73 supra at page 700 (semble); Star Kidney Pad Co. v. Greenwood, 3 Ont. 280 (Can. 1883).

<sup>80</sup>Swan v. Talbot, 152 Cal. 142 (1907).

<sup>81</sup>Fred Macy Co. v. Macy, 143 Mich. 138 (1906); 2 Story Eq. Jur. 93 (14th ed. 1918).

<sup>82</sup>Calhoun v. Millard, 121 N. Y. 69 (1890).

<sup>83</sup>Holland, Jurisprudence, 320 (11th ed. 1910).

<sup>84</sup>Fink v. Farmers' Bank, 178 Pa. 154 (1896); Larivere v. Larocque, 105 Vt. 460 (1935); Long v. Inhabitants of Athol, 196 Mass. 497 (1907)

matter of absolute right, but is within the sound discretion of the court to be carefully exercised in granting or refusing the relief prayed for, in accordance with what is reasonable and proper under the circumstances of the particular case.<sup>85</sup> And such action may be based upon extrinsic evidence.<sup>86</sup> But where a question of unconstitutionality presents itself, there is authority for remitting the controversy to an action at law, in view of the public or governmental interest involved.<sup>87</sup> In brief, it is the constant endeavor of chancellors to permit no party to have an inequitable advantage;<sup>88</sup> and an important element which is frequently taken into consideration, is the equitable principle, "he who seeks equity must do equity."<sup>89</sup>

In the performance of a duty of exercising an inherent or conferred power of discretion, there are three points to which the attention of a court of justice may be directed. In the first place, it must not transcend the limitations imposed by rules of law or usage, or equitable principles, as the case may be, which define the scope of its freedom of judgment and action.<sup>90</sup> Secondly, the power must be exercised to an end justified by (or at least not opposed to) reason and evidence.<sup>91</sup> Thirdly, it must not be so exercised as to occasion injustice.<sup>92</sup>

All of which amounts to this, that the discretion of a trial court is circumscribed by well-established rules, principles and usages; and its exercise will not be revised by an appellate court except where palpably wrong and prejudicially injurious.

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<sup>85</sup>*Traction Co. v. Warrick*, 249 Ill. 470, 476 (1911); *Lariviere v. Larocque*, note 84 *supra*; *Cowley v. Northern Pacific Co.*, 68 Wash. 558 (1912).

<sup>86</sup>*Louisville & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552, 576 (1899); *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474, 483 (1880).

<sup>87</sup>*Russo v. Chapin*, 197 Mass. 64 (1907).

<sup>88</sup>*Salmon v. Hoffman*, 2 Cal. 138 (1852); *Traction Co. v. Warrick*, note 85 *supra*; *Reggio V. Warren*, 207 Mass. 525, 536, (1911).

<sup>89</sup>*Salmon v. Hoffman*, note 88 *supra*; *Traction Co. v. Warrick*, note 85 *supra*.

<sup>90</sup>*Haffner v. Dobrinski*, 215 U. S. 446, 450 (1910); *DeForg v. Railroad Co.*, note 9 *supra*; *Spofford v. Railway Co.*, 66 Me. 26, 48 (1876); *Chetwood v. Brittan*, 2 N. J. Eq. 438 (1844); *Thompson v. Connell*, 31 Ore. 231 (1877); *Stoup v. Raymond*, 183 Pa. 279, 288 (1897); *Trabue v. Walsh*, 177 Atl. 815 (Pa. 1935); *Borger v. Mineral Wells Gas Products Co.*, 80 S. W. (2d) 333 (Tex. 1935); *Lariviere v. Larocque*, note 84 *supra*; *Hayward v. Cope*, 25 Beav. 140, 151, (Eng. 1858); *Scott v. Alvarez*, note 59 *supra*; *Holliday v. Lockwood* [1917] 2 Ch. 47, 57 (Eng.).

<sup>91</sup>*Bennett v. Bennett*, note 7 *supra*; *Sharon v. Sharon*, 75 Cal. 148 (1888); *Butler v. Strickland*, note 9 *supra*; *State v. District Court*, 213 Iowa 822, 831 (1931); *Seaba v. State*, 144 Okla. 295 (1930); *Schlitz v. Insurance Co.*, 96 Vt. 337, 343 (1923); *Murray v. Buell*, 74 Wis. 14, 19 (1889); *Millington v. Fox*, 3 M. & C. 333, 353, (Eng. 1838).

<sup>92</sup>*Banaghan v. Malaney*, note 60 *supra*; *King v. Gsanter*, note 66 *supra*; *Bartley v. Lindabury*, note 60 *supra*; *Humphrey v. Brown*, note 60 *supra*; *Schlitz v. Insurance Co.*, note 91 *supra*; *Barrett v. Forney*, note 64 *supra*; *Powell v. Lloyd*, 2 Y. & J. 372 (Eng. 1828); *Logan v. Bank of Scotland* [1908] 1 K. B. 141, 149 (Eng.); *Rees v. Marquis of Bute*, note 62 *supra*.