
STATE OF WISCONSIN,)	
)	
Plaintiff,)	Case No.: 04 CV 1709
v.)	
)	
ABBOTT LABORATORIES, <i>et. al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
BRIEF REGARDING ITS CLAIM TO A JURY TRIAL**

Defendants submit this brief in response to Plaintiff's Brief in Support of Its Claim to a Trial by Jury,¹ as discussed at the July 9, 2008 telephone status conference.

INTRODUCTION

The Wisconsin Constitution provides that "the right to trial by jury shall *remain* inviolate, and shall extend to all cases *at law*...."² The Wisconsin Supreme Court has interpreted this language narrowly, and has held that "this right shall continue *as it was at the time of the formation and adoption of the constitution by the people of this State*."³ The Wisconsin Supreme Court has repeatedly warned against attempts to expand the right to jury trial beyond its scope at the time the Wisconsin constitution was adopted, and has

¹ Reflective of the State's own belief in its entitlement to a jury is the fact that it failed to timely pay the jury fee as required by Wis. Stat. §§ 802.10 and 814.61(4). Indeed, the payment was only made by counsel this week in the midst of briefing its claimed entitlement to a jury. Timely payment of the fee is necessary to preserve a litigant's right to a jury trial. *See* Wis. Stat. §§ 814.61(4), 805.01(2) (like a jury demand, the jury fee must be paid "at or before the scheduling conference or pretrial conference, whichever is held first").

² Wis. Const., art. 1, § 5 (emphasis added).

³ *Village Food & Liquor Mart v. H&S Petroleum, Inc.*, 2002 WI 92, ¶ 10 n.5, 254 Wis.2d 478, 647 N.W.2d 177, *citing* *Gaston v. Babcock*, 6 Wis. 490, 494 (1887) (emphasis added); *see also* *Stilwell v. Kellogg*, 14 Wis. 499, *4 (1861) (noting that the jury trial provision of the state constitution "evidently had reference to the condition of the law as it existed when the constitution was adopted," and therefore "did not preserve [a jury trial] as a matter of right, in those cases which, by the law and practice then existing, were submitted entirely to the judgment of the court.").

formulated a two-part test to ensure that the right to jury trial is not extended to statutorily-created actions that either did not exist in 1848, or would not have been afforded a jury trial in 1848. The test requires (1) that the cause of action created by statute existed, was known, or was recognized at common law at the time of the adoption of the Wisconsin constitution in 1848, and (2) that the action was recognized at law in 1848, as opposed to at equity.⁴

All three of Plaintiff's statutory claims fail both prongs of this test, because none existed, were known or were recognized at common law in 1848, and none could have been tried to a court at law in 1848, because they are equitable claims seeking equitable relief, or other relief that did not exist at law in 1848. Of course, the legislature remains free to expressly provide a right to jury trial for any statutorily created action. As Plaintiff concedes, the legislature has not done so for any of the State's statutory claims. Moreover, Plaintiff is not entitled to a jury trial on its sole non-statutory claim, unjust enrichment, because this claim is equitable in nature and seeks purely equitable relief.⁵

I. PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL BECAUSE ITS CLAIMS SEEK EQUITABLE RELIEF.

Plaintiff misstates the law regarding the right to a jury on claims seeking both equitable and legal relief, citing a United States Supreme Court case for the proposition that such claims are afforded a right to jury trial under the Seventh Amendment of the United States Constitution. While that may be true for the jury right in federal courts under the United States Constitution, Wisconsin courts have explicitly held that this line of

⁴ See *Village Food*, 2002 WI 92, ¶ 28.

⁵ Although the State initially conceded that it has no right to a jury trial on its unjust enrichment claim by failing to address the issue in its prior briefing, Plaintiff has now indicated that it intends to contest this point in its supplemental briefing. Plaintiff's apparent change of heart allows it an opportunity to respond to Defendants' arguments, without affording the same opportunity to Defendants. Accordingly, Defendants request that the Court allow Defendants an opportunity to respond to any new arguments raised by Plaintiff regarding the right to jury trial on its unjust enrichment claim.

Supreme Court jurisprudence is neither binding nor persuasive in interpreting the right to jury trial under the Wisconsin State constitution.⁶

In fact, Wisconsin courts have gone the other way, holding that in cases such as this one, where there are claims seeking both equitable and legal relief, no jury trial right exists because such claims would have been considered “at equity” in 1848, rather than at law, and would have been tried by an equity court without a jury.⁷ In *Stilwell v. Kellogg*, the Wisconsin Supreme Court held that there was no right to a jury trial for a foreclosure action seeking both legal relief (judgment for the deficiency) and equitable relief (foreclosure of the right of redemption).⁸ In so holding, the *Stilwell* court determined that “[t]he practice of uniting the legal cause of action for the debt with the equitable remedy of foreclosure ... prevailed in this territory before the adoption of our state constitution.”⁹ The court determined that the legal remedy sought would have been “adopted as an extension of the powers of a court of equity in an equitable suit, so that under that practice the whole became an equitable proceeding, in which the parties could not claim a jury.”¹⁰ Similarly, in *Neff v. Barber*, the court held that no jury trial right attached to an equitable action brought by a stockholder against the officers of a company, despite the fact that the action included a conspiracy claim, which was traditionally considered “at law.” The court noted

⁶ See *Village Food*, 2002 WI 92, ¶ 7 n.3; *State v. Ameritech Corp.*, 185 Wis. 2d 686, 698, 417 N.W.2d 705 (Ct. App. 1994) (rejecting the State’s argument that the United States Supreme Court had held that a right to jury trial attached to forfeiture actions under statutes that did not provide for a right to jury trial, because such cases were based on an analysis of the Seventh Amendment of the United States Constitution, and therefore are not binding in state courts).

⁷ See *Stilwell*, 14 Wis. 499, *1 (“The provision in the constitution of this state (Art. 1, sec.5) which preserves the right to trial by jury, does not extend that right to cases which, by the law and practice existing at the time of the adoption of the constitution, were triable by the court alone.”); *Neff v. Barber*, 165 Wis. 503 (1917). See also 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 220 (4th ed. 1918) (excerpt attached as Ex. A) (noting that the jurisdiction of courts of equity to grant equitable remedies is exclusive, and that “courts of law (except as authorized by modern statutes) have not power to grant them”).

⁸ See *Stilwell*, 14 Wis. 499, *4.

⁹ *Id.*

¹⁰ *Id.*

that “[i]n an action in equity all the issues, whether legal or equitable, are triable by the court.”¹¹

Numerous other state courts also have held that claims seeking both equitable and legal relief are not guaranteed a jury trial, and have rejected the application of the federal court interpretation of the Seventh Amendment in determining the right to a jury trial under state constitutions.¹² The reasoning behind these decisions is that courts at law did not have the power to grant equitable relief, such as the injunctive relief sought by the Plaintiff here.¹³ Thus, cases seeking both injunctive relief and traditional monetary damages could not have been brought “at law.”¹⁴ Rather, under the doctrine of “equitable clean-up,” such cases would have been heard by a court of equity, which had the power to award both equitable and legal relief.¹⁵ While the United States Supreme Court has rejected the doctrine of equitable clean-up in determining the right to a jury trial under the Seventh Amendment to the United States Constitution, several state courts have held that

¹¹ See *Neff*, 165 Wis. 503 ¶ 1.

¹² See, e.g., *Park Oil, Inc. v. Getty Refining and Mktg. Co.*, 407 A.2d 533, 535 (Del. 1979) (“[O]nce equity jurisdiction attached, the Court of Chancery properly proceeded to deal with the whole matter. ... [The] right to jury trial, applies to [an] action at law; it did not apply in an equity suit.”); *Builders Floor Serv., Inc. v. Kirby*, No. 17076, 2002 WL 32073955, at *4 (Va. Cir. Ct. Sept. 27, 2002) (“[N]o constitutional right to a jury exists because Builders Floor instituted this suit in equity seeking injunctive relief.”); *Lyn-Anna Props., Ltd. v. Harborview Dev. Corp.*, 145 N.J. 313, 321-26, (N.J. 1996) (noting that legal remedies that are “ancillary” to equitable relief sought are tried without a jury); *Moore v. Capital Gas Corp.*, 117 Mont. 148, 153, 158 P.2d 302, 305 (Mont. 1945) (noting that equity courts “determined all questions involved, whether legal or equitable, and that, too, without the intervention of a jury, except at the discretion of the chancellor.”); *Puget Sound Nat’l Bank of Tacoma v. Olsen*, 174 Wash. 200, 202-03, 24 P.2d 613, 614 (Wash. 1933) (“The action was not only one to recover upon the notes and the contract of guaranty, but also to foreclose certain liens upon pledges of collateral security. This raised a question of equitable cognizance. Where equitable issues are involved, equity will assume full jurisdiction. In such case a trial by jury is not a matter of right....”).

¹³ See POMEROY at 332 (Ex. A).

¹⁴ See *Stilwell*, 14 Wis. 499, *4; *Moore*, 117 Mont. at 153; *Puget Sound*, 174 Wash. at 202-03.

¹⁵ See *Stilwell*, 14 Wis. 499, *4; *Donaldson v. Pharmacia Pension Plan*, 435 F.Supp.2d 853, 863 (S.D.Ill. 2006) (discussing the doctrine of equitable clean-up); *Morris v. Bank One, Indiana, N.A.*, 789 N.E.2d 68, 70 (Ind. Ct. App. 2003) (same, and noting that a recent Indiana Supreme Court opinion “leaves no doubt the doctrine is still with us.”).

the language of state constitution jury trial provisions, mainly that “the right of trial by jury shall *remain* inviolate,”¹⁶ prohibits the abandonment of the doctrine of equitable clean-up, which would have determined the right to a jury trial at the time of statehood.¹⁷

Allowing a right to jury trial to attach to claims seeking mixed legal and equitable relief would expand the right to a jury trial as it existed at statehood, which can only be accomplished through express legislative grant. As Plaintiff has conceded, none of its statutory claims are subject to an express legislative grant of a right to jury trial.

Plaintiff does not deny (nor can it) that it seeks equitable relief. Because such claims would have been tried to a court of equity in 1848, and would not have been afforded a jury trial, the Wisconsin constitution does not guarantee a right to a jury trial for these claims.

II. PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL ON ITS § 100.18 CLAIM.

The Court of Appeals’ *Ameritech* decision flatly holds that there is no jury trial right in pursuing a claim under § 100.18. This aspect of the *Ameritech* ruling has not been overturned, and is binding here. Plaintiff incorrectly argues that *Ameritech* is *not* binding for two reasons. First, Plaintiff argues that the test used in *Ameritech* was superseded by the test pronounced in *Village Food*, and that under that test, Plaintiff is entitled to a jury trial. Second, Plaintiff argues that *Ameritech*’s holding that no right to jury trial attaches to a § 100.18 claim was limited to situations in which the State was pursuing relief under §

¹⁶ Wis. Const. art. I, § 5 (emphasis added). *See also Lyn-Anna*, 145 N.J. at 321 (citing the same language from the New Jersey Constitution, and finding that “the right to civil jury trial preserved in each of our constitutions has been the right to jury trial that existed theretofore.”).

¹⁷ The Wisconsin Supreme Court’s holding in *Stilwell* was based on this interpretation of the Wisconsin Constitution. *See Stilwell*, 14 Wis. 499, *4 (“The constitution provides that the ‘right of trial by jury shall *remain* inviolate,’ which evidently had reference to the condition of the law as it existed when the constitution was adopted. It therefore, did not preserve it as a matter of right, in those cases which, by the law and practice then existing, were submitted entirely to the judgment of the court.”)(internal citations omitted).

100.18(11)(d), and that because here the State newly asserts that it is seeking relief under § 100.18(11)(b)(2), *Ameritech* does not apply. Neither argument is persuasive.

A. The *Village Food* test does not alter *Ameritech*'s holding.

Nothing in the language of the *Village Food* decision overrules *Ameritech*'s holding that no jury trial right attaches to a claim under § 100.18. Nor does the application of the *Village Food* analysis. Under the first prong of the *Village Food* test, the modern statutory cause of action must be “essentially a counterpart” to an 1848 common-law cause of action, and must only “differ slightly” from such a cause of action.¹⁸ Subsequent Wisconsin Supreme Court Cases, *State v. Schweda* and *Dane County v. McGrew*, have stressed a narrow interpretation of the *Village Food* test, and have made clear that broad similarities between a modern statutory cause of action and an 1848 cause of action are not enough to render it “essentially a counterpart.”¹⁹

Plaintiff argues that § 100.18 is “essentially a counterpart” to the offense of “cheating” as described in Blackstone’s Commentaries; however, an examination of Blackstone’s “cheating” reveals that it is more than “slightly different” from § 100.18. According to Blackstone, cheating covers an extremely broad range of fraud-based activity that is clearly irrelevant to the Court’s analysis, such as using false weights to measure grain, using false dice, using counterfeit money or pawning another’s property without consent. The only provision contained in Blackstone’s description of “cheating” that even comes close to § 100.18 is “defraud[ing] another of any valuable chattels by ... false

¹⁸ *Dane County v. McGrew*, 2005 WI 130, ¶¶ 21-25, 285 Wis. 2d 519, 699 N.W.2d 890. The “essentially a counterpart” language propounded by the *Village Food* court derives from *Ameritech*. See *Village Food*, 2002 WI 92, ¶ 28 (quoting *Ameritech*).

¹⁹ See *State v. Schweda*, 2007 WI 100, ¶¶ 31-35, 303 Wis.2d 353, 736 N.W.2d 49 (finding no right to jury trial because “[m]odern environmental regulatory laws, however, regulate more subtle and attenuated harms than the common law of nuisance does[.]”) (internal citations omitted); *McGrew*, 2005 WI 130, ¶ 25, 37 (finding no right to a jury trial under a speeding regulation, despite the existence of 1848 actions to ensure safety on public highways).

pretence,” which is explained in a footnote to essentially encapsulate the elements of common-law fraud.²⁰ As discussed in Defendants’ prior briefing, the Wisconsin Court of Appeals in *Kailin v. Armstrong* clearly found that § 100.18 created a *new* cause of action that is *distinct* from common-law causes of action such as fraud.²¹ Specifically, *Kailin* holds that the fact that the legislature added an element to common-law actions for misrepresentation, mainly that the representation be made “to the public,” shows an intent to create a new cause of action.²² None of the offenses Blackstone describes as “cheating” include the element that a representation be made “to the public,” nor do any address deceptive advertising.

Plaintiff’s argument that § 100.18 has “roots that can easily be found in common law unfair trade offenses” such as “cheating” was expressly rejected in *Schweda*. The court in *Schweda* analyzed claims under a number of modern environmental regulations, and determined that no right to jury trial existed despite the fact that the modern regulations had “roots” in common-law nuisance, because having “doctrinal roots” is insufficient for a modern cause of action to be “essentially a counterpart” to an 1848 cause of action.²³ Like the environmental regulations in *Schweda*, § 100.18 regulates a “more subtle and attenuated harm” than common-law fraud as it existed in 1848, specifically deceptive advertising to the public. Thus, even if § 100.18 has “roots” in “cheating” or common-law fraud, it is not “essentially a counterpart” to those actions as required by *Village Food*.

B. Plaintiff is not seeking legal relief pursuant to §100.18(11)(b)(2), and even if it were, *Ameritech’s* holding still controls.

²⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 12, at 1556 n.16 (1778) (attached as an exhibit to Plaintiff’s Brief) (“Whosoever shall by any false pretence obtain from any other person, any chattel, money, or valuable security, with intent to defraud shall be guilty of a misdemeanor....”).

²¹ *Kailin v. Armstrong*, 2002 WI App 70, ¶ 40, 252 Wis.2d 676, 643 N.W.2d 132.

²² *Id.*

²³ *Schweda*, 2007 WI 100, ¶¶ 31-35.

Plaintiff also argues that *Ameritech's* holding denying the right to a jury trial only applies when the State is seeking forfeitures pursuant to § 100.18(11)(d), and not when the State is pursuing damages as a private litigant under § 100.18(11)(b)(2). First, Plaintiff is not seeking, has never sought, and does not have the authority to seek relief under subsection (11)(b)(2). Second, even if Plaintiff were seeking relief under subsection (11)(b)(2), Plaintiff's claim would still fail both prongs of the *Village Food* test.

1. Plaintiff is not seeking relief under §100.18(11)(b)(2).

The State's novel assertion that it has brought a claim for damages under § 100.18(11)(b)(2), raised for the first time over four years after it filed its initial complaint, is wrong as a matter of fact. The Second Amended Complaint clearly requests that the Court “[g]rant plaintiff State of Wisconsin, its citizens, and State programs who have been harmed by defendants’ practices, restitution to restore their pecuniary loss, pursuant to Wis. Stat. § 100.18(11)(d).”²⁴ Nowhere does the Complaint mention § 100.18(11)(b)(2).²⁵ Plaintiff has not abandoned its § 100.18(11)(d) claim for injunctive relief and forfeitures, thus belying its argument that it was seeking relief pursuant to subsection (11)(b)(2) all along.²⁶ Just three months ago, Plaintiff *expressly denied* that it was seeking damages under § 100.18(11)(b)(2) in its summary judgment reply brief: “In short, Judge Krueger was right when she held that ‘the Amended Complaint was [not] filed pursuant to Wis. Stat. § 100.18(11)(b)(2), and no argument or authority is offered to support the proposition that

²⁴ Second Amended Complaint, ¶ 82.

²⁵ Plaintiff stated at the July 9, 2008 status conference that it intends to move for leave to amend its Complaint to add a claim for damages under §100.18(11)(b)(2). At the proper time, Defendants will oppose this motion on the grounds that adding a new theory of relief will be extremely prejudicial given the advanced stage of discovery and the fact that dispositive motions have been argued on the basis of the equitable nature of Plaintiff's §100.18 claim under subsection (11)(d).

²⁶ See The State of Wisconsin's Brief In Support of Its Claim to a Trial by Jury (“Plaintiff's Br.”) at 2 n.1 (July 3, 2008) (“In this action, the State seeks injunctive relief under §100.18(11)(d)...”). Additionally, subsection II.A.2 of Plaintiff's brief is entitled “The State Seeks Legal Relief in the Form of Forfeitures.” *Id.* at 4.

causation or reliance by a consumer is required for an action filed pursuant to § 100.18(11)(d).”²⁷ Plaintiff further stated that it has brought its claims under § 100.18(11)(d), and that subsection (11)(b) is a “*private* right of action.”²⁸

Despite Plaintiff’s statement to the contrary, Defendants have been consistent in expressing their understanding that Plaintiff was seeking relief solely pursuant to § 100.18(11)(d).²⁹ Subsection (11)(d) allows the State to seek “such orders or judgments as may be necessary to restore any person any pecuniary loss suffered because of the acts or practices involved in this action.” While Defendants may have analogized this relief under subsection (11)(d) to the traditional damages remedy provided by subsection (11)(b)(2) in their summary judgment briefing for the purpose of showing that reliance is a required element of Plaintiff’s claim,³⁰ Defendants never stated nor believed that Plaintiff was seeking relief under § 100.18(11)(b)(2).

2. Plaintiff does not have the authority to seek relief pursuant to § 100.18(11)(b)(2).

Even if the State had properly plead a claim under § 100.18(11)(b)(2), the Wisconsin Department of Justice (DOJ) does not have the authority to bring an action on behalf of the State under subsection (11)(b)(2)—its exclusive authority to bring suit lies under subsection

²⁷ Plaintiff State of Wisconsin’s Reply Brief In Support of Its Motions for Summary Judgment and Response Brief In Opposition to Defendants’ Cross-Motions for Summary Judgment (“Plaintiff’s Summary Judgment Reply”) at 9 (Mar. 7, 2008), *citing* Remainder of the Decision and Order On Defendants’ Motions To Dismiss at 4 (May 18, 2006).

²⁸ Plaintiff’s Summary Judgment Reply at 5, 7.

²⁹ *See* Defendants’ Reply Memorandum of Law In Support of Their Joint Motion to Dismiss the Amended Complaint at 14 (April 19, 2005) (“Plaintiff asserts that it may bring DTPA claims (Counts I and II) because section 100.18(11)(d) empowers a court to enter orders “necessary to restore to any person any pecuniary loss.”); Defendants’ Memorandum of Law In Support of Their Joint Motion to Dismiss the Amended Complaint at 26 (Jan. 20, 2005) (“Although the Attorney General’s authority under §100.18 is limited to seeking injunctive relief, the Court separately has authority, once a violation of the statute has been established, to ‘make such orders or judgments as may be necessary to restore any person any pecuniary loss suffered’ because of such violations.”).

³⁰ *See* Defendants’ Reply in Support of Their Joint Cross-Motion for Summary Judgment at 6-7 (Apr. 28, 2008).

(11)(d). While § 100.18(11)(d) provides an express grant of authority to the DOJ to “commence an action in the circuit court in the name of the state to restrain by temporary or permanent injunction any violation of this section,” such grant of authority is absent from § 100.18(11)(b)(2). Under Wisconsin law, the DOJ may *only* bring suit on behalf of the state pursuant to *express* legislative authorization.³¹ Because no such express grant of authority exists, the State cannot now claim to have brought this action under § 100.18(11)(b)(2).

Moreover, when read in contrast to § 100.18(11)(a), it is clear that subsection (11)(d) provides the *exclusive* remedy available to the DOJ. Subsection (11)(a) provides the Department of Agriculture with the authority to bring an action “to enjoin violation of this section,” and expressly states that “[t]his remedy is not exclusive.” Notably, subsection (11)(d) does not contain language stating that the Department of Justice’s remedy is “not exclusive.” The legislature must have intended subsection (11)(d) to set forth the exclusive remedy available to the DOJ, or else the language of subsection (11)(a) would be rendered superfluous. Principles of statutory construction therefore demand that § 100.18(11)(d) be interpreted to provide the exclusive remedy available to the DOJ.³²

3. Even under § 100.18(11)(b)(2), Plaintiff’s claim fails the *Village Food* test.

Neither the subsection of the statute pursuant to which the State seeks relief nor the type of relief sought changes the analysis under the first prong of the *Village Food* test. *Ameritech*’s holding is based *solely* on the fact that no common-law action existed in 1848

³¹ See *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 21-24, 232 Wis. 2d 612, 605 N.W.2d 526 (“[T]he attorney general must find authority in the statute when he sues in the circuit court in the name of the state or in his official capacity. ... [U]nless the power to bring a specific action is granted by the law, the office of the attorney general is powerless to act.”) (internal quotations omitted).

³² *Pool v. City of Sheboygan*, 2007 WI 38, ¶ 23, 300 Wis.2d 74, 729 N.W.2d 415 (“[O]ne of the basic tenants of statutory construction is that courts are to construe a statute so that no part of it is rendered superfluous.”).

that was an “essential counterpart” to § 100.18. The ruling applies to the *entire* statute, not just one specific subsection. Moreover, the relief sought is immaterial to *Ameritech’s* holding because the court did not reach the second prong of the test. As the *Kailin* court held, the fact § 100.18 requires proof of additional elements not present in common-law fraud demonstrates that the legislature intended § 100.18 to be a new and distinct cause of action, regardless of the subsection under which a party is seeking relief.

Plaintiff’s surreptitious attempt to add a request for relief under § 100.18(11)(b)(2) is based on the fact that the Wisconsin Supreme Court has found *all* relief sought pursuant to subsection (11)(d) to be equitable in nature (including restoration of pecuniary losses),³³ which as this Court suggested, would preclude the right to a jury trial under the second prong of the *Village Food* test.³⁴ Plaintiff’s attempt is ultimately unnecessary. Even if the State somehow could seek legal damages pursuant to § 100.18(11)(b)(2) (which it cannot), and even if it had included such a request for relief in its Complaint filed over four years ago (which it did not), Plaintiff’s claim would still fail the second prong of the *Village Food* test, because it still seeks equitable relief, and therefore would have been tried to an equity court in 1848, and would not have been considered an action “at law.”

III. PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL ON ITS § 133.05 CLAIM.

Plaintiff is not entitled to a jury trial on its §133.05 claim, because no “essential counterpart” existed at common law in 1848. Contrary to the Wisconsin Supreme Court’s holding in *Schweda*, Plaintiff attempts to draw an analogy “based on exceedingly general descriptions,”³⁵ between the statement of legislative intent for the *entire* chapter containing the Wisconsin Trust and Monopolies Act (i.e., Wis. Stat. §§ 133.01 – 133.18) and the offense

³³ See *State v. Excel Mgmt. Servs., Inc.*, 111 Wis. 2d 479, 484, 490-91, 331 N.W.2d 312 (1983).

³⁴ Decision and Order on Plaintiff’s Motions for Partial Summary Judgment Against Defendants Novartis, AstraZeneca, Sandoz and Johnson & Johnson at 6 n.3 (May 20, 2008).

³⁵ *Schweda*, 2007 WI 100, ¶ 23.

of “monopolies” as described in Blackstone’s Commentaries. While Blackstone’s offense of “monopolies” may be a counterpart to other provisions contained in this chapter,³⁶ Plaintiff attempts to conflate the general statement of legislative intent “to safeguard the public against the creation or perpetuation of monopolies”³⁷ with the specific provision of § 133.05, the only section of the Wisconsin Trust and Monopolies Act under which Plaintiff is pursuing a claim, which prohibits “secret rebates,” and clearly has no analog in the offenses described in Blackstone’s commentaries or any other historical common-law action. In fact, the only mention of the term “rebate” contained in Blackstone’s description of “monopolies” specifically *exempts* the practice of rebating from the offense.³⁸ The State has not claimed that Defendants are perpetuating a monopoly under § 133.01 or § 133.03; rather, it claims that Defendants “discounted secretly from [their] published prices” under § 133.05, to which no jury trial right attaches.³⁹

Even if the Court were to determine that §133.05 somehow met the first prong of the *Village Food* test, and had an 1848 common-law counterpart, Plaintiff would not be entitled to a jury trial, because its claim would have been brought at equity in 1848, not “at law.” Assuming, *arguendo*, that Blackstone’s “monopolies” was essentially a counterpart to §133.05, Plaintiff still would have been compelled to bring its “monopolies” claim to a court of equity, because it is seeking injunctive relief, and a court at law was unable to grant such

³⁶ For example, § 133.03 prohibits the “combination in the form of trust or otherwise, or conspiracy, in restraint of trade,” and “monopoliz[ing] any part of trade or commerce.” *Compare* Wis. Stat. § 133.03 with BLACKSTONE at 1558 (“all monopolies and combinations to keep up the price of merchandise, provisions or work-manship were prohibited....”).

³⁷ Wis. Stat. § 133.01 (2008).

³⁸ See BLACKSTONE at 1558 n.20 (attached as an exhibit to Plaintiff’s Brief) (“Nor is it a monopoly to make a rebate to purchasers, on the condition that they would purchase their distillery supplies exclusively from the company, and not undersell the company’s distributing agents.”).

³⁹ Second Amended Complaint at ¶ 88 (June 28, 2006).

relief in 1848.⁴⁰ This necessary result is supported by the holding in *Village Food*, which, after determining that a common-law counterpart to the statutory claim at issue existed in 1848, still analyzed the relief sought by the plaintiff under the modern statute in that case to determine whether that action was considered “at law.”⁴¹ If, as Plaintiff claims, the fact that money damages were available under the Blackstone offense was dispositive on the issue of whether that action would have been brought at law, there would have been no need for the *Village Food* court to analyze the remedies sought under the modern statute.

IV. PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL ON ITS § 49.49 CLAIM.

Plaintiff is not entitled to a jury trial on its Medical Assistance Fraud claim under Wis. Stat. § 49.49 because Medical Assistance Fraud is not an “essential counterpart” to any cause of action that existed in 1848. Plaintiff claims § 49.49 has a counterpart in common-law fraud, or in the alternative, in the offense of “concealing of treasure-trove” described by Blackstone. Neither argument is persuasive.

For the reasons discussed in *Kailin* (in the context of § 100.18), § 49.49 is clearly a distinct cause of action from common-law fraud. Section 49.49 requires that a statement be made “in connection with medical assistance,” and “for use in determining rights to a payment or benefit.” No such elements are required to prove common-law fraud. Moreover, like the environmental regulations in *Schweda*, the Medical Assistance Fraud statute is designed to “regulate a more subtle and attenuated harm” than common-law fraud—namely the submission of false claims to the medical assistance program. Indeed, had the legislature determined that the common-law action of fraud was sufficient to regulate such a complex program, it would not have needed to enact § 49.49 in the first place. Finally, Wisconsin courts have specifically declined to extend the right to a jury trial to modern

⁴⁰ See *Stillwell*, 14 Wis. 499, *4; *Neff*, 165 Wis. 503; POMEROY at 332 (Ex. A).

⁴¹ See *Village Food*, 2002 WI 92, ¶¶ 32-33.

statutory claims that merely contain fraud-based elements.⁴² As the Wisconsin Supreme Court noted in *Schweda*, the fact that a modern cause of action has “doctrinal roots” at common-law does not mean that it has an “essential counterpart” at common law.

Plaintiff’s attempt to analogize Medical Assistance Fraud to “concealing of treasure-trove” as described in Blackstone is unfounded. The entirety of Blackstone’s description of this offense consists of the following:

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly punishable by death; but now only by fine and imprisonment.⁴³

Somehow, Plaintiff extrapolates from this brief description that the offense “prohibits the taking of money from the government through deception or fraudulent means.”⁴⁴ This is an untenable interpretation. The offense Blackstone describes merely requires concealment, not deception, fraud or even a “taking.” It certainly does not require the submission of a statement “made in connection with medical assistance,” or “for use in determining rights to a payment or benefit,” or the affirmative submission of any statement or claim whatsoever. In fact, the term “treasure-trove” as used in English law, is defined as “[t]reasure (gold or silver, money, plate, or bullion) found hidden in the ground or other place, the owner of which is unknown,”⁴⁵ not treasure “taken” from the government through “fraudulent means.” Because under the laws of England, any discovered treasure belonged to the King by royal right, the crime of “concealing of treasure-trove” was merely the failure

⁴² See *Ameritech*, 185 Wis. 2d at 698 (refusing to recognize a right to jury trial for §100.18, which incorporates several elements of common law fraud); *Village Food*, 2002 WI 92, ¶¶ 23-25 (explicitly rejecting the plaintiff’s attempt to analogize its Unfair Sales Act claim to a common law fraud).

⁴³ See BLACKSTONE, ch. 9 at 1515 (attached as an exhibit to Plaintiff’s Brief).

⁴⁴ Plaintiff’s Br. at 12.

⁴⁵ See *Oxford English Dictionary Online* (2d ed., Oxford University Press 1989) (retrieved July 12, 2008) (attached as Ex. B).

to inform the King when one discovered hidden treasure.⁴⁶ Clearly this offense is irrelevant to the determination of whether Plaintiff has a right to a jury trial on its § 49.49 claim.

Even if common-law fraud or “concealing of treasure-trove” could be considered a counterpart to § 49.49, the fact that the State is seeking civil forfeitures pursuant to its Medical Assistance Fraud claim⁴⁷—a remedy that did not exist “at law” in 1848—is sufficient grounds to deny its demand for a jury trial. Plaintiff cites *County of Columbia v. Bylewski*, a small claims action to collect forfeitures for zoning violations, for the proposition that today, civil forfeitures are considered legal relief, rather than equitable.⁴⁸ Plaintiff misses the point. The issue is not whether a claim would be considered legal or equitable today, but whether it existed “at law” in 1848, and thus whether it would have been afforded the right to a jury trial at the time of the adoption of the Wisconsin Constitution. *Ameritech* specifically rejected the State’s argument in that case that “all statutory forfeiture actions were considered at law and triable to a jury in 1848,” noting

⁴⁶ See SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW (CRIMES AND PUNISHMENTS), art. 342 (1883) (excerpt attached as Ex. C) (defining “Concealing Treasure Trove” as “conceal[ing] from the knowledge of our Lady the Queen the finding of any treasure, that is to say, of any gold or silver in coin, plate or bullion hidden in ancient times, and in which no person can shew any property. It is immaterial whether the offender found such treasure himself or received it from a person who found it, but was ignorant of its nature.”).

⁴⁷ Ascertaining the exact relief Plaintiff is seeking in this case has been elusive. For example, according to the Complaint, Plaintiff seeks damages and forfeitures pursuant to Wis. Stat. § 49.49. However, Plaintiff has in other papers claimed that “*the State is not seeking forfeitures from defendants ... it is seeking injunctive and damage relief from defendants.*” Plaintiff’s Reply Brief in Support of Protective Order Barring Defendants from Requiring Wisconsin to Search Electronic Files for What Defendants Call Government Knowledge Documents at 17 (Nov. 30, 3007) (emphasis added). Similarly, the Plaintiff has at various times claimed to be pursuing an action under § 100.18(11)(b)(2) or not. Compare Plaintiff’s Br. at 3 with Second Amended Complaint at ¶ 86; Plaintiff’s Summary Judgment Reply at 9 (arguing that the Complaint “was [not] filed pursuant to Wis. Stat. § 100.18(11)(b)(2)...”). The specific claims and relief requested appear to change in relation to whether the specific claim or relief advances or detracts from the argument the Plaintiff is advancing at the time.

⁴⁸ *County of Columbia v. Bylewski*, 94 Wis. 2d 153, 162, 288 N.W.2d 129 (1980). Notably, *Bylewski* did not address the issue of a right to a jury trial on a claim for forfeitures, it merely held that a small claims court did not have the authority to issue injunctive relief absent statutory authority. *Id.* at 164-67.

that such an argument was “without merit.”⁴⁹ As the *Ameritech* court held with respect to a forfeiture action under §100.18, the State’s claim for forfeitures under §49.49 is statutorily created, and “there is no dispute that in 1848, the State had no right to commence a civil suit to collect forfeitures”⁵⁰ for submitting false claims for payment from the Medical Assistance program. To grant the State the right to a jury trial on its §49.49 claim for forfeitures would expand the right to a jury trial beyond that which existed in 1848, a right which can only be expanded (but with respect to this claim, was not) by express legislative grant.

CONCLUSION

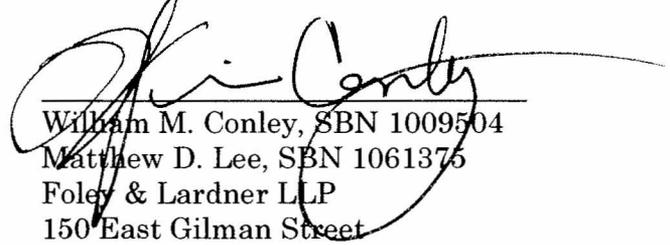
For the foregoing reasons, and for the reasons set forth in Defendants’ Submission in Response to the Court’s Request for Briefing Regarding Plaintiff’s Right to a Jury Trial, filed July 3, 2008, the Court should deny Plaintiff’s demand for a jury trial on all remaining counts of the Second Amended Complaint.

⁴⁹ *Ameritech*, 185 Wis.2d at 695 n.3.

⁵⁰ *Id.* at 696.

July 23, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "William M. Conley", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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EXHIBIT A

A TREATISE
ON
EQUITY JURISPRUDENCE,

AS ADMINISTERED IN

THE UNITED STATES OF AMERICA;

ADAPTED FOR ALL THE STATES,

AND

TO THE UNION OF LEGAL AND EQUITABLE REMEDIES
UNDER THE REFORMED PROCEDURE

By JOHN NORTON POMEROY, LL.D.

FOURTH EDITION

BY

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IN FOUR VOLUMES

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TABLE OF CONTENTS.

CONTENTS OF VOLUME I.

INTRODUCTORY CHAPTER.

SECTION I.

THE ORIGIN OF EQUITY JURISDICTION AND JURISPRUDENCE.

- § 1. Object of this Introduction.
- §§ 2-9. *Æquitas* in the Roman Law.
- §§ 10-42. Origin of Equity in the English Law.
- §§ 10-13. Primitive condition of the law and the courts.
- §§ 14, 15. Early influences of the Roman Law.
- §§ 16-29. Causes which made a court of equity necessary.
- §§ 21-23. The earliest common-law actions and procedure.
 - § 24. Statute of Edward I. concerning new writs.
- §§ 25-29. Limited results of this legislation.
- §§ 30-42. Commencement and progress of the chancery jurisdiction.
 - § 31. Original powers of the King's Council.
 - § 32. Original common-law jurisdiction of the Chancellor.
- §§ 33-35. Jurisdiction of grace transferred to the Chancellor; Statute 24 Edward III.
- §§ 36-39. Development of the equitable jurisdiction.
- § 40. Abolition of the court in England and in many American states.
- §§ 41, 42. Equity jurisdiction in other American states.

SECTION II.

THE NATURE OF EQUITY.

- § 43. Importance of a correct notion of equity.
- §§ 44, 45. Various meanings given to the word.
- §§ 46, 47. True meaning as a department of our jurisprudence.
- §§ 48-54. Theories of the early chancellors concerning equity as both supplying and correcting the common law.
- §§ 55-58. Sources from which the early chancellors took their doctrines; their notions of "conscience" as a ground of their authority.
- §§ 59-61. Equity finally established upon a basis of settled principles.
- § 62. How the equitable jurisdiction is determined at the present day.
- §§ 63-67. Recapitulation: Nature of equity stated in four propositions.

- §§ 201-207. III. The nature, subject-matter, and objects of the discovery itself; of what the plaintiff may compel discovery, and the defendant must make discovery.
- § 201. General doctrine; of what facts discovery will be compelled.
- § 202. Of what kinds of facts discovery will not be compelled.
- § 203. What is privileged from discovery.
- § 204. The manner in which the defendant must make discovery.
- §§ 205-207. Production and inspection of documents.
- § 208. IV. When, how far, and for whom may the answer in the discovery suit be used as evidence.
- § 209. How far the foregoing rules have been altered by statute.
- §§ 210-215. Of the examination of witnesses.
- § 210. This branch of the jurisdiction described.
- §§ 211, 212. I. Suit to perpetuate testimony.
- § 212. Statutory modes substituted.
- §§ 213-215. II. Suits to take the testimony of witnesses *de bene esse*, and of witnesses in a foreign country.
- § 215. Statutory modes substituted.

CHAPTER SECOND.

GENERAL RULES FOR THE GOVERNMENT OF THE JURISDICTION.

SECTION I.

INADEQUACY OF LEGAL REMEDIES.

- § 216. Questions to be examined stated.
- § 217. Inadequacy of legal remedies is the very foundation of the concurrent jurisdiction.
- § 218. Is only the occasion for the rightful exercise of the exclusive jurisdiction.
- § 219. Operation of the principle upon the exclusive jurisdiction; does not affect the first branch, which deals with equitable estates and interests.
- §§ 220, 221. Is confined to the second branch, which deals with equitable remedies.
- § 222. Summary of the equity jurisdiction as affected by the inadequacy of remedies.

SECTION II.

DISCOVERY AS A SOURCE OR OCCASION OF JURISDICTION.

- § 223. General doctrine as to discovery as a source of concurrent and an occasion for exclusive jurisdiction.
- §§ 224, 225. Early English rule.
- § 226. Present English rule.

CHAPTER SECOND.
GENERAL RULES FOR THE GOVERNMENT OF
THE JURISDICTION.

SECTION I.
INADEQUACY OF LEGAL REMEDIES.

ANALYSIS.

- § 216. Questions to be examined stated.
§ 217. Inadequacy of legal remedies is the very foundation of the concurrent jurisdiction.
§ 218. Is only the occasion for the rightful exercise of the exclusive jurisdiction.
§ 219. Operation of the principle upon the exclusive jurisdiction; does not affect the first branch, which deals with equitable estates and interests.
§§ 220, 221. Is confined to the second branch, which deals with equitable remedies.
§ 222. Summary of the equity jurisdiction as affected by the inadequacy of remedies.

§ 216. Questions Stated.—Having thus described the three main divisions into which the equitable jurisdiction of courts clothed with chancery powers is separated, it becomes important to examine with more fullness some of the general rules which govern this jurisdiction, and the courts in its exercise. It is especially important that we should determine with exactness the true operation and effect of the principle, so constantly quoted, and even embodied in statutory legislation, that the equitable jurisdiction can only be resorted to when the legal remedies are insufficient and inadequate.^a How far and under what circumstances is this principle the foundation of the equitable jurisdiction, the essential fact upon which its very existence depends? and how far is it simply a rule—although a funda-

§ 216 (a) See, also, *ante*, §§ 132, 133.

mental rule—regulating and controlling the proper exercise of that jurisdiction? I purpose, in the first place, to give the answer to these questions.

§ 217. **Inadequacy of Legal Remedies the Foundation of the Concurrent Jurisdiction.**—The insufficiency and inadequacy of the legal remedies to meet the requirements of justice under any given state of circumstances, where the primary rights, interests, or estates of the litigant parties to be enforced or maintained are wholly legal, constitute the foundation of the *concurrent* jurisdiction of equity to interfere under those circumstances, they are the essential facts upon which the existence of that jurisdiction depends. Since the primary rights, interests, or estates of the litigant parties are legal, those parties are, of course, entitled to go into a court of law and obtain the remedies which it can furnish. But it is solely because these legal remedies are, under the assumed circumstances, inadequate to do complete justice, by reason of the imperfection of the judicial methods adopted by the law courts, that the courts of equity have also the power to interfere and to award, in pursuance of their own judicial methods, remedies which are of the same general kind as those granted by the courts of law to the same litigant parties under the same circumstances. This is the essential element of the concurrent jurisdiction; its very existence thus depends upon the inadequacy of the legal remedies given to the litigant parties, under the same circumstances upon which the equity tribunal bases its adjudication. This proposition has been sufficiently explained in the preceding sections.^a

§ 218. **Is the Occasion Only of the Exclusive Jurisdiction.** There is, however, a radical difference between the *operation* of this inadequacy of legal remedies upon the concurrent equitable jurisdiction and upon the exclusive jurisdiction, although the direct results of the operation in both cases may be apparently the same; and it is the

§ 217, (a) See §§ 139, 173, 176, 180.

neglect to observe this distinction which has tended more than anything else to involve the whole subject in confusion. The exclusive equitable jurisdiction, or the power of the courts to adjudicate upon the subject-matters coming within that jurisdiction, *exists* independently of the adequacy or inadequacy of the legal remedies obtainable under the circumstances of any particular case. It exists, as has been shown in a preceding section, from one or the other of two facts: either, *first*, because the primary rights, interests, or estates of the complaining party, which are to be enforced or protected, are equitable in their nature, and are therefore not recognized by the law so as to be cognizable in the law court; or *second*, because the remedies asked by the complaining party are such as are administered alone by courts of equity, and are therefore beyond the competency of the courts of law to grant. Whenever either of these two facts is involved in the circumstances of a judicial controversy, the jurisdiction of equity over the subject-matter of such controversy is, and from the nature of the case must be, *exclusive*. But because the equitable jurisdiction in certain kinds of circumstances is exclusive, it does not follow that the jurisdiction can be *properly exercised* in every individual case involving or depending upon such circumstances. The power of a tribunal to adjudicate upon a class of facts to which a certain individual case belongs is not identical with the due and proper *exercise* of that power, according to the established rules of jurisprudence, by a judgment maintaining the alleged right and conferring the demanded remedy. This proposition is self-evident, is a mere commonplace truism; and yet it has been ignored in much that has been said concerning the equitable jurisdiction. The distinction thus stated clearly shows the manner in which the inadequacy of legal remedies under a given condition of circumstances operates upon and affects the *exclusive* equitable jurisdiction. Such inadequacy simply furnishes the *occasion* upon which much of the exclusive jurisdiction may properly be resorted to; it is the

rule, in many instances, for the proper use of the exclusive jurisdiction in accordance with the settled doctrines of equity jurisprudence; that jurisdiction can only be duly and regularly exercised, in many instances, by an affirmative adjudication upon the alleged rights and an award of equitable remedies, when the legal remedies obtainable under the same facts are inadequate to promote the ends of justice.^{1a}

§ 219. **Operation of the Principle upon the Exclusive Jurisdiction.**—The foregoing statement is so general and vague as to be of little practical benefit; it is necessary, therefore, to define the principle more exactly, and to ascertain, if possible, what portions of the exclusive jurisdiction thus depend for their due and proper exercise upon the inadequacy of legal remedies and the insufficiency of legal methods. The exclusive jurisdiction consists, as has been shown, of two distinct branches, namely: 1. Where the primary rights, interests, or estates of the complaining parties are wholly equitable; and 2. Where the primary rights, interests, or estates are legal, but the remedies sought and obtained are wholly equitable. The principle that the inadequacy of legal remedies furnishes the occasion for a resort to the equitable jurisdiction and the rule for its proper exercise does not extend to the first branch or division of the exclusive jurisdiction. The exercise of the power, in cases belonging to this first branch, to adjudicate upon, maintain, enforce, or protect purely equitable primary rights, interests, or estates does not at all depend upon any insufficiency or inadequacy of legal methods and remedies, but solely upon the fact that these primary rights, interests, or estates are wholly equitable, are not recognized by the law nor cognizable by the courts of law,

§ 218, 1 *Earl of Oxford's Case*, 1 Ch. Rep. 1, 2 *Lead. Cas. Eq.* 1291; *Southampton Dock Co. v. Southampton, etc., Board*, L. R. 11 *Eq.* 254; *Rathbone v. Warren*, 10 *Johns.* 587; *King v. Baldwin*, 2 *Johns. Ch.* 554.

§ 218 (a) See, also, *ante*, §§ 137, 138, 139, note, 173.

and there is therefore no other mode of maintaining and enforcing them except by the courts of equity. Wherever the complaining party has purely equitable primary rights, interests, or estates according to the doctrines and principles of the equity jurisprudence, courts having equitable powers do and must exercise their exclusive jurisdiction over the case, entirely irrespective of the adequacy or inadequacy of legal remedies, for the plain and sufficient reason that the litigant party cannot possibly obtain any legal remedies under the circumstances; the courts of law do not recognize his rights, and cannot adjudicate upon nor protect his interests and estates. One or two examples will illustrate the correctness and the generality of this statement. In the case of a trust created in lands, the estate of the *cestui que trust* is purely an equitable one, of which law courts refuse to take cognizance. He is therefore always entitled to the aid of a court of equity in establishing, maintaining, and enforcing his estate according to the nature of the trust and the doctrines of equity jurisprudence which regulate it, and to obtain such remedies as the circumstances may require; and the question never is asked, nor could be asked, whether the remedies given him by a court of law are or are not adequate, since all legal remedies are to him impossible.¹ Again, in case of an equitable assignment,—as, for example, the equitable assignment of a particular fund or a portion thereof by means of an unaccepted order on the depository,—the interest of the assignee in the fund is a purely equitable ownership, and he is always entitled to maintain an action in a court

§ 219, 1 It will be understood, of course, that I am speaking of the equity jurisdiction, unaffected by any particular statutes. There may be legislation in the various states similar to the statute of Georgia already referred to [§ 137, note], which permits the holder of a "complete equity" in land, e. g., the vendee under a land contract who has paid the purchase price, to maintain the legal action of ejectment, in order to recover possession of the land.

§ 219, (a) The text is cited, to this effect, in *Warren v Warren*, 75 N. J. Eq. 415, 72 Atl. 960.

of equity, although the actual relief which he obtains is legal in its nature, being simply a recovery of money. The proper exercise of the equitable jurisdiction under such circumstances cannot depend upon any inadequacy of legal remedies, since a court of law would not acknowledge any right or interest of the assignee.² A well-settled doctrine concerning the interference with actions at law by injunction furnishes a further illustration. If the defendant in an action at law has an equitable interest or estate in the property, or an equitable right in the subject-matter, which, according to the established rules of equity jurisprudence, should prevent a recovery against him, but which, being purely equitable, cannot be set up as a defense in the proceeding before a court of law, he can invoke the exclusive jurisdiction of a court of equity, without regard to any legal defenses which he may have, and can procure the action at law to be restrained, and his own equitable interest to be established and enforced by means of appropriate equitable reliefs, because such equitable interest is not recognized by the law nor cognizable by the legal tribunals.³

§ 219, 2 *Rodick v. Gandell*, 1 De Gex, M. & G. 763; *Ex parte Imbert*, 1 De Gex & J. 152; *Mandeville v. Welch*, 5 Wheat. 277, 286; *Gibson v. Finley*, 4 Md. Ch. 75; *Wheatley v. Strobe*, 12 Cal. 92, 98, 73 Am. Dec. 522; *Shaver v. West. U. T. Co.*, 57 N. Y. 459, 464; and see cases cited *ante*, under § 169.

§ 219, 3 *Earl of Oxford's Case*, 1 Ch. Rep. 1, 2 Lead. Cns. Eq. 1291; *Pyke v. Northwood*, 1 Beav. 152; *Newlands v. Paynter*, 4 Mylne & C. 408; *Langton v. Horton*, 3 Beav. 464, 1 Hare, 549; *East India Co. v. Vincent*, 2 Atk. 83; *Stiles v. Cowper*, 3 Atk. 692; *Jackson v. Cator*, 5 Ves. 688; *Pilling v. Armitage*, 12 Ves. 85; *Young v. Reynolds*, 4 Md. 375; *Ross v. Harper*, 99 Mass. 175; *Fanning v. Dunham*, 5 Johns. Ch. 122, 9 Am. Dec. 283; *Edwards v. Varick*, 1 Hoff. Ch. 382, 11 Paige, 290, 5 Denio, 664, 679; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Miller v. Gaskins*, 1 Smedes & M. Ch. 524; *Smith v. Walker*, 8 Smedes & M. 131; *Wilson v. Leigh*, 4 Ired. Eq. 97; *Rees v. Berrington*, 2 Ves. 540; *Williams v. Price*, 1 Sim. & St. 581; *Capel v. Butler*, 2 Sim. & St. 457; *Hayes v. Ward*, 4 Johns. Ch. 123, 8 Am. Dec. 554; *Viele v. Hoag*, 24 Vt. 46; *Gallagher v. Roberts*, 1 Wash. C. C. 156, 328; *Boardman v. Florez*, 37 Mo. 559.

Such illustrations might be indefinitely multiplied. They are, however, sufficient to show that, so far as the exclusive jurisdiction of equity is concerned with equitable estates, interests, and primary rights alone of the complaining party, and therefore belongs to the first branch, its exercise does not depend upon any consideration of the adequacy or inadequacy of legal remedies, but depends upon and is controlled by the doctrines and rules of the equity jurisprudence. Such jurisdiction both exists and is exercised because the equitable estates, interests, or rights of the litigant party exist, and can be established, protected, and enforced by no other judicial means and instrumentalities.

§ 220. It is otherwise with the second branch of the exclusive jurisdiction, as above described, where the primary rights, interests, or estates of the complaining party are legal in their nature, but the remedies sought by him are entirely equitable. Where a person has a legal primary right, he is not always, and as a matter of course, entitled to go into a court of equity, set its jurisdiction in motion, and obtain the equitable remedies appropriate to maintain or protect his right. Since his estates, interests, or primary rights are legal, he can always, in case of their infringement or violation, demand and recover the legal remedies which are conferred by courts of law under the circumstances. Whether he may also demand and recover the proper equitable remedies depends upon other considerations. Although the jurisdiction of courts of equity to grant these equitable remedies in all such cases is *exclusive*, because courts of law (except as authorized by modern statutes) have no power to grant them, yet the courts of equity will not, in every instance, exercise their jurisdiction. The proper exercise of the jurisdiction in every case of this kind—but not the jurisdiction itself—depends upon the question whether the legal remedies which the party can obtain from courts of law upon the

same facts and circumstances are inadequate to meet the ends of justice,—insufficient to confer upon him all the relief to which he is justly entitled. If the legal remedies administered by the judicial machinery and methods adopted in the law courts *are* fully adequate to establish, protect, and enforce the party's legal estates, interests, and rights, a court of equity will not interfere in his behalf with the purely remedial branch of its exclusive jurisdiction; if the legal remedies, either from their own essential nature or from the imperfection of the legal procedure, are inadequate, then a court of equity will interpose, and do complete justice by granting the appropriate equitable remedies which it alone is competent to confer.* Examples taken from the decided cases in which the various kinds of equitable remedies have been decreed would clearly show that the *dicta* of judges and the rules laid down by courts concerning the general dependence of the equitable jurisdiction upon the inadequacy of legal remedies, however conflicting they may *appear* to be, are all embraced within and rendered harmonious and consistent by the foregoing principle; they all become particular applications and illustrations of this principle.¹ A few such instances must suffice for explanation.

§ 220, ¹ I do not mean that in their *dicta* and statements of rules concerning the equitable jurisdiction, the judges have always consciously recognized this principle, and have expressly drawn the distinction formulated in the text, viz., that while the inadequacy of legal remedies is the fact upon which the *concurrent* jurisdiction *exists*, it simply furnishes the occasion and rule for the *exercise* of the exclusive jurisdiction, and furthermore, that the application of this latter doctrine, by which the actual exercise of the exclusive jurisdiction is made to depend upon the inadequacy of legal remedies, is confined to one branch alone of that jurisdiction, the branch which is concerned with the granting of purely equitable remedies in cases where the primary rights of the complaining party are legal,

§ 220, (a) The text is quoted in (quieting title); and cited in *Bankers' Reserve Life Co. v. Omberson*, *Brady v. Carteret Realty Co.*, 70 *N. J. Eq.* 749, 118 *Am. St. Rep.* 778, 123 *Minn.* 285, 48 *L. R. A. (N. S.)* 866, 64 *Atl.* 1078 265, 143 *N. W.* 735.

§ 221.^a The well-settled rules concerning the restraint of actions at law by means of injunction furnish a great variety of examples. When the defendant in an action at law has some equitable interest or right which, being established according to the doctrines of equity jurisprudence, would prevent the recovery at law against him, then a court of equity will, as a matter of course, take cognizance of the matter, entertain a suit on his behalf, and enjoin the action at law, in order that it may, by the proper equitable remedies, maintain, protect, or enforce the equitable right held by such party.¹ But, on the other hand, when the right or interest on which the defendant in the action at law relies is legal in its nature, so that it may be set up by way of defense in such action, and may be adjudicated upon by the court of law, and the defendant is prevented or hindered from thus presenting or availing himself of his legal defense by means of some collateral or extrinsic matter, such as fraud, duress, mistake, ignorance, negligence, and the like, or the defense itself, although legal, involves some matter of equitable cognizance, such as fraud, mistake, or accident,—whether a court of equity will then interpose in aid of the party, will take cognizance of the controversy, and enjoin the action at law, in order that the legal right of the defendant therein may be rendered effective so as to prevent a recovery against him, always depends upon the question whether the legal remedies which the litigant party, under the circumstances of the case, has obtained from the court of law, or might have

and does not extend to the other branch, which deals with cases where the primary rights of the party are wholly equitable. But I claim that the principle formulated and distinctions thus stated in the text are implicitly and necessarily contained in and established by the judicial *dicta* and rules, and produce an orderly and consistent system out of materials which, on the surface, appear to be unarranged and conflicting.

§ 221, ¹ See *ante*, § 219.

§ 221, (a) This paragraph of the text is cited in *Bankers' Reserve Life Co. v. Omberson*, 123 Minn. 285, 48 L. E. A. (N. S.) 265, 143 N. W. 735.

obtained by the use of due diligence, are inadequate to attain the ends of justice; in other words, whether the refusal of a court of equity to interpose would, from the insufficiency of the legal relief, or the imperfection of the legal procedure, work a substantial injustice to the litigant party under all the facts of this case.² In both these classes of cases the equitable jurisdiction is exclusive, since a court of equity alone has power to grant the remedy of injunction; in the first, the jurisdiction is always exercised as a matter of right, in the second, its exercise is supplementary to the judicial methods existing at the law, and is called into operation only when those methods fail to give complete relief.³ Additional examples may be found in the established rules concerning the use of the injunction. The jurisdiction to restrain torts to property, real or personal, nuisances, trespasses, and the like, by injunction, is exclusive, although the estate of the complaining party which is interfered with, and which he seeks to protect, is legal, and he is entitled to the legal remedy of compensatory damages, yet the preventive remedy which he demands for the protection of his property is wholly equitable, and can only be administered by courts of equity.

§ 221, ² *Earl of Oxford's Case*, 1 Ch. Rep. 1, 2 Lead. Cas. Eq. 1291; *Harrison v. Nettleship*, 2 Mylne & K. 423; *Hardinge v. Webster*, 1 Drew. & S. 101; *Simpson v. Lord Howden*, 3 Mylne & C. 108, per Lord Cottenham; *Curtess v. Smalridge*, 1 Eq. Cas. Abr. 377, pl. 1; *Stephenson v. Wilson*, 2 Vern. 325; *Blackhall v. Combs*, 2 P. Wms. 70; *Protheroe v. Forman*, 2 Swanst. 227, 233; *Holworthy v. Mortlock*, 1 Cox, 141; *Stevens v. Praed*, 2 Ves. Jr. 519; *Ware v. Horwood*, 14 Ves. 31; *Holmes v. Stateler*, 57 Ill. 209; *Foster v. Wood*, 6 Johns. Ch. 89; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Hendrickson v. Hinckley*, 17 How. 445; *Danaher v. Prentiss*, 22 Wis. 311; *Forsythe v. McCreight*, 10 Rich. Eq. 308; *Wilsey v. Maynard*, 21 Iowa, 107; *Day v. Cummings*, 19 Vt. 496; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Harrison v. Davenport*, 2 Barb. Ch. 77; *Perrine v. Striker*, 7 Paige, 598; *Powell v. Watson*, 6 Ired. Eq. 94; *Hood v. N. R. R. Co.*, 23 Conn. 609; *Clapp v. Ely*, 10 N. J. Eq. 173.

§ 221, ³ It is for this reason that some writers have classified all cases in which the exercise of the jurisdiction depends upon the inadequacy of legal remedies under the head of the "concurrent" jurisdiction.

The general doctrine is well established that this exclusive jurisdiction will not be exercised in any case for the purpose of enjoining trespasses and other tortious acts to property, at the suit of one having the legal estate, unless the legal remedy—compensatory damages—is inadequate, under the circumstance of the case, to confer complete relief upon the injured party.⁴ Another illustration may be found in the doctrines concerning the remedy of specific performance of contracts. The jurisdiction to enforce performance of contracts specifically is exclusive, for the remedy itself is most distinctively equitable and completely beyond the judicial methods of the law courts; yet the complaining party has a *legal* primary right created by the contract, and upon its violation is *always* entitled to the relief afforded by an action at law,—compensatory damages,—even though such damages are only nominal. The doctrine is fundamental that this jurisdiction will be called into operation, and the specific performance will be decreed only in those classes of cases in which, according to the views taken by the equity court, the legal remedy of compensatory damages is, from its essential nature, insufficient, and fails to do complete justice between

§ 221, ⁴ Garth v. Cotton, 1 Ves. Sr. 524, 546, 1 Dick. 183, 3 Atk. 751, 1 Lead. Cas. Eq. 955, 987-1027; Jesus College v. Bloome, 3 Atk. 262, Amb. 54; Van Winkle v. Curtis, 3 N. J. Eq. 423; Weigel v. Walsh, 45 Mo. 560; Musselman v. Marquis, 1 Bush, 463, 89 Am. Dec. 637; Hicks v. Compton, 18 Cal. 206; Gause v. Perkins, 3 Jones Eq. 177, 69 Am. Dec. 728; Livingston v. Livingston, 6 Johns. Ch. 497, 499, 500, 10 Am. Dec. 353, and cases cited; Hawley v. Clowes, 2 Johns. Ch. 122; De Veney v. Gallagher, 20 N. J. Eq. 33; Coe v. Lake Mfg. Co., 37 N. H. 254, and cases cited; Burnham v. Kempton, 44 N. H. 78; Gallagher v. Fayette Co. R. R., 38 Pa. St. 102; Johnson v. Conn. Bank, 21 Conn. 143, 157; Hardesty v. Taft, 23 Md. 512, 530, 87 Am. Dec. 584; Mechanics' and Traders' Bank v. De Bolt, 1 Ohio St. 591; Eastman v. Amoskeag Mfg. Co., 47 N. H. 71, 78; Watson v. Sutherland, 5 Wall. 74, 78; Parker v. Winnipiseogee Co., 2 Black, 545, 550, and cases cited; Creely v. Bay State Brick Co., 103 Mass. 514; Morgun v. Palmer, 48 N. H. 336; Jenks v. Williams, 115 Mass. 217; Walker v. Zorn, 50 Ga. 370; Ziegler v. Bensley, 44 Ga. 56.

the litigant parties.⁵ It is true that in applying this doctrine the courts of equity have established the further rule that in general the legal remedy of damages is inadequate in all agreements for the sale or letting of land, or of any estate therein; and therefore in such class of contracts the jurisdiction is always exercised, and a specific performance granted, unless prevented by other and independent equitable considerations which directly affect the remedial right of the complaining party; but this result does not interfere with nor modify the principle which is under discussion.^{6 b} Another illustration may be drawn from

§ 221, 5 Pomeroy on Specific Performance of Contracts, §§ 9-27.

§ 221, 6 Various and sometimes very insufficient reasons have been given by judges for the foregoing rule, that the legal remedy is always to be regarded as *inadequate* in contracts relating to real estate, while on the other hand it is generally to be regarded as *adequate* in contracts relating to personal property. The distinction stated in the text, and which I am illustrating, may perhaps furnish a complete explanation. In an agreement for the sale of land, the vendee, in addition to his legal primary right, also obtains, in pursuance of the equitable doctrine of conversion, an equitable *estate* in the land,—an estate which equity regards as the real beneficial ownership, burdened simply or encumbered with the lien of the unpaid purchase price. Being thus the holder of the equitable estate in the subject-matter, the equitable owner of the land, he is, according to the doctrine stated in the text, entitled as a matter of course to the aid of a court of equity in protecting such estate and in clothing him with the legal title by means of a conveyance from the vendor. The exercise of the jurisdiction does not then depend, as it does when the jurisdiction is *merely* to confer equitable relief, upon the inadequacy of the legal remedy, but is rather a matter of equitable right in the vendee. The same rule is applied in cases of similar contracts to the vendor, partly because he acquires an equitable ownership of the purchase price, and partly because of the doctrine of mutuality. In the contracts relating to personal property, the equitable principle of conversion is not applied with the same strictness and with all the consequences as in contracts

§ 221, (b) The text is quoted in Maryland Clay Co. v. Simpers, 96 Md. 1, 53 Atl. 424, and cited in Christiansen v. Aldrich (Mont.), 76 Pac. 1007; and in Telephone Corp. v. Canadian Telephone Co., 103 Me. 444, 69 Atl. 767. Note 6 is cited in Matthes v. Wier (Del.), 84 Atl. 878.

the doctrines concerning the cancellation or surrender of written instruments on the ground of some actual fraud either in their original execution or in their subsequent use. Such remedy is entirely equitable; but when the injured party has a legal estate in the subject-matter or a legal primary right, he may set up the actual fraud as a defense in an action at law, if his legal title is thereby attacked, or a recovery is thereby sought against him on the instrument. Whether, under these circumstances, and at the suit of a party holding a legal interest or a legal primary right, the exclusive jurisdiction will be exercised for the purpose of protecting his estate or maintaining his right, by decreeing a cancellation or a surrender of the instrument thus affected by fraud, depends upon the question whether the legal remedies, either affirmative or defensive, open to the party, are inadequate to promote the ends of justice, and to afford him complete relief.^{7 a} In the

relating to real estate. The further rule, that the granting a specific performance in all cases depends upon certain equitable grounds affecting the remedial right of the plaintiff, or, to use the common but misleading expression, that it depends upon the judicial discretion of the court, plainly does not interfere with this view. See Pomeroy on Specific Performance of Contracts, §§ 35-43.

§ 221, 7 *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Bushnell v. Hartford*, 4 Johns. 301; *Dale v. Roosevelt*, 5 Johns. 174; *Mitler v. Mitler*, 18 N. J. Eq. 270, 19 N. J. Eq. 257, 457; *Town of Glastonbury v. McDonald*, 44 Vt. 453; *Bissell v. Beckwith*, 33 Conn. 357; *Hall v. Whiston*, 5 Allen, 126; *Martin v. Graves*, 5 Allen, 601; *Sherman v. Fitch*, 98 Mass. 59; *Ferguson v. Fisk*, 28 Conn. 501; *McHenry v. Hazard*, 45 N. Y. 580. In *Hamilton v. Cummings*, 1 Johns. Ch. 517, Chancellor Kent stated the rule concerning the exercise of the jurisdiction as follows: "Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual cases may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defense, not arising upon its face, may be difficult or uncertain at law, or from some other

§ 221, (c) The text is cited to this effect in *Druon v. Sullivan*, 68 Vt. 609, 30 Atl. 93; *Andrews v. Frier-son*, 134 Ala. 626, 33 South. 6; *Mosier v. Walter*, 17 Okl. 305, 87 Pac. 877.

same manner, where a bill of exchange, promissory note, or other negotiable security has been obtained by fraud, conversion, or other like manner which would create a valid defense at law as between the original parties, the acceptor, maker, or other party apparently liable on the instrument may invoke this jurisdiction of equity, before the maturity of the paper, against the holder, and procure an injunction restraining him from making any transfer to a *bona fide* purchaser, and even the final relief of a cancellation or surrender; because in such a case, if the present unlawful holder, although the legal defense to an action by him would be perfect, should transfer the security to a *bona fide* purchaser, such legal defense would be cut off, and the injured party would be without adequate and complete remedy in a court of law.^d This doctrine extends, under similar circumstances, to the transfer of lands, goods, and things in action to a *bona fide* purchaser, where the rights and equities of the original grantor, vendor, or owner would be cut off, and he would be deprived of com-

special circumstances peculiar to the case, and rendering a resort to chancery proper and clear of all suspicion of any design to promote expense and litigation." I would remark that the statement in this extract that the exercise of the jurisdiction is a matter of "*discretion*" in the court, which was a favorite mode of expression among some equity judges of a former day, is very misleading, no matter how much the word is guarded by adding "sound" or "judicial." No part of the regular jurisdiction of equity can depend upon the "*discretion*" of the judge, if the word is used in any signification properly belonging to it. In *Martin v. Graves*, 5 Allen, 601, the court thus stated the general rule: "Whenever a deed or other instrument exists, which may be vexatiously or injuriously used against a party after the evidence to impeach or invalidate it is lost, or which may throw a cloud of suspicion over his title or interest, and he cannot immediately protect or maintain his right by any course of proceedings at law, a court of equity will afford relief by directing the instrument to be delivered up and canceled, or by making any other decree which justice and the rights of the parties may require."

§ 221, (d) The text is cited in 98 (cancellation of negotiable instruments not generally granted when applied for *after* their maturity),
Louisville, N. A. & C. R. R. Co. v. Ohio Val. I. & C. Co., 57 Fed. 42, 45;
Druon v. Sullivan, 66 Vt. 609, 30 Atl.

plete relief at law, as against the *bona fide* transferee.⁸ Similar illustrations might be taken from the settled rules concerning the use of the exclusive jurisdiction to grant the remedies of reformation, re-execution, interpleader, and other strictly equitable remedies, in order to maintain, protect, and enforce estates, interests, and primary rights of the complaining party, which are legal in their nature; but the foregoing examples are sufficient to explain the distinction, and to show the generality of the principles stated in the preceding paragraph.

§ 222. Summary of the Jurisdiction as Affected by the Principle.—The principle which has been thus explained in the preceding paragraphs of this chapter, and which is not a mere speculative theory, but is fully sustained by settled rules taken from every part of the equity jurisprudence, presents the entire equitable jurisdiction in the form of a simple, well-defined, and consistent system, the result of a few plain and harmonious rules. Laying out of view for the present that special branch of equity which is called the “auxiliary jurisdiction,” and which has become obsolete except in a few of our American states, the administration of the equitable jurisdiction, and the resulting doctrines which make up the equity jurisprudence, may be separated, according to a natural order, into four distinct classes, namely: 1. Where the primary right or interest of the complaining party which has been invaded is purely equitable,—one which the doctrines of equity jurisprudence alone create and recognize,—and his remedial right and the remedies which he obtains are also wholly equitable; for example, where an equitable owner of land, under the

§ 221, 8 *Hamilton v. Cummings*, 1 Johns. Ch. 517; *DeLafield v. Illinois*, 26 Wend. 192; *Van Doren v. Mayor of New York*, 9 Paige, 389; *Cox v. Clift*, 2 N. Y. 118; *Town of Glastonbury v. McDonald*, 44 Vt. 453; *Bank of Bellows Falls v. Rutland, etc., R. R. Co.*, 28 Vt. 470; *Franklin v. Green*, 2 Allen, 520; *Sherman v. Fitch*, 98 Mass. 59; *Poor v. Carleton*, 3 Sum. 70; *Ferguson v. Fisk*, 28 Conn. 501; *Mitler v. Mitler*, 18 N. J. Eq. 270, 19 N. J. Eq. 257; *Peirsoll v. Elliott*, 6 Pet. 95.

doctrines of trust or of conversion, procures the declarative relief establishing his estate, and the relief of specific performance by means of a conveyance of the legal title. 2. Where the primary right or interest of the complaining party is in like manner equitable, and the remedies which he asks and receives are legal; that is, are of the same kind as those conferred by courts of law; for example, where the equitable owner of a fund, through an equitable assignment, establishes his ownership and recovers the fund by a final judgment which is simply pecuniary. 3. Where the primary right or interest of the complaining party is legal,—one which is created by the law, and cognizable by the law courts,—and his remedial right, and the remedies which he procures, are entirely equitable; for example, where the legal owner of property obtains protection to his possession or enjoyment by means of injunction against tortious acts, or against wrongful proceedings at law, or protects his title from disturbance, or himself from wrongful demands, by means of the remedy of cancellation, and the like. 4. Where the primary right or interest of the complaining party is legal, recognized and maintainable by the law courts, and the remedies which he obtains are also legal,—of the same kind as those administered and conferred by the courts of law,—recoveries of money, or of specific lands or chattels; for example, where a surety sues his principal, under his right of exoneration, to recover back the money paid out on behalf of such principal, or sues his co-surety to recover money, under his right of contribution; or where an owner in common of land by a legal estate therein recovers his own specific portion by a partition, and the like. All possible cases of equity may be referred to one or the other of these four divisions. The first three belong to the “exclusive” jurisdiction; the fourth constitutes the “concurrent” jurisdiction. Furthermore, in the first and second, the jurisdiction is not only exclusive, but is exercised as a matter of right in behalf of the complaining

party whenever he has an equitable estate, interest, or primary right, according to the doctrines of equity jurisprudence. In the third division, although the jurisdiction always exists and is exclusive, it is not exercised on behalf of the complaining party as a matter of right in him; its proper exercise depends upon the inadequacy of the legal remedies which he might obtain to do him complete justice. Finally, in the fourth division, the very existence as well as the exercise of the jurisdiction, being concurrent, depends upon the inadequacy of the remedies which the party could obtain from a court of law, owing partly to the form of those remedies themselves, and partly to the imperfection of the legal mode of procedure.

SECTION II.

DISCOVERY AS A SOURCE OR OCCASION OF JURISDICTION.

ANALYSIS.

- § 223. General doctrine as to discovery as a source of concurrent and an occasion for exclusive jurisdiction.
- §§ 224, 225. Early English rule.
- § 226. Present English rule.
- §§ 227-229. Broad rule established in some American states.
- § 229. The limitations of this rule.
- § 230. The true extent and meaning of this rule examined.

§ 223. **General Doctrine.**^a—It has already been shown that, under the general jurisdiction of equity, a suit of discovery alone without relief might be maintained in order to procure admissions from the defendant to be used on

§ 223, (a) This and the following sections are cited in *Yates v. Stuart's Adm'r*, 39 W. Va. 124, 19 S. E. 423; *Collier v. Collier* (N. J. Eq.), 33 Atl. 193; *In Re Beckwith*, 203 Fed. 45, 121 C. C. A. 381; *Griese v. Mutual Life Ins. Co.*, 169 Fed. 509, 94 C. C. A. 635, reversing 156 Fed. 398.

This paragraph is cited in *Nixon v. Clear Creek Lumber Co.*, 150 Ala. 602, 9 L. E. A. (N. S.) 1255, 43 South. 805; *Daab v. New York C. & H. E. R. Co.*, 70 N. J. Eq. 489, 62 Atl. 449 (*Stevenson*, V. C.); *State v. Chicago & N. W. R. Co.*, 132 Wis. 345, 112 N. W. 515.

EXHIBIT B

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treasure-trove

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(ˈtreɪzəˈtrəʊv, ˈtreɪzəˌtrəʊv) [Orig. two words, in AF. *tresor trové* = L. *thesaurus inventus*, in 15th c. rendered in Eng. *tresoure founden, founde, found*; in 16th c. with the Fr. form anglicized *treasure trovey, trove, trouve*.]

lit. *treasure found* (see *b*), i.e. anything of the nature of treasure which any one finds; *spec.* in *English Law*: Treasure (gold or silver, money, plate, or bullion) found hidden in the ground or other place, the owner of which is unknown.

In original use a merely descriptive phrase, of general application. But from an early period a distinction arose; treasure which had been lost (and not claimed), or voluntarily abandoned (of which the amount was naturally small and inconsiderable) was allowed to be kept by the first finder; while that which had been (certainly or presumably) hidden, was claimed by the Crown. This practically included all ancient treasure, and to this the name *treasure trove* was specifically restricted. To encourage the giving up of such treasure, when found, and to prevent the destruction of valuable antiquities, the Crown may award things found or their value to the finder. (For full discussion, see Wm. Martin in *Law Quart. Rev.* (1904) XX. 27.)

[**a1190** *GLANVILL De Leg. et Consuet. Angl.* XIV. ii, Placitum de occultatione inventi thesauri fraudulosa. **1292** *BRITTON* I. ii. §18 Et ausi apent a lour office de enquire de viel tresor trové en terre. **1348** *Year-bk. 22 Edw. III, Easter* in *Statham Abridgement* (? 1491) hij, Thesaurum inuentum competit domino meo regi et non domino libertatis. *Ibid.*, *Mich.* hijb, Punysshement pur tresoure troue pris et emporte de werk de meere. **1443-4** *Year-bk. 22 Hen. VI, Mich.* (*ibid.* gvij), Cestuy a qui le proprete est auera tresoure troue. **1527** *RASTELL Expos. Terminorum*, *Tresour troue* est quant ascun money ou argent plate ou bolion est troue ascun leu et nul conust a quele proprete est, doncques le proprete de ceo apperteynt al roy et ceo est dit tresour troue [see 1567 below].]

1550 *Acts Privy Counc.* N.S. (1891) III. 14 To go with certain persons that have offred to finde treasure trovey. **1567** *Expos. Terms Law* (1579) 180b/2 Treasure founde is when any money, gold, or siluer, plate, or bolion, is found in any place, & no man knoweth to whom the property is, then the property thereof belongeth to the queene, and that is called

treasure troue, that is to say treasure found. **1572** WOGAN in T. Wright *Q. Eliz. & Times* (1838) I. 442 One of the parties charged with the saide threasure trove. **1591** SYLVESTER *Du Bartas* I. v. 737 As wroth, that men upon his right should rove, Or theevish hands usurp his Treasar-trove. **c1634** COKE *Inst.* III. 132. **1765** BLACKSTONE *Comm.* I. viii. 295. **1776** ADAM SMITH *W.N.* II. i. (1869) I. 282 Treasure-trove was in those times considered as no contemptible part of the revenue of the greatest sovereigns in Europe. **1904** W. MARTIN in *Law Q. Rev.* XX. 32 From the present-day point of view..we may say that if the discovered treasure has not been hidden..it is not specifically treasure trove.

attrib. **1868** G. STEPHENS *Runic Mon.* II. 515 They have been continually sent to the melting-pot, thanks to the old Treasure-trove law.

fig. **c1700** PRIOR *Dial. Dead Poems* (1907) 227 Substances, Identity, Diversity, and fifty other glorious Tresor-troves, to which you [Locke], the Master of the Soil, have the only right and Property. **1864** TENNYSON *Aylmer's F.* 515 There the manorial lord too curiously Raking in that millennial touchwood-dust Found for himself a bitter treasure-trove.

†b. Rendered **treasure found**. *Obs.*

1467-8 *Rolls of Parlt.* V. 583/1 Deodandes, Tresoure founden, and also all maner Goodes, Catelles and forfeitures. **1482** *Ibid.* VI. 205/1 Wrekke of the See, Tresour founde, and all such Issues, Fynes and amerciamentes. **1567** [see above]. **1651** G. W. tr. *Cowel's Inst.* 66 There is a propriety gained by finding, as in case of Treasure found,..by Treasure we mean an ancient hoarding of Money or other Mettall. **1670** BLOUNT *Law Dict.* s.v. *Treasure-trove*, The punishment for concealing Treasure found is imprisonment and fine. [**1887 Act 50 & 51 Vict.** c. 71 §36 A coroner shall continue as heretofore to have jurisdiction to inquire of treasure that is found, who were the finders, and who is suspected thereof.]

EXHIBIT C

A DIGEST
OF THE
CRIMINAL LAW

(CRIMES AND PUNISHMENTS).

BY
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CONTENTS.

PART	PAGE
I. PRELIMINARY	1
II. OFFENCES AGAINST PUBLIC ORDER—INTERNAL AND EXTERNAL	40
III. ABUSES AND OBSTRUCTIONS OF PUBLIC AUTHORITY	82
IV. ACTS INJURIOUS TO THE PUBLIC IN GENERAL	106
V. OFFENCES AGAINST THE PERSON, THE CONJUGAL AND PARENTAL RIGHTS, AND THE REPUTATION OF INDIVIDUALS	133
VI. OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS	209

PART I.

PRELIMINARY.

EXPLANATION OF TERMS	1
--------------------------------	---

CHAPTER I.

OF PUNISHMENTS.

ART.	PAGE
1. Punishments	4
2. Punishment of Death	4
3. Punishment of Penal Servitude	4
4. Punishment of Imprisonment	5
5. Imprisonment to be separate	5
6. Hard Labour	5
7. Employment of Prisoners not sentenced to Hard Labour	7
8. Solitary Confinement	7
9. Imprisonment as a Misdemeanor of the First Division	7
10. Detention in a Reformatory	8
11. Subjection to Police Supervision	8

ART.	PAGE
325. Thefts punishable with Penal Servitude for Fourteen Years	254
326. Thefts punishable with Penal Servitude for Seven Years	256
327. Thefts punishable with Penal Servitude for Five Years	256
327A. Theft punishable with Two Years Imprisonment	258
328. Sundry Offences resembling Theft—Punished by various Terms of Imprisonment, &c.	259

CHAPTER XL.

OBTAINING PROPERTY BY FALSE PRETENCES AND
OTHER CRIMINAL FRAUDS AND DEALINGS WITH
PROPERTY.

329. Obtaining Goods, &c., by False Pretences	264
330. Definition of "False Pretence"	265
331. Of "Obtaining"	267
332. Intent to defraud	269
333. Cheating at Play	269
334. Obtaining Credit, &c., by False Pretences	270
335. Concealing Deeds and Incumbrances	270
336. Conspiracy to defraud or extort	271
337. Pretending to exercise Witchcraft	272
338. Cheating	272
339. Servants feeding Horses, &c., against Orders	273
340. Fraudulently concealing Ore	273
341. Taking Marks from Public Stores	274
342. Concealing Treasure Trove	274

CHAPTER XLI.

FRAUDS BY AGENTS, TRUSTEES, AND OFFICERS OF
PUBLIC COMPANIES—FALSE ACCOUNTING.

343. Punishment of Misdemeanors in this Chapter	275
344. "Misappropriate" defined	275
345. Misappropriations by Bankers, Merchants, &c.	275
346. Misappropriation under Power of Attorney	277
347. Misappropriation by Factors or Agents	277
348. Clerks, &c., assisting in procuring Advances	278
349. Fraudulent Trustees	278
350. Frauds by Directors and Public Officers	279
351. Rule of Evidence	280
352. Fraudulent False Accounting	281

CHAPTER XLII.

RECEIVING.

353. Receiving defined	282
354. Receiving Property unlawfully obtained	283

thereof to a maximum punishment of two years imprisonment and hard labour,

who, being employed in or about any mine, takes, removes, or conceals any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found, or being in such mine with intent to defraud any proprietor of, or any adventurer in, any such mine, or any workman or miner employed therein.

ARTICLE 341.

TAKING MARKS FROM PUBLIC STORES.

¹ Every one commits felony, and is liable upon conviction thereof to a maximum punishment of seven years penal servitude,

who, with intent to conceal Her Majesty's property in any stores under the care, superintendence, or control of a Secretary of State, or the Admiralty, or any public department or office, or of any person in the service of Her Majesty, takes out, destroys, or obliterates wholly or in part any mark described in the 1st schedule to the Public Stores Act, 1875 (38 & 39 Vict. c. 25), or any mark whatsoever denoting the property of Her Majesty in any stores.

ARTICLE 342.

CONCEALING TREASURE TROVE.

² Every one commits a misdemeanor who conceals from the knowledge of our Lady the Queen the finding of any treasure, that is to say, of any gold or silver in coin, plate, or bullion hidden in ancient times, and in which no person can shew any property. It is immaterial whether the offender found such treasure himself or received it from a person who found it, but was ignorant of its nature.

¹ 38 & 39 Vict. c. 25, s. 5. The same Act contains many offences punishable on summary conviction too special to be inserted here.

² 3rd Inst. 132. And see *R. v. Thomas*, L. & C. 313.