THE PRINCIPLES OF EQUITY.

THE PRINCIPLES OF EQUITY,

INTENDED FOR

THE USE OF STUDENTS AND THE PROFESSION.

BY

EDMUND H. T. SNELL,

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW

Twelfth Edition.

BY

ARCHIBALD BROWN,

M.A. EDIN. & OXON., AND B.C.L. OXON.

OF THE MIDDLE TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

LONDON:

STEVENS & HAYNES,

Law Publishers,

BELL YARD, TEMPLE BAR.

1898.

Printed by Ballantyne, Hanson, & Co
At the Ballantyne Press

TO

THE MEMORY

OF

WILLIAM LLOYD BIRKBECK, ESQ., Q.C., *deceased*,

LATE DOWNING PROFESSOR OF THE LAWS OF ENGLAND

IN THE UNIVERSITY OF CAMBRIDGE,

AND FORMERLY

READER IN EQUITY TO THE INNS OF COURT

(AND WHO DIED MAY 25, 1888),

THIS TWELFTH EDITION

OF

"Snell's Equity"

IS

RESPECTFULLY INSCRIBED,

BY THE EDITOR,

WHO (LIKE THE AUTHOR) WAS

FORMERLY HIS MUCH ADMIRING PUPIL.

PREFACE TO THE TWELFTH EDITION.

In this twelfth edition of the "Principles of Equity" (being the ninth which I have done), I have endeavoured to maintain the qualities of accuracy and of simplicity, the combination of which in the previous editions has so largely secured the acceptability of "Snell" with students. Since the date of the last edition, there have been only two statutes,—the Judicial Trustees Act, 1896, and the Land Transfer Act, 1897, — of any material importance in equity; but the growth of the new decisions, being new developments of the principles of equity, has been very great; and the size of the book has (I regret to say) been thereby necessarily increased, there being no fewer than seventy-two pages of new text alone, besides the other incidental additions. I have, however, studied the greatest brevity; and I have adopted in this edition, and have consistently maintained throughout it, a somewhat novel and laborious mode of punctuation, by means of which I have relieved considerably the labours of the student.

But the "Principles" are now undoubtedly become a heavy book to master,—and that largely by reason of the new developments which are introduced into this new edition; still, when it is remembered, that in the early years of the century the treatise of Littleton on Tenures, as edited by Coke, was one of the books which all law students were required to master, the student of the present day has really very little reason to commiserate his lot; for "Snell" is, and (notwithstanding its increase) remains, an easier,—and also a more interesting,—book than "Coke upon Littleton" was or could at any time have been; and the mastery of these "Principles of Equity" is absolutely indispensable to every student who seriously intends to practise.

A. BROWN.

8 New Square, Lincoln's Inn, W.C.,
March 1898.

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WITH

ABBREVIATIONS.

A. C.	Law Reports, House of Lords and Privy Council Appeals, since 1891 inclusive.
Ad. & Ell.	Adolphus and Ellis.
Amb.	Ambler.
Anstr.	Anstruther.
Atk.	Atkyns.
Ball & B.	Ball and Beatty (Irish).
B. & A.	Barnewall and Alderson.
B. & Ad.	Barnewall and Adolphus.
Barn. & Cress.	Barnewall and Cresswell.
Beav.	Beavan.
B. & S.	Best and Smith.
Bing. N. C.	Bingham, New Cases.
Bl. Com.	Blackstone's Commentaries.
B. & P.	Bosanquet and Puller.
Brod. & Bing.	Broderip and Bingham.
Bro. C. C.	Brown's Chancery Cases.
Bro. P. C.	Brown's Parliamentary Cases.
Ca. t. Talb.	Cases *tempore* Talbot.
Ch.	Law Reports, Chancery Cases, since 1891 inclusive.
Cha. Ca.	Cases in Chancery.
Co. Lit.	Coke upon Littleton.
Coop.	Cooper (G.), Chancery Cases.
Coote.	Coote on Mortgages.
Cowp.	Cowper.
Cr. & Ph.	Craig and Phillips.
Cro. Eliz.	Croke's Reports, vol. i.
De G. F. & Jo.	De Gex, Fisher, and Jones.
De G. & J.	De Gex and Jones.
De G. J. & S.	De Gex, Jones, and Smith.
De G. M. & G.	De Gex, Macnaughten, and Gordon.
Dixon on Partn.	Dixon on Partnership.
Doug.	Douglas.
Drew.	Drewry.
Dr. & Walsh.	Drury and Walsh.
Dr. & War.	Drury and Warren.
Eden.	Eden's Chancery Cases.

Ell. Bl. & Ell.	Ellis, Blackburn, and Ellis.
Ell. & Black.	Ellis and Blackburn.
Exch. Rep.	Exchequer Reports.
Fonbl.	Fonblanque on Equity.
Fry on Spec. Perf.	Fry on Specific Performance.
Giff.	Giffard.
Gilb. Us.	Gilbert on Uses.
Ha.	Hare.
Hayes' Intro.	Hayes' Introduction to Conveyancing.
H. & Tw.	Hall and Twells.
H. & M.	Hemming and Miller.
Holt, N. P.	Holt, Nisi Prius Cases.
H. L. Cas.	House of Lords Cases.
John.	Johnson.
J. & H.	Johnson and Hemming.
J. & L.	Jones and Latouche (Irish).
Jac.	Jacob.
J. & W.	Jacob and Walker.
Jur. N. S.	Jurist, New Series.
K. & J.	Kay and Johnson.
Kay.	Kay.
Kee.	Keen.
L. J., N. S.	Law Journal, New Series.
L. R., Ch. App.	Law Reports, Chancery Appeal Cases.
L. R., Eq.	Law Reports, Equity Cases.
L. R., H. L.	Law Reports, House of Lords Cases.
L. R., P. C.	Law Reports, Privy Council Cases.
Ch. Div., or Ch. D. only.	Law Reports, Chancery Division (comprising Equity Cases and Chancery Appeal Cases since November 1875 to November 1890).
L. R., App. Ca., or App. Ca. only.	Law Reports, Appellate Cases (comprising House of Lords and Privy Council Cases since November 1875 to November 1890).
L. R., Exch. Div. L. R., C. P. Div. L. R., Q. B. Div. (or without L. R. prefixed).	Law Reports, the respective Common Law Divisions (commencing November 1875).
Lew. on Tr.	Lewin on Trusts.
L. C.	White and Tudor's Leading Cases in Equity, 5th ed.
Lind. Part.	Lindley on Partnership.
L. T., N. S.	Law Times Reports, New Series.
M. & G.	Macnaghten and Gordon.
Mad. & G.	Maddock and Geldart.
Madd.	Maddock.
Mayne on Dan.	Mayne on Damages.
Mod.	Modern Reports.
Moll.	Molloy (Irish).
Mont. D. & D.	Montagu, Deacon, & De Gex.
Moore P. C. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig.
My. & K.	Mylne and Keen.
Nev. & Man.	Neville and Manning.
Peach. Mar. Settl.	Peachy on Marriage Settlements.

P.	Law Reports, Probate Division, since 1891 inclusive.
P. Wms.	Peere Williams.
Ph.	Philips.
Prec. Ch.	Precedents in Chancery.
Q. B.	Law Reports, Queen's Bench Division, since 1891 inclusive.
Rep.	Lord Coke's Reports.
Rob.	Robertson's Ecclesiastical Reports.
Roper, Husb. & Wife.	Roper's Husband and Wife.
Russ.	Russell.
Russ. & My.	Russell and Mylne.
Sand. Us.	Sanders on Uses.
Sch. & Lef.	Schoales and Lefroy (Irish).
Sel. C. C.	Select Chancery Cases.
Show.	Shower.
Sim.	Simons.
Sm. & Giff.	Smale and Giffard.
Sp.	Spence's Equity.
St.	Story's Equity Jurisprudence.
Sugd. V. & P.	Sugden's Vendors and Purchasers, 14th ed.
Sw. & Tr.	Swabey and Tristram.
Swanst.	Swanston.
T. R.	Term Reports.
T. & R.	Turner and Russell.
Vern.	Vernon.
Ves. & B.	Vesey and Beames.
Ves. Sr.	Vesey, Senior.
Ves. Jr.	Vesey, Junior.
W. R.	Weekly Reporter.
Wms. on Assets.	Williams on Real Assets.
Wms. on Exors.	Williams on Executors, 6th ed.
Wilm.	Wilmot's Notes and Opinions, K. B.
Y. & C. Exch. Ca.	Younge and Collyer's Exchequer Cases.
Yo. & Co. C C.	Younge and Collyer's Chancery Cases.
Y. & J.	Younge and Jervis.

Note.—The Law Reports are now cited respectively by the year (1891, 1892, &c.), there being three (but latterly only two) volumes called 1, 2, and 3 Ch., and two volumes called 1 & 2 Q. B., and one volume called P., and one volume called A. C., as in the above table, for each year.

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ADDENDA.

Page 311—*In re Gilbert, ex parte Gilbert*, is now reported in 1898, 1 Q. B. 282.

Pages 362, 381—*In re Castell and Brown*, is now reported in 1898, 1 Ch. 315.[1]

THE

PRINCIPLES OF EQUITY.

PART I.—INTRODUCTORY.

CHAPTER I.

THE JURISDICTION IN EQUITY.

Nature and character of the jurisdiction in equity.

EQUITY, in its most general sense, is that quality in the transactions of mankind which accords with natural justice,—that is to say, with honesty and right,—and which is popularly said to arise *ex æquo et bono;* but in its juridical sense,—that is to say, *as administered in the courts,*—equity embraces a jurisdiction much less wide than the principles of natural justice,—there being many matters of natural justice which the courts leave wholly unprovided for, partly from the difficulty of framing any general rules to meet them, and partly from the doubtful policy of attempting to give a legal sanction to duties of imperfect obligation; in other words, a large portion of equity in its widest sense cannot be,—at least, is not,—judicially enforced, but must be (and is) left to the conscience of private individuals (*a*).

(*a*) *Green* v. *Lyon*, 21 W. R. 830.

Definition of equity,—by reference to its province or extent, and not its content.

What then is equity as administered in the courts? To answer this question, it is necessary to distinguish equity more accurately, having regard as well to the common law as to the statute law,—the common law being as much founded in natural justice as equity is, and the statutes of the realm embodying (and giving legal sanction to) the principles of natural equity. If, therefore, we bear in mind regarding natural justice, that a large portion of it is not enforced at all by any civil tribunals; that another large portion of it is, and always has been, enforced in the Queen's Bench division and in the Courts of Common Law, which were the predecessors of that division; and that a still further part of it is, by virtue of the various statutes in that behalf, enforced in the Common Law and in the Equity divisions indifferently—we are in a position to indicate, approximately, the province of equity strictly and properly so called, as being that portion of natural justice which is *of a nature to be judicially enforced*, but which the Courts of the Common Law, for reasons of a purely technical and formal character, omitted to enforce, and which accordingly the Courts of Chancery undertook to enforce, being influenced thereto by considerations of what was right in substance and in conscience.

Equity and law,—the distinction between them is merely historical, and yet is permanent.

The distinction between Law and Equity (the more it is examined by the student) will be found to be, in fact, a distinction not of principle but of history; and yet the distinction (as will presently be seen) is a permanent one, and has not been materially affected even by the modern fusion of the two.

The older definitions of equity stated.

It is necessary first of all to understand, with their proper limitations, the vague and inaccurate definitions, or rather descriptions, of equity, with which

the text-writers (chiefly the earlier ones) abound. Thus, one writer says, that it is the duty of equity "to correct or mitigate the rigour, and what, in a "proper sense, may be termed the injustice, of the "common law;" and another says, that equity is a "judicial interpretation of the laws, which, pre-"supposing the Legislature to have intended what "is just and right, pursues and effectuates that "intention;" and Lord Bacon says, "*Habeant simi-*"*liter Curiæ Prætoriæ potestatem tam subveniendi*"*contra rigorem legis quam supplendi defectum legis,*"—which, being interpreted, means,—"In like manner, "let the courts of the Lord Chancellor have the "power both of relieving against the rigour, and of "*supplying* the defects, of the common law,"—the Chancery being ordained to *supply*, not to *subvert*, the law. Now all these definitions of equity are good (at least as descriptions of equity), so far as they go; and in the early history of English equity jurisprudence, there was much to justify them; for the courts of equity were not then bound by definite rules,—the early Chancellors acting on principles of good conscience and natural justice, without much external guidance of any sort; for they were gentlemen the most learned, experienced, and capable, and were (for the most part) deeply imbued also with religion and the spirit of justice, and their consciences therefore supplied the place of the definite rules which had not then yet been made or settled. But these definitions (or descriptions) do in no degree sufficiently express the extent or character of modern equity, and they tend, in fact, to mislead as definitions, and are inaccurate even as descriptions, of modern equity,—a court of equity being now bound by settled rules as completely as a court of common law. That is to say, all cases are now decided upon fixed principles, and courts of equity have, as regards these principles of decision,

The older definitions of equity explained; in other words, "*the measure of the Chancellor's foot*" justified.

Equity in modern times, —character of: 1. Courts of equity bound by settled rules and precedents.

no more discretionary power than courts of common law, but decide new cases by the principles of former cases, enlarging the operation or the application of those principles, but not altering the principles themselves (*b*); and again, a court of equity, equally with a court of law, now interprets law according to its true intent, and there is not a single rule of interpreting laws,—there is not even a single rule of evidence,—that is not now equally used in both the Queen's Bench and the Chancery divisions. The distinction, *e.g.*, between the *ratio legis* (*i.e.*, the principle of a statute) and the *ratio decidendi* (*i.e.*, the principle of a decided case), is strictly and equally acted upon in both divisions; that is to say, in both divisions the *ratio decidendi* is alone considered of weight in interpreting and in applying decided cases, and the *ratio legis* or so-called "*equity of the statute*" receives in the interpretation of the statute no weight at all where the words of the statute are clear, and is taken into consideration only where the words of the statute are not clear (*c*).

2. Modes of interpreting laws the same in equity as at law.

Origin of the jurisdiction in equity.

It is a well-known fact that, during the Anglo-Saxon and early Norman periods of English history, the principles of the Roman CIVIL law were familiar to the clergy; and the clergy, being also in those days the administrators of the law, imported into their decisions many of the principles, and much also of the practice, of the Roman civil law (*d*); and early in the twelfth century, shortly after the discovery of the Pandects, schools for the study of the Roman civil law, and in particular the school of Irnerius at Oxford, were established in England; but the study was never popular in England, and it

(*b*) *Bond* v. *Hopkins*, 1 Sch. & Lef. 428, 429.
(*c*) *Heydon's case*, 3 Rep. 7; *Ex parte Griffith, in re Wilcoxon*, 23 Ch. Div. 69; *Salmon* v. *Duncombe*, 11 App. Ca. 627.
(*d*) 1 Sp. 16.

received an early and effectual check. Nevertheless, the familiar study of that law would probably have gone far to obviate the necessity for any distinction between equity and law in England; for the Roman civil law itself had in the course of its history developed the like distinction, and had afterwards invented and effectively applied a method for abolishing, and had abolished, the distinction. The English law had therefore merely to receive instruction from the Roman civil law in order to forestall the growth of the distinction; but the English law chose to follow its own natural genius in the matter; and yet, although it proceeded independently of the Roman civil law, it pursued a course analogous to that law, first developing the distinction between law and equity, and eventually inventing and applying a method for abolishing the distinction,—in the common fusion of the two *in one administrator*.

Reasons of separation between the two systems,—common law and equity.

The principles of the common law being founded in reason and equity, the common law, while in the course of its development, was capable of being extended to new cases, and of having the principles of equity applied to them wherever the circumstances of the case called for their application; but in the course of time, and apparently at a very early time, the common law appears to have completed its development, becoming thereafter a *jus strictum*, or system positive and inflexible, and which was unable to accommodate itself to the exigencies of a larger world than the school in which it had been formed (*e*).

1. The common law became a *jus strictum* rather early.

2. The Roman law was deprived of authority in the courts.

The Roman civil law, it must also be remembered, was not capable of very easy or of very general adaptation; *e.g.*, the laws governing the tenure of

(*e*) 1 Sp. 321, 322.

land in England were founded on feudal principles, and involved distinctions, which, although not altogether alien to the doctrines of the Roman civil law, were most inadequately expressed therein. Moreover, the Roman civil law was confessedly an alien law, and (in the popular imagination) was associated with the Court of Rome; and it appears, judging from the current histories, that in the reign of Edward III. the Court of Rome was become odious to the English king and people, and the Roman civil law was also become an object of aversion; and in the next following reign of Richard II., the barons protested that they never would suffer the kingdom to be governed by the Roman civil law, and the judges prohibited it from being any longer cited (at least as of authority) in the common law tribunals (*f*); consequently, the common law of England, ceasing to derive elasticity from the Roman civil law, grew more and more inflexible in its nature, adopting also a procedure which was cramping and inelastic; and to the adoption of that procedure may be proximately attributed, though concurrently with the other causes noticed above, the eventual rise and rapid progress of the Court of Chancery as a separate jurisdiction.

3. The system of procedure at common law was even more inflexible than the principles themselves of the common law.

For it must be known, that, according to the common law, every species of civil wrong was supposed to fall within some particular class, and for every such class of wrong an appropriate remedy existed, the remedy in question being the *writ* or BREVE; and the writ or *breve* was the first step in every action. Thus if a man had suffered an injury, it was not competent for him to bring to the notice of the court the facts of his case in a simple and natural manner by merely stating them (as he would

(*f*) 1 Sp. 346.

now do), and leaving the court to say whether upon the facts stated the case was one deserving of redress; but he had first to determine for himself within what class of wrong his case fell, and then he applied for the appropriate remedy or writ. It followed, therefore, that even in cases in which the facts were such as to bring the wrong within some one of the classes recognised at law, the suitor was exposed to the risk of selecting the improper writ, and merely on that account failing in his action; which technical stumbling *in limine*, although from time to time relieved by subsequent legislation, continued to be a fertile source of injustice until the Common Law Procedure Act of 1852 (15 & 16 Vict. cap. 76, sec. 3) enacted that it should not be necessary for the plaintiff to mention any form of action in his writ of summons (*g*).

4. "The Statute in Consimili Casu," —attempted a remedy, but failed.

There was also another (and perhaps more serious) mischief attendant upon the ancient common law procedure; for if the alleged wrong did not fall within any recognised class of writ, the plaintiff was absolutely without any remedy at all; which latter mischief appears to have been very early felt; for in the 13 Edw. I. a remedy was attempted for it. It is to be remembered, that at that time the writ for commencing actions was an original writ issuing out of the Chancery, and the drawing up of these original writs was a part of the business of the clerks in Chancery. Now the remedy that was attempted for the mischief was to give a larger discretion to the clerks in the framing of these writs, it being enacted, by the statute "In Consimili Casu" (13 Edw. I. stat. 1, cap. 24), that "whensoever "from henceforth it shall fortune in the Chancery "that in one case a writ is found, and in like case

(*g*) *Sharrod* v. *N. W. R. Co.*, 4 Exch. Rep. 580.

"falling under like law and requiring like remedy "none is found, the clerks of the Chancery shall "agree in making the writ,—or the plaintiff may "adjourn it until the next Parliament; and the cases "in which the clerks cannot agree are to be written "and referred by them unto the next Parliament, "and by agreement of men learned in the law a writ "is to be made, lest it should happen that the court "should long time fail to minister justice unto com- "plainant." The enactment in question proved, however, wholly inadequate to remedy the mischief, and that chiefly for two reasons, namely: (1) The judges of the common law courts assumed, and very properly assumed, to decide on the validity of the writs as adapted by the clerks (*h*)—many of which adaptations were no doubt both clumsy and impractical, and so lengthy and verbose as to render the writ or *breve* a misnomer; and (2) The progress of civilisation, by giving rise to novel and unusual circumstances, increased the difficulty which the clerks experienced in adapting new cases to old forms, besides that (in addition to new forms of *action*) new forms of *defence* also arose, for which no provision had been made (*i*), and which necessarily therefore could not be entertained by the courts of common law (*j*).

5. The Lord Chancellor, by direction of the sovereign and of Parliament, personally intervened, at length, in 22 Edw. III.

5. When the common law judges, therefore, either could not or would not grant relief, the only course open to suitors was to petition the King in Parliament (*i.e.*, in his Council); and the sovereign thereupon referred the matter to the "keeper of his conscience," the Chancellor; and ultimately, in the reign of Edward III., the Chancellor came to be recognised as a permanent judge, and the Court of Chancery as a permanent jurisdiction, distinct from the judges

(*h*) 1 Sp. 325.
(*i*) Ibid.
(*j*) See 17 & 18 Vict. c. 125, s. 83.

and from the courts of the common law, and empowered to give relief in cases which required *extraordinary* relief. The last-mentioned King, by an ordinance in the twenty-second year of his reign, referred all such matters as were "of grace" to the Chancellor or Keeper of the Great Seal (*k*); and from that time, suits by petition or bill, *without any preliminary writ*, became the common course of procedure before the Chancellor, *i.e.*, in the Court of Chancery,—on which bill or petition being presented, if the Chancellor, on looking into it, thought that the case called for *extraordinary* relief, a writ called a writ of *subpœna* was issued by command of the Chancellor, *summoning the defendant to* APPEAR *before the Chancery and to* ANSWER *the complaint, and to abide by the order of the court.* The personal examination of the bill or petition by the Chancellor was afterwards dispensed with, the signature of counsel to the bill or petition coming latterly to be accepted as a guarantee that the case was a proper one, sufficient to authorise the immediate issue of the writ of subpœna (*l*); and subsequently, by the Chancery Jurisdiction Act, 1852 (15 & 16 Vict. c. 86), the writ of subpœna to *appear* and to *answer* the complaint was superseded altogether, being replaced by a mere indorsement to the like effect on the copy of the bill which was served on the defendant.

Ordinance of 22 Edw. III. as to matters "of grace."

By and in consequence of the Judicature Acts, 1873–75, and the rules and orders from time to time made thereunder, law and equity have in substance and effect been fused into one system, and a uniform system of procedure in the Chancery division and in the Queen's Bench division has been introduced

The modern fusion of law and equity.

(*k*) 1 Sp. 337.
(*l*) Langdell's Summary of Equity Pleading.

and become established (*m*); and upon such new procedure, it will be sufficient to mention here, in order to complete the historical outline of the origin and full development of the Jurisdiction in Equity given above, that an action (as it is now called) in the Chancery division of the High Court is now commenced, as in the Queen's Bench division, by issuing a writ,—which writ is, however, now of the most flexible character, and capable of expressing every form of possible claim; and then the writ may or may not be (but usually is) followed up by a statement of claim on the part of the plaintiff, such statement of claim corresponding (excepting in, for the present, immaterial respects) with the old bill or petition to the Lord Chancellor, and being, as heretofore, the first pleading properly so called on the part of the plaintiff in an action, and being also of an even more elastic character than the writ.

Classification of equity jurisdiction,—prior to, and so far also as affected by, the Supreme Court of Judicature Act, 1873.

Prior to the Judicature Acts, 1873–75, it was usual, in treatises on equity, to classify the various subject-matters falling within the jurisdiction of equity *by relation to the common law*, and accordingly to subdivide the jurisdiction by arranging these various subject-matters under three heads, viz., the *exclusive*, the *concurrent*, and the *auxiliary* jurisdictions in equity. However, now, by the Supreme Court of Judicature Act, 1873, it is enacted, that in every civil cause or matter, law and equity shall be administered *concurrently;* that each division of the High Court and the judges thereof shall have, and shall exercise, all the jurisdiction of the other divisions or of the judges thereof, in addition to their own original or proper jurisdiction; and that where there is any conflict or variance between the rules of equity and the rules of

(*m*) See (on this Procedure) *Snow, Indermaur, Gibson, &c.*

the common law, the rules of equity shall prevail (*n*). But by the 34th section of the Judicature Act, 1873, it is expressly enacted, that there shall be assigned (subject to the general provisions of the Act) to the Chancery division (besides other matters not material to specify) all causes and matters for any of the purposes specified in the now stating section, and being the following various matters, that is to say,—

1. The administration of the estates of deceased persons;
2. The dissolution of partnerships, and the taking of partnership and other accounts;
3. The redemption and foreclosure of mortgages;
4. The raising of portions and other charges on land;
5. The sale and distribution of the proceeds of property subject to any lien or charge;
6. The execution of trusts, charitable and private;
7. The rectification, the setting aside, and the cancellation of deeds and other written instruments;
8. The specific performance of contracts between vendors and purchasers of real estate, including contracts for leases;
9. The partition or sale of real estates; and
10. The wardship of infants, and the care of infants' estates.

The effect, therefore, of the Judicature Acts is, nominally, to put an end to the *exclusive* jurisdiction, as such, of the Court of Chancery, and to render that jurisdiction concurrent in all cases; but the effect of

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(*n*) 36 & 37 Vict. c. 66, ss. 24, 25; and see *Newbigging Co.* v. *Armstrong*, 13 Ch. Div. 310; *Le Grange* v. *M'Andrew*, 4 Q. B. D. 211.

it, practically, is to retain as exclusive all that part of the jurisdiction which was originally exclusive; while as regards the *auxiliary* jurisdiction of Chancery, the effect of these Acts is to abolish that jurisdiction altogether, both nominally and practically,—*scil.* because the suitor in the Queen's Bench division now no longer needs the *aid* (auxilium) of the Chancery division for the proper and effective conduct of his action in the Queen's Bench division.

I. The originally exclusive jurisdiction.

Prior to the abolition of the threefold distinction aforesaid, the EXCLUSIVE jurisdiction of equity (and which must now be distinguished as the *originally exclusive* jurisdiction of equity) extended to and embraced all those matters above specified which the Judicature Acts have assigned exclusively to the Chancery division, being generally all matters capable of being judicially enforced, but for which no forms of action were originally available at law.

II. The originally concurrent jurisdiction.

Furthermore, equity always had, even before the Judicature Acts, and of course still has, a CONCURRENT jurisdiction with the courts of common law in every legal matter where no complete relief could or can be obtained at law except by circuity of action or by multiplicity of suits, and complete relief could and can be given in equity in one and the same action.

The old distinction between the *exclusive* and the *concurrent* jurisdictions,—importance of maintaining.

And notwithstanding the fusion of law and equity, the distinction between matters which were and are respectively within the originally exclusive jurisdiction and the originally concurrent jurisdiction of equity is still one of vital importance,—it being *equitable* rights and remedies properly so called that are enforced and applied in the originally exclusive jurisdiction, while it is *legal* rights and remedies that are enforced and applied in the originally concurrent jurisdiction; and the principles of equity differ very materially (as will presently be seen), according as it is sought to apply

them to the one or to the other of these two groups of rights and remedies (*o*).

III. The now obsolete auxiliary jurisdiction.

The now OBSOLETE auxiliary jurisdiction of equity was a jurisdiction which equity assumed to exercise in favour of litigants in the courts of common law, *in aid* of the assertion of their legal rights in such courts, where they had an equitable title to such aid, and the courts of law did not themselves recognise such equitable title, or could not, or would not, afford such aid; and the kind of aid which equity afforded in such cases was principally in the matter of the discovery of title-deeds and other evidences of the alleged rights of the litigants,—a species of aid which the litigants (first becoming actual litigants) may now obtain from the Queen's Bench division itself,—provided always they might formerly have obtained it in equity, but not otherwise.

It will be convenient to retain in these "Principles" the ancient threefold distinction of equity into the exclusive, the concurrent, and the auxiliary jurisdictions; for that distinction is still attended with too many consequences to be lightly thrown aside; and its retention cannot mislead the student who peruses this Introductory Chapter.

(*o*) *Blake* v. *Gale*, 31 Ch. Div. 196; *Andrews* v. *Barnes*, 39 Ch. Div. 133; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.

CHAPTER II.

THE MAXIMS OF EQUITY.

EQUITY is pre-eminently a science; and, like geometry or any other science, it starts with and assumes certain maxims, which are supposed to embody and to express the fundamental notions, or the postulates, of the science. A common element of equity pervades each of the maxims, which sometimes gives them the appearance of running into each other; but with a little practice they are readily distinguishable; and it is highly necessary to keep the distinctions between them clear. The maxims peculiar to equity are the eleven following:—

Maxims of Equity.

1. Equity will not, by reason of a merely *technical* defect, suffer a wrong to be without a remedy.
2. Equity follows the law,—*Æquitas sequitur legem.*
3. Where there are equal equities, the first in time shall prevail.
4. Where there is equal equity, the law must prevail.
5. He who seeks equity must do equity.
6. He who comes into equity must come with clean hands.
7. Delay defeats equities,—*Vigilantibus non dormientibus, æquitas subvenit.*
8. Equality is equity.
9. Equity looks to the intent rather than to the form.
10. Equity looks on that as done which ought to

have been done, or which has been agreed or directed to be done; and

11. Equity imputes an intention to fulfil an obligation.

And to these eleven maxims may be added a further or twelfth maxim, relating, however, to the procedure in a court of equity, and not to the principles themselves of equity, viz.,—

12. Equity acts *in personam.*

1. Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy.

1. *Equity will not, by reason of a merely technical defect, suffer a wrong to be without a remedy.*—It will be evident that this maxim is at the foundation of a large proportion of equity jurisprudence, so far as that jurisprudence aims at supplying the defects which at one time existed in the common law. For example, an outstanding dry legal term prior in date to the plaintiff's title to an estate, although it was a merely technical objection, yet it would at law prior to the Satisfied Terms Act, 1845, have prevented the plaintiff from recovering in ejectment; but in such a case, the courts of equity interposed and put the term out of the plaintiff's way, and even permitted him, by means of an "ejectment-bill," to recover the very possession of the land itself without regard to the term. Similarly, in the case of a mortgagor seeking to recover an estate or rent, the fact of the legal estate being in the mortgagee, which was a fatal defect at law, was no impediment in equity; and under the Judicature Act, 1873, sect. 25, sub-sect. 5, the rule of equity in this respect is now made the rule at law also. So also, where a successful plaintiff could not have legal execution, because of, *e.g.*, a prior legal mortgage, equity interposed and gave him equitable execution, or (to speak more properly) "*equitable relief in the nature*

of execution" (*a*),—as, *e.g.*, by the appointment of a receiver; and under the Judicature Act, 1873, the common law also will now in a proper case issue the like execution, and is in the constant habit of doing so, in order to enforce, *e.g.*, the recovery of judgment debts. This first maxim must, however, be understood as referring to rights which are capable of being judicially enforced; for many real wrongs are still not remediable at all, either at law or in equity, as being, *e.g.*, *damnum sine injuriâ* (*b*); also, apparent wrongs which are not wrongs at all, save in the imagination of the suitor, are, of course, not within the maxim.

2. Equity follows the law.

2. *Equity follows the law.*—This maxim has two principal applications, according as it is attempted to apply it in the originally concurrent jurisdiction, or in the originally exclusive jurisdiction of equity; for, firstly, in the originally *concurrent* jurisdiction, that is to say, as regards *legal* estates, rights, and interests, equity was and is strictly bound by the rules of law, and had and has no discretion to deviate from them; but, secondly, in the originally *exclusive* jurisdiction, including for this purpose the now obsolete *auxiliary* jurisdiction also, that is to say, as regards *equitable* estates, rights, and interests, equity, although not strictly speaking *bound* by the rules of law, yet acted and acts in analogy to these rules, wherever an analogy exists; and we will illustrate these diverse applications of the maxim.

(*a*.) Originally concurrent jurisdiction: Primogeniture, and rules of descent generally.

(*a*.) As regards legal estates, it is well settled that equity follows the law in applying, *e.g.*, all the canons of descent, and in particular the rule of primogeniture, although that rule may in particular instances be productive of the greatest hardship towards

(*a*) *Harris* v. *Beauchamp Brothers*, 1894, 1 Q. B. 801, citing *In re Shephard, Atkins* v. *Shephard*, 43 Ch. D. 131.
(*b*) *Day* v. *Brownrigg*, 10 Ch. Div. 294, per James, L.J., at p. 305.

the younger members of the family, by leaving them, for example, without any sort of provision, while the eldest son may be in affluence,—which latter accidental circumstances create in themselves no equitable right or equity in favour of the youngest son as against the eldest, and demand no interposition of the court of equity. And even where the circumstances of the case are such as to be sufficient to create an equity, then even there a court of equity never does break through a rule of law, or refuse to recognise it, *because it has no power and no discretion in the matter;* but while recognising the rule of law, and even founding upon it and maintaining it, a court of equity will in a proper case get round about, avoid, or obviate it. For example, if an eldest son should prevent his father from executing a proposed will devising an estate to his younger brother, by promising to convey that estate to the younger brother, and the estate accordingly descends at law to the eldest son *as a consequence flowing from the promise*, a court of equity would, in such a case, interpose and say,—"True it is, you (the eldest "son) have the estate at law, in other words the legal "estate; that we don't deny or interfere with: *but "precisely because you have it*, you will make a con- "venient trustee of it for your younger brother, who "(in our opinion) is equitably entitled to it,—*scil.* be- "cause, *but for your promise*, he would have had it." Accordingly, in *Loffus* v. *Maw* (*c*), where a testator in advanced years and in ill-health induced the plaintiff, his niece, to reside with him as his housekeeper, on the *verbal* representation that he had left her certain property by his will, which in fact he had prepared and executed, but subsequently by a codicil revoked,—the court directed that the trusts of the will in favour of the niece should be performed; and held, that in cases

Following the law, equity may at the same time avoid it in effect.

Loffus v. *Maw*, —instance of equity avoiding the law.

(*c*) 3 Giff. 592.

of this kind, a representation that property is given, even though by a revocable instrument, is binding, where the person to whom the representation is made has acted upon the faith of it to his or her detriment; and that it is the law of the court, *grounded on such detriment*, that makes it binding; and that it does not matter that the represented mode of gift is of an essentially revocable character. And it will be observed, that there is here no setting aside of law, but merely a getting round or avoiding of the law,—the complete legal conveyance, effected by the operative testamentary document, being left to subsist unaffected, but to subsist *subject to the contract in favour of the niece*, upon the ground that the testator had already during his lifetime, and *to the extent of that contract*, fettered his own otherwise free power of devise (*d*). It is to be noted, however, as regards all these cases, that the representation, in order to be binding, must amount to a contract, that is to say, to the representation of an existing fact with an implied promise that the fact shall continue (*e*); and where it does not amount to that, but is merely a representation of an *intention*, it is not binding, and will not be any ground for avoiding the legal effect of the document (*f*).

(*b*.) Originally exclusive jurisdiction: Words of limitation in deeds and wills,—trusts executed, and trusts executory.

(*b*.) As regards equitable estates, it may be mentioned (but only briefly in this place, as the matter will be fully considered in the next following chapter), that in construing the words of limitation of trust estates in deeds and wills, at least where the trust estate is executed, and in some cases even where it is executory, a court of equity follows the rule of law

(*d*) *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121; *Coles* v. *Pilkington*, L. R. 19 Eq. 174; *In re Applebee, Leveson* v. *Beales*, 1891, 3 Ch. 422.
(*e*) *Synge* v. *Synge*, 1894, 1 Q. B. 466.
(*f*) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 45; *Jorden* v. *Money*, 5 Ho. Lo. Ca. 185; *Alderson* v. *Maddison*, 8 App. Ca. 497.

called the rule in Shelley's case, and also observes all the other rules of law for the construction of the words of limitation of legal estates (*g*). But where the trust estate is executory only, and the court sees an intention to exclude the rules of law in the construction of the words of limitation, then, and in that case, the court carries out the intention in analogy to the rules of law, but not in servile obedience to them, where such obedience would defeat the execution of the intention.

(*a.* and *b.*) Originally concurrent and originally exclusive jurisdictions: The Statutes of Limitation.

(*a.* and *b.*) And as regards both legal and equitable estates, it is instructive to observe the manner in which equity dealt with, and also still deals with, the statutes of limitation for actions and suits. Thus, while the old statutes of limitation were in their terms applicable to courts of law only, nevertheless equity acted upon them by analogy, and in general refused relief where the statutes would have been a bar; and now the modern statutes of limitation (3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57) are in their very terms applicable to courts of law and of equity indifferently. Apart, however, from any such statutes, and for reasons of its own, equity always discountenanced laches, and held that laches (where it existed) was as valid a defence as the positive bar of time at law; wherefore, in cases of equitable title to land, equity required, and still requires, relief to be sought within the same period in which an ejectment would lie at law (*h*); and in cases of personal claims, it also required, and still requires, relief to be sought within the period prescribed for personal suits of a like nature (*i*); but equity goes even farther than law in this respect, and upon the ground of laches applies an even stricter rule; for while there are no cases in which equity

(*g*) *In re Whiston, Lovatt* v. *Williamson*, 1894, 1 Ch. 661.
(*h*) *Beckford* v. *Wade*, 17 Ves. 99.
(*i*) *Knox* v. *Gye*, L. R. 5 H. L. 656

gives relief where the statutes would be a bar at law, yet there are many cases (*scil.* within the originally *exclusive* jurisdiction of equity) where the statutes would not be a bar at law, in which equity will notwithstanding refuse relief (*k*). In other words, the rule of equity regarding the statutes of limitation may be stated thus,—that in its originally *exclusive* jurisdiction equity never exceeds, although for reasons of its own (such as laches, &c.) it often stops a long way short of, or within, the limit of time prescribed at law; and that in its originally *concurrent* jurisdiction equity never either exceeds or abridges the limit of time prescribed at law (*l*),—equity in its originally concurrent jurisdiction being a slave to law, and in its originally exclusive jurisdiction being free (within the limits of law) to give weight to considerations of its own. But the statutes of limitation run, in the general case, both at law and in equity, from the time of the discovery (actual or constructive) of the fraud (where the action is grounded on fraud), and not from the time of the perpetration of the fraud (*m*),—although, in actions for negligence and the like, it may be otherwise; but mere ignorance of any one's right of action does not, either at law or in equity, prevent the statutes from running (*n*).

3. *Qui prior est tempore, potior est jure.*

3. *Qui prior est tempore, potior est jure.*—Where the equities are equal, the first in time shall prevail. This maxim has been sometimes understood as meaning, that as between persons having only equitable interests, *Qui prior est tempore, potior est jure*,—a

(*k*) *De Bussche* v. *Alt*, 8 Ch. Div. 286; *Blake* v. *Gale*, 31 Ch. Div. 196; *Andrews* v. *Barnes*, 39 Ch. Div. 133.

(*l*) *Fullwood* v. *Fullwood*, 9 Ch. Div. 176; *In re Maddever, Three Towns* v. *Maddever*, 27 Ch. Div. 523; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.

(*m*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; *In re Crossley, Munns* v. *Burn*, 35 Ch. Div. 266; *Moore* v. *Knight*, 1891, 1 Ch. 547; *Betjemann* v. *Betjemann*, 1895, 2 Ch. 474.

(*n*) *Rains* v. *Buxton*, 14 Ch. D. 537.

proposition far from being true (*o*); for the true meaning of the maxim is, that, as between persons having only equitable interests, if such equities are *in all other respects* equal, then *Qui prior est tempore, potior est jure.* In other words, in a contest between persons having only equitable interests, priority of time is the ground of preference *last resorted to; i.e.*, a court of equity will not prefer one to the other on the mere ground of priority of time, until it finds, on an examination of their relative merits, that there is no other sufficient ground of preference between them (*p*). Thus where A., B., C., three vendors entitled in common to a piece of land, sold the land to D., and on the day for completion of the purchase executed the deed of conveyance to D., in the body of which the payment of the *entire* purchase-money was acknowledged by A. and B., and also by C.; and A. and B., and also C., severally also signed receipts endorsed on the deed of conveyance for their respective purchase-moneys; and thereupon C. (although in fact he had not been paid his proportion of the purchase-money) negligently let D. take away the deed of conveyance (together with the other deeds) in his bag, and D. the same afternoon deposited the deeds with his bankers,—the court held that, as between the bankers (equitable mortgagees by deposit) and C. (unpaid vendor having equitable lien), the bankers, although second in date, were first in right, because of C.'s negligence,—which negligence, it is to be observed, consisted in a *positive* act of imprudence on C.'s part, and that imprudence led directly to the bankers accepting the proffered security of the title-deeds (*q*); and but for such *positive* act, C. would

True statement of rule.

(*o*) *Loveridge* v. *Cooper*, 3 Russ. 30.
(*p*) *Rice* v. *Rice*, 2 Drew. 73; *Gordon* v. *James*, 30 Ch. Div. 249; *National Provincial Bank* v. *Jackson*, 33 Ch. Div. 1.
(*q*) *Farrand* v. *Yorkshire Bank*, 40 Ch. Div. 182; *National Provincial Bank* v. *Jackson*, 33 Ch. Div. 1.

have retained his priority (*r*). And here it is proper to observe, that by the Conveyancing Act, 1881, s. 56 (*s*), either the acknowledgment of the receipt contained in the body of the deed, or the endorsement of such receipt duly signed on the back of the deed, will now sufficiently protect even at law the subsequent purchaser or mortgagee as against the lien of any unpaid vendor who has executed the deed or signed the endorsed receipt,—*scil.* where such subsequent purchaser or mortgagee has no actual notice that the purchase-money is in fact unpaid.

4. Where there is equal equity, the law must prevail.

4. *Where there is equal equity, the law must prevail.*—If, for example, the defendant has a claim to the passive protection of the court, and his claim is equal to the claim which the plaintiff has to call for the active aid of the court, in such a case the court will do simply nothing, and accordingly the defendant who has the legal estate will prevail. Thus, in the case of *Thorndike* v. *Hunt* (*t*), where the trustee of a sum of stock for T., in pursuance of an order of the court made in a suit instituted by his *cestui que trust*, T., transferred what purported to be T.'s trust funds into court, and the funds were thereafter treated as belonging to T.'s estate, and the legal estate, therefore, vested in the Accountant-General (now Paymaster-General) for the purposes of T.'s trust; and it afterwards appeared, that the trustee had provided himself with the means of paying T.'s fund into court by fraudulently misappropriating funds which he held in trust for another *cestui que trust*, B.,—upon the question whether B. had a right to follow the money into court as against T.'s estate, the court held that

(*r*) *Shropshire Union Railway* v. *The Queen*, L. R. 7 Ho. Lo. 496.
(*s*) 44 & 45 Vict. c. 41.
(*t*) 3 De G. & Jo. 563; and see *Newman* v. *Newman*, 28 Ch. Div. 674; *Taylor* v. *Blakelock*, 32 Ch. Div. 560; and *London and County Bank* v. *Goddard*, 1897, 1 Ch. 642.

B. had no such right; for that B.'s right or equity to follow the money was no greater than T.'s right to retain it, and the circumstance of the legal title being held for T. was sufficient to create a preference in favour of T. as against B. But *nota bene*, the legal title, in order to confer protection in such a case, must be an absolutely complete (and not a merely inchoate) legal title (*u*).

Defence of purchase for valuable consideration without notice.

The third and fourth maxims, which we have thus briefly illustrated, find (or used to find) their principal application in cases where the defendant in an action sets up the defence that he has purchased for valuable consideration without notice of the plaintiff's adverse title; and it is proposed now to deal with the various cases in which that defence may or may not be made available; and this will be most conveniently effected by means of the following series of rules; that is to say:—

(*a.*) Plaintiff having equitable estate only, defendant legal estate and equitable estate both.

1. Where purchaser obtains the legal estate at the time of his purchase.

Rule 1. Where the defendant who sets up the defence has the legal estate, a court of equity will grant no relief against him. For nothing can be clearer than the general rule, that a purchaser for valuable consideration, without notice of a prior equitable right, who obtains the legal estate *at the time of his purchase*, is entitled to priority in equity as well as at law, according to the fourth maxim, Where the equities are equal, the law must prevail. Thus if A., the owner of an estate, contracts with B. to sell it to him, and B. pays a part of the purchase-money, but the conveyance to him is not actually executed; and then A., after this contract of sale with B., makes an absolute sale and conveyance of the legal estate to C., who purchases it for valuable

(*u*) *Roots* v. *Williamson*, 38 Ch. Div. 485; *Powell* v. *London and Provincial Bank*, 1893, 2 Ch. 555.

consideration without notice of B.'s claim; here, as C. has the legal estate in him, and has besides purchased *bonâ fide* for value without notice, and his equity to retain the estate is equal to B.'s right to enforce his equitable claim to it, therefore the court of equity refuses to give B. any relief as against C. And again, a purchaser for valuable consideration without notice, although he should not obtain the legal estate at the time of his purchase, may protect himself by *subsequently getting in the outstanding legal estate*, so long as he does not by that act become a party to any breach of trust (*v*); for the equities of both parties being equal, there is no reason why such a purchaser should be deprived of the advantage which he subsequently obtains at law by superior diligence (*x*). And not only where such a purchaser has *actually obtained*, but also where he has the *best right to call for*, the legal estate, will he be entitled to the protection of equity (*y*). For example, a purchaser for value, or mortgagee, who has obtained possession of all the title-deeds, has the best right to call for the legal estate as against any other merely equitable purchaser or mortgagee who has neglected to obtain such possession (*z*); but where no negligence of this sort is imputable to the other party, neither would in such a case have any better right as against the other; and nothing but the complete legal estate itself would, in such latter case, confer priority (*a*).

2. Where purchaser gets in the legal estate subsequently.

3. Where purchaser has the best right to call for the legal estate.

What constitutes the best right to call for the legal estate.

(*b.*) Plaintiff having legal estate, and

Rule 2. Where an application was made to the now obsolete *auxiliary* jurisdiction of the court, as contra-

(*v*) *Saunders* v. *Dehew*, 2 Vern. 271; *Carter* v. *Carter*, 3 K. & J. 617; *Taylor* v. *Russell*, 1891, 1 Ch. 8; 1892, A. C. 244.
(*x*) *Pilcher* v. *Rawlins*, 7 L. R. Ch. 259.
(*y*) *Wilmot* v. *Pike*, 5 Hare, 14.
(*z*) *Buckle* v. *Mitchell*, 18 Ves. 100.
(*a*) *Moore* v. *North-Western Bank*, 1891, 2 Ch. 599.

distinguished from its originally *concurrent* jurisdiction, by the possessor of a legal title, and the defendant pleaded he was in possession as a *bonâ fide* purchaser for value without notice, the defence used to be good, and the court gave no aid to the legal title; but whether the High Court would now give aid by way of *discovery* in such a case, is a question which has been much debated, but which appears now to be settled by the case of *Ind* v. *Emmerson* (*b*). In order duly to understand the rule, we will refer to the case of *Basset* v. *Nosworthy* (*c*), where to a bill filed by an heir-at-law, claiming, under an alleged legal title, against a person claiming as purchaser from the devisee under the will of his ancestor, but which will the plaintiff alleged had been revoked, the prayer of the bill being for discovery of the revocation of the will,—the defendant pleaded that he was a *bonâ fide* purchaser for value without notice of any revocation; and this defence was allowed. So again, in *Wallwyn* v. *Lee* (*d*), where to a bill filed by a tenant in tail, in possession under a marriage settlement, claiming delivery up of certain title-deeds, which he alleged were the title-deeds of portion of the settled estate,—the defendant pleaded that the plaintiff's father, alleging himself to be seised in fee, and being in actual possession as apparent fee-simple owner, and being also in possession of the title-deeds as apparent fee-simple owner, executed the several mortgages under which the defendant claimed, and the defendant averred that he had no notice of the alleged fact (if fact it was) that the plaintiff's father was only tenant for life; and Lord Eldon held that the defence was good, and dismissed the bill. But apparently, if the plaintiff had in such a case shown by his own evidence,

defendant the equitable estate: (*aa.*) The now obsolete auxiliary jurisdiction.

Basset v. *Nosworthy*,—discovery simply.

Wallwyn v. *Lee*,—discovery and delivery up.

(*b*) 33 Ch. Div. 323; 12 App. Ca. 300.
(*c*) 2 L. C. 1.
(*d*) 9 Ves. 24; *Joyce* v. *De Moleyns*, 2 J. & L. 374.

without discovery to aid him, or if the defendant should unguardedly have admitted that the title-deeds in question were the title-deeds of the estate, the plaintiff would, even under the old law, have had judgment for their delivery up, according to his legal right (*e*); and now, by and in consequence of the Judicature Acts, the distinctions between courts of common law on the one hand and courts of equity on the other hand having been abolished, and complete relief being given in either class of court without any need of resorting to the other class of court,—so that relief as well as discovery may now in all cases be claimed in one and the same action, and not discovery merely in aid of the relief claimed in another action elsewhere,—the House of Lords, affirming the decision of the court of appeal, have decided in the case of *Ind* v. *Emmerson* (*f*), that the principle of the decision in *Basset* v. *Nosworthy*, and the other old cases cited above, is no longer applicable, but is obsolete and exploded; in other words, that the plea of purchase for value without notice is no longer any defence (in an action claiming relief) to making discovery of the defendant's title-deeds, for such discovery (it is said) is ancillary to the relief (*g*). It is to be noted also, that the maxim never had any application to cases where the Court of Chancery, *concurrently* with the courts of common law, afforded legal relief, or even when it was asked for substantive equitable relief; and in *Williams* v. *Lambe* (*h*), where to a bill filed by a widow against a purchaser from her husband, claiming her dower, the defendant pleaded that he was a purchaser of the estate for value without notice of

The principle, —how far modified by the fusion of law and equity.

(*bb.*) Originally concurrent jurisdiction.

(*e*) *In re Cooper*, *Cooper* v. *Vesey*, 20 Ch. Div. 611; *Manners* v. *Mew*, 29 Ch. Div. 725.

(*f*) 33 Ch. Div. 323; 12 App. Ca. 300.

(*g*) *Lyell* v. *Kennedy*, 8 App. Ca. 217; *Kennedy* v. *Lyell*, 9 App. Ca. 81; and see *Danford* v. *M'Anulty*, 8 App. Ca. 456.

(*h*) 3 Bro. C. C. 264.

the vendor being married,—Lord Thurlow overruled the plea; and the like decision was also given in a suit for tithes (*i*).

(c.) Plaintiff having equitable estate only, defendant also having equitable estate only.

Rule 3. Where neither the plaintiff nor the defendant has the legal estate or the best right to call for it, but each has an equitable estate only, the court neither gave nor gives any aid or preference to either, but determines their rights by reference to their respective dates; and this rule is well expressed by Lord Westbury in *Phillips* v. *Phillips* (*j*): "I take "it to be clear, that every conveyance of an equitable "interest is an innocent conveyance; that is to say, "the grant of a person entitled in equity passes only "that which he is justly entitled to, and no more. If, "therefore, a person possessed of an equitable estate, "the *legal estate being outstanding*, makes an assurance "by way of mortgage, and afterwards conveys the "estate to a purchaser, he can only grant to the pur-"chaser that which he has, namely, the estate subject "to the mortgage, and no more; the subsequent "grantee takes only that which is left in the grantor. "Hence grantees and encumbrancers claiming only in "equity take and are ranked (*scil.* in the absence of "exceptional circumstances) according to the dates "of their securities, and the maxim applies, *Qui prior "est tempore, potior est jure.* The first grantee is "*potior*, that is *potentior.* He has a better and a "superior, because a prior, equity." And here it is convenient to observe, that, *in cases falling within this third rule,* the subsequent encumbrancer or subsequent purchaser will not acquire priority over the anterior encumbrancer, although he should have had

Notice of first encumbrance immaterial.

(*i*) *Collins* v. *Archer*, 1 Russ. & Ny. 284; *Finch* v. *Shaw*, 19 Beav. 500.

(*j*) 8 Jur. N. S. 145; 10 W. R. 237; 31 L. J. Ch. 321; 5 L. T. N. S. 655; *Harpham* v. *Shacklock*, 19 Ch. Div. 207; *In re Richards, Humber* v. *Richards*, 45 Ch. Div. 589.

no notice of such anterior encumbrancer, assuming always that the anterior encumbrancer has not, by any *positive* act of negligence on his part, conduced to mislead the other. For example, in *Ford* v. *White* (*k*), where property in Middlesex was mortgaged to A., and afterwards to B., and subsequently (with notice of B.'s encumbrance) to C., and C. registered his mortgage before B., and afterwards assigned it to D., who had no notice of B.'s mortgage,—it was held that as C.'s interest was equitable, he could not, by assigning it to D. without notice, put D. in a better situation than himself; and consequently that D. was not entitled to priority over B., the prior registration by C. notwithstanding. But in such a case, if the property were in Yorkshire, the priorities between B. and C. would now (in the absence of actual fraud) be determined exclusively by the dates of the registration of their respective securities (*l*).

(*d.*) Plaintiff having an equity merely, and not an equitable estate, defendant having both legal and equitable estate.

Rule 4. Where there are circumstances that give rise to an "equity," as distinguished from an "equitable estate,"—for example, an equity to set aside a deed for fraud, or to correct it for mistake or accident, —and the purchaser under the instrument puts forward the plea of purchase for valuable consideration without notice of the mistake or fraud, and proves such plea, the court will not interfere. Thus in *Sturge* v. *Starr* (*m*), where a man, already married, performed the ceremony of marriage with a woman, and then he and she assigned her life-interest in a trust fund to a purchaser, it was held that, though she might not have executed such an instrument had she been aware of the fraud practised upon her, yet that that fraud could not affect the rights of the defendant, who was a *bonâ fide* purchaser. This female had,

(*k*) 16 Beav. 120; *Taylor* v. *Russell*, 1891, 1 Ch. 8.
(*l*) 47 & 48 Vict. c. 54, ss. 14, 15, stated *infra*, p. 30.
(*m*) 2 My. & K. 195; *Harpham* v. *Shacklock*, 19 Ch. Div. 207.

doubtless, the strongest equity possible; but that equity, however strong *in se*, was no equity *as against the purchaser*, who was innocent of the fraud.

The doctrine of notice.

In order to complete our understanding of the third and fourth maxims, it remains to consider the doctrine of Notice, and its effect in equity as between successive purchasers or mortgagees. Now no equitable doctrine is better established than this, that the person who purchases an estate, although for valuable consideration, *after notice* of a prior equitable estate or right, makes himself a *malâ fide* purchaser, and will not be enabled, by means of the legal estate or otherwise, to defeat such prior equitable interest. Thus, in *Potter* v. *Saunders* (*n*), it was held that if a vendor should contract with two different persons successively for the sale to each of them of the same estate, and if the party with whom the second contract was made had *notice of the first contract*, and notwithstanding completed his contract by taking a conveyance of the legal estate in pursuance of his second contract, the court would in a suit for specific performance by the first purchaser against the vendor and the second purchaser, decree the latter to convey the estate to the plaintiff; and similarly in *In re A. D. Holmes* (*o*), where a second encumbrancer on a fund in court had notice of the first encumbrance thereon at the time of taking his security, and afterwards obtained a stop-order on the fund before the first encumbrancer had done so, the court held that the second encumbrancer did not thereby obtain priority.

Purchaser with notice of prior claim, a trustee to the extent of such claim.

And to such an extent has the effect of notice been allowed to prevail in equity, that the policy of the old Registration Acts was even infringed upon by the

(*n*) 6 Hare, 1; and see *Trinidad Asphalte Co.* v. *Coryat*, 1896, A. C. 587.
(*o*) 29 Ch. Div. 786; *Ex parte Whitehouse*, 32 Ch. Div. 512.

courts; for example, in *Le Neve* v. *Le Neve* (*p*), where lands in a register county, *i.e.*, in Middlesex, settled on a first marriage by a deed which was not registered, were settled upon a second marriage, with notice of the former settlement, by a deed which was registered, it was held that the former settlement should be preferred in equity to the latter settlement. Still it always required, and (in Middlesex) it requires, a very strong case to get over the effect of the Registry Acts, express notice amounting to fraud being required, and merely constructive notice not being sufficient (*q*); and as regards lands in Yorkshire, it has now been provided by the Yorkshire Registries Acts, 1884–85 (*r*), that registered assurances shall have priority *inter se* according to the dates of the registration thereof, and that the priorities given by the Act shall have full effect in all courts, and shall not be affected by actual or constructive notice, except in cases of actual fraud (sec. 14),—the provision contained in the principal Act, that the registration should constitute actual notice (sec. 15), having been repealed by the second Amending Act of 1885 (*s*); and therefore these registered assurances will (in the absence of actual fraud) be now in all cases on the same footing as registered judgments (*t*),—taking rank *inter se* according to the dates of their respective registrations, without reference to any question of notice; a prior document of a registrable nature, being and remaining unregistered, will therefore not be able to prevail against a subsequent document of a registrable nature, which is duly registered. But when the registered security is

Lands in Middlesex,—effect of notice of unregistered deed.

Lands in Yorkshire,—effect of notice of unregistered deed.

(*p*) 2 L. C. 35.

(*q*) *Lee* v. *Clutton*, 24 W. R. 942; 45 L. J. Ch. 43; *Bradley* v. *Riches*, 26 W. R. 910; 9 Ch. Div. 212.

(*r*) 47 & 48 Vict. c. 54; 48 Vict. c. 4; and 48 & 49 Vict. c. 26.

(*s*) 48 & 49 Vict. c. 26.

(*t*) *Robinson* v. *Woodward*, 4 De G. & Sm. 562; *Proctor* v. *Cooper*, 2 Drew. 1.

obtained under circumstances of "*grave moral blame*" attaching to the lender, and is registered purposely with the view of prejudicing the prior unregistered security, that is "*actual fraud*" within the meaning of the Act, and the registered document will in such a case have no priority (*u*); also, an unregistered equity of which the subsequent registered purchaser has notice will still prevail against him in all cases in which it would be a fraud on his part not to hold his registered title subject thereto (*v*).

Case of sub-purchaser with notice, where his vendor bought without notice.

It has been long settled, that if a person purchases for valuable consideration with notice *from a person who bought without notice*, the second purchaser may (provided he obtain the legal estate or have the best right to call for it) shelter himself under the first purchaser,—for otherwise the first or *bonâ fide* purchaser would be unable to deal with his property, and the sale of estates would be very much clogged.

Case of sub-purchaser without notice, where his vendor bought with notice.

And conversely, if a person who buys with notice sells to a *bonâ fide* purchaser for valuable consideration without notice, the latter may protect his title: *e.g.*, where, as in *Harrison* v. *Forth* (*w*), A. purchased an estate with notice of the plaintiff's encumbrance, which was equitable, and then sold the estate to B., who had no notice, and B. afterwards sold it to C., who had notice, the court held that, though A. and C. had notice, yet as B. had no notice, the plaintiff could not be relieved against the defendant C. But although formerly the purchaser for valuable consideration of an estate, who had notice of a *voluntary* settlement, would not have been affected by it (*x*), the words of the statute 27 Eliz. c. 4, against fraudu-

(*u*) *Battison* v. *Hobson*, 1896, 2 Ch. 403; and see *Trinidad Asphalte Co.* v. *Coryat*, 1896, A. C. 587.

(*v*) *Le Neve* v. *Le Neve*, supra; *White* v. *Neaylon*, 11 App. Ca. 171.

(*w*) Prec. Ch. 51; *Att.-Gen.* v. *Biphosphated Guano Co.*, 11 Ch. Div. 327.

(*x*) *Buckle* v. *Mitchell*, 18 Ves. 100.

lent conveyances, having so provided, he would now be affected thereby (*y*).

What constitutes notice.

The notice which is to affect in equity a subsequent purchaser or mortgagee in the way above indicated, may be either actual or constructive,—constructive notice having, in general, the same effect as actual notice (*z*), although in exceptional cases constructive notice may not always have the effect of actual notice (*a*). And firstly, as regards actual notice, it suffices to say, that in order to make it binding, it must be given by a person interested in the property, and in the course of the negotiations (*b*), and to a person in his official capacity (*c*); and vague reports from persons not interested in the property or given to a person in his private and not in his official capacity (*c*), will not amount to actual notice; and further, a mere assertion of title in some other person, or a mere general claim of title by some other person, does not amount to actual notice of such other title (*d*); but if the knowledge, from whatsoever source derived, is of a kind to operate upon the mind of any rational man, or man of business, and to make him act with reference to it, then it will amount to actual notice (*e*). Secondly, as regards constructive notice, that is in its nature no more than evidence of notice, the weight of the evidence being such that the court imputes to the purchaser that he had notice (*f*); whence also constructive notice has been sometimes called imputed notice. In *Jones* v.

Actual notice.

Constructive notice.

(*y*) 56 & 57 Vict. c. 22.
(*z*) *Prosser* v. *Rice*, 28 Beav. 68.
(*a*) P. 30, *supra*.
(*b*) *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18.
(*c*) *Société Générale* v. *Tramways Union Co.*, 14 Q. B. D. 424; *Simpson* v. *Molsons' Bank*, 1895, A. C. 270.
(*d*) Sugd. V. & P. 755.
(*e*) *Lloyd* v. *Banks*, L. R. 3 Ch. 488; *Agra Bank* v. *Barry*, L. R. 7 H. L. 135; *Arden* v. *Arden*, 29 Ch. Div. 702.
(*f*) *Plumb* v. *Fluitt*, 2 Anst. 438; *Henderson* v. *Graves*, 2 E. & A. 9.

Smith (*g*), Wigram, V.C., thus expressed himself upon the subject: "I believe I may, with sufficient accuracy for present purposes, assert that the cases in which constructive notice has been established resolve themselves into two classes. Firstly, cases in which the party charged has had actual notice that the property in dispute was in fact charged, encumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an inquiry into the charge, encumbrance, or other circumstance affecting the property, of which he had actual notice; and, Secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged had designedly abstained from inquiring, for the very purpose of avoiding notice,—a purpose which, if proved, would clearly show that he had a suspicion of the truth, and a wilful determination not to learn it. But if there is neither on the one hand actual notice that the property is in some way affected, nor on the other hand any such wilful turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind, but there is merely a want of caution, as distinguished from wilful blindness, then the doctrine of constructive notice will not apply; and in such latter case, the purchaser will, in equity, be considered, as in fact he is, a *bonâ fide* purchaser without notice."

Jones v. *Smith* —Constructive notice of two kinds.

1. Where actual notice of a fact, which would have led to notice of other facts.

2. Where inquiry purposely avoided to escape notice.

But mere want of caution is not constructive notice.

As an illustration of the first of these two kinds of constructive notice may be cited the case of *Bisco* v. *Earl of Banbury* (*h*),—being a case in which the purchaser had actual notice of a specific mortgage, the

Examples of constructive notice.

(*g*) 1 Hare, 55; *Williams* v. *Williams*, 17 Ch. Div. 437.
(*h*) 1 Ch. Ca. 287; *Ware* v. *Egmont*, 4 De G. M. & G. 473; *National Provincial Bank* v. *Jackson*, 33 Ch. Div. 1.

deed creating this mortgage referring also to other encumbrances; and the court held, that the purchaser, knowing of the specific mortgage, ought to have inspected the deed, which would have led him to a knowledge of the other deeds, and in that way the whole case must have been discovered by him. As an illustration of the second of the two kinds of constructive notice may be cited the case of *Birch* v. *Ellames* (*i*),—being a case in which the title-deeds of an estate were deposited with the plaintiff by way of security, and the defendant, fourteen years after, upon the eve of the bankruptcy of the mortgagor, took a mortgage, with actual notice of the deposit with the plaintiff, but without inquiring the purpose for which the deposit was made; and the court decreed for the plaintiff (*k*). And in explanation of what the court considers mere want of caution not amounting to constructive notice, it may be mentioned, that the mere absence of title-deeds has never been held sufficient *per se* to affect a person with notice, if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them; for in that case the court cannot impute either fraud or gross and wilful negligence to him (*l*). *Secus*, if he omit all inquiry as to the title-deeds (*m*),—unless in the case of registered lands (*n*), or of copyhold lands; but note, that in mercantile transactions, the doctrine of constructive notice of the contents of one document from the reference thereto in another document (*e.g.*, in the contract), is not applicable (*o*).

Example of mere want of caution.

(*i*) 2 Anstr. 427.

(*k*) *Whitebread* v. *Jordan*, 1 Y. & C. Ex. Ca. 303; *English and Scottish Mercantile* v. *Brunton*, 1892, 2 Q. B. 1, 700; *In re New Chile Gold Mining Co.*, W. N. 1892, L. 93.

(*l*) *Hewitt* v. *Loosemore*, 9 Hare, 449; *Spencer* v. *Clarke*, 9 Ch. Div. 137.

(*m*) *Worthington* v. *Morgan*, 16 Sim. 547.

(*n*) *Lee* v. *Clutton*, 24 W. R. 942.

(*o*) *Manchester Trust* v. *Furness*, 1895, 2 Q. B. 539, following *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201.

Lessee has constructive notice of lessor's title.

A lessee has constructive notice of his lessor's title (*p*); for if a man who purchases a fee-simple is bound to look into the title in a regular way, so also is a man who takes a lease for 1000 years, or for twenty-one years, or any other lease. The notice which affects lessees is usually notice of some restrictive covenant affecting the lessor's title; and the most express statement made by the lessor to the lessee that there are no such restrictive covenants will not save the lessee from being affected with constructive notice of them, if there are any (*q*). Before the Vendor and Purchaser Act, 1874, the lessee was frequently debarred from looking into the lessor's title, and since that Act he cannot look into that title unless he expressly stipulate to see it; but in either case, his not looking into the lessor's title amounts to the same thing as closing his eyes to avoid inquiry; and although he is or may be neither fraudulent nor negligent in so doing, still he must take the consequences of the constructive notice which the law imputes to him in such a case (*r*). Also, knowledge by the purchaser that the land is in the occupation or tenancy of any one is constructive notice of the terms of such occupation or tenancy, so far as such terms may affect the land (*s*): also, knowledge by the purchaser that the tenants in occupation pay their rents to some particular person other than the assuming vendor, is constructive notice of the right or title of such other person, of whatever quality or worth such right or title may prove to be (*t*),—unless, of course, the usual effect of such notice should be otherwise got rid of.

Notice of occupation or tenancy,—effect of.

(*p*) *Fielden* v. *Slater*, L. R. 7 Eq. 523.
(*q*) *Patman* v. *Harland*, 17 Ch. Div. 353; *In re Cox and Neve's Contract*, 1891, 2 Ch. 109.
(*r*) *Patman* v. *Harland*, supra; *Carter* v. *Williams*, L. R. 9 Eq. 678; *Allen* v. *Seckham*, 11 Ch. Div. 790.
(*s*) *Daniels* v. *Davison*, 16 Ves. 249; *Caballero* v. *Henty*, L. R. 9 Ch. App. 447.
(*t*) *Bailey* v. *Richardson*, 9 Ha. 734; *Knight* v. *Bowyer*, 2 De G. & Jo. 421

3. Notice to agent, &c., notice to principal,—when and when not.

There is a third species of constructive notice, to wit, notice to the agent, which is sometimes held to be constructive notice to his principal; and this is generally so where the same agent is concerned (in the case of sales) for both vendor and purchaser (*u*), or (in the case of mortgages) for both lender and borrower (*v*). But the imputation of constructive notice being in this case also merely a presumption of fact, it is manifest that the presumption may be rebutted, *e.g.*, by showing that the agent was designing a fraud, the success of which required that he should not communicate to the principal the notice which he himself had or which he himself received (*x*),—a principle recognised also in the Partnership Act, 1890 (*y*), which enacts that notice to an active partner is notice to all the partners, *unless the active partner is designing a fraud.* Also, where the common agent is, *e.g.*, the secretary of both the borrowing and the lending company, and he has personal notice of some irregularity which, if known to the lending company before the loan, would be fatal to the validity of the loan, and he fails to communicate his knowledge of the irregularity to the lending company, but is not otherwise guilty of any fraud, the court will not impute to the lending company a knowledge of the irregularity (*z*),—*Scil.*, because the lending company may reasonably assume, that all preliminaries to the loan, being matters of

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(*u*) *Spencer* v. *Topham*, 2 Jur. N. S. 865; and see *Saffron Walden Building Society* v. *Rayner*, 10 Ch. Div. 696 (notice to the solicitor of mortgagees); *Hallows* v. *Lloyd*, 39 Ch. Div. 686 (notice to retiring trustees); and *In re Wyatt, White* v. *Ellis*, 1892, 1 Ch. 188, and (sub nomine *Ward* v. *Duncombe*), 1893, A. C. 369 (notice to one of two trustees).

(*v*) *In re Hampshire Land Co.*, 1896, 2 Ch. 743.

(*x*) *Allen* v. *Lord Southampton, Banfather's claim*, 16 Ch. Div. 178; *Cave* v. *Cave*, 15 Ch. Div. 639.

(*y*) 53 & 54 Vict. c. 39, s. 16.

(*z*) *In re Hampshire Land Co.*, supra; *Simpson* v. *Molsons' Bank*, supra.

internal management of the borrowing company, have been duly observed (*a*).

Duty of agent to communicate the matter to his principal.

Moreover, notice to counsel, agents, or solicitors, in order to affect in equity their several principals, must be notice of something which they could be reasonably expected both to remember and to mention; and it is commonly said, therefore, that the notice must have been given or imparted to them in the same transaction; although if one transaction be closely followed by and connected with another, then the second transaction will usually be considered the same transaction, it being reasonable to so consider it (*b*). And when it is said that the notice must be of something which an agent could be reasonably expected to mention as well as to remember, it is intended that the knowledge *is so material to that transaction as to make it the* DUTY *of the agent to communicate it to his principal;* wherefore, as was observed in *Wylie* v. *Pollen* (*c*), the transferee of a first mortgage would not be affected by his solicitor's knowledge of an encumbrance *subsequent* to the first mortgage, so as to prevent the transferee from afterwards making further advances, such knowledge not being material to the business of the transfer, for which business alone the solicitor acted; but in such a case, if the transferee had had actual notice of the subsequent encumbrance, he could not have safely made the further advances.

Constructive notice,— under the Conveyancing Act, 1882.

And it has now been provided generally, by the Conveyancing Act, 1882 (*d*), that a purchaser shall not be affected by notice, unless the instrument or

(*a*) *Royal British Bank* v. *Turquand*, 6 El. & Bl. 327.
(*b*) *Fuller* v. *Bennet*, 2 Hare, 394.
(*c*) 32 L. J. (Ch.) N. S. 782; and see *Bradley* v. *Riches*, 9 Ch. Div. 212; *Kettlewell* v. *Watson*, 21 Ch. Div. 685; 26 Ch. Div. 501; and Conveyancing Act. 1882, s. 3.
(*d*) 45 & 46 Vict. c. 39; *In re Cousins*, 31 Ch. Div. p. 71; *Bailey* v. *Barnes*, 1894, 1 Ch. 25.

thing is within his own knowledge, or would have come to his knowledge if reasonable inquiries and inspections had been made by him, or unless *in the same transaction* it has come to the knowledge of his counsel as such, or to the knowledge of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such if reasonable inquiries and inspections had been made by such solicitor or agent (*e*).

Maxims of equity,—three characteristic maxims.

Returning now to the consideration of the maxims of equity, the next three in order, namely,—(5.) He who seeks equity must do equity; (6.) He who comes into equity must come with clean hands; and (7.) Equity aids the vigilant, not the indolent, or, in other words, Delay defeats equities,—these three maxims may be viewed as together illustrating the distinctive and governing principle of equity, that nothing can call forth the court into activity but conscience, good faith, and personal diligence; but we must illustrate each of the three maxims separately.

5. He who seeks equity must do equity, —illustrations of this maxim:

5. In illustration of the maxim, "*He who seeks equity must do equity*," may be mentioned the rules which used to govern, and which (so far as they have room to operate) still govern, what is termed the wife's "equity to a settlement." The general rule of the old common law was, that when a woman married, all her personal property (not being settled to, or otherwise belonging to her for, her separate use) passed to her husband; and therefore all her choses in action which he could reduce into possession without the aid of a court of equity, and also all her things in possession, he might realise and take to his own use absolutely; but the moment

(*a*.) Married woman's equity to a settlement.

(*e*) *Sheffield* v. *London Joint Stock Bank*, 13 App. Ca. 333.

he was obliged to ask the assistance of a court of equity for that purpose, the court told him, "We "will help you to get the money on condition that "you make a fair settlement out of it for the "benefit of your wife and children, and otherwise we "will not aid you at all" (*f*). And again, where a person having a title to an estate knowingly suffers some third person (who is ignorant of his title) to expend money upon the estate, either in buildings or in other improvements, and then *afterwards* asserts his title to the estate, together with the buildings or improvements thereon,—although upon his proving his title, judgment that he recover possession of the estate would be given for him at law, still in equity, and now also in a court of law, such third person would be entitled to be reimbursed his expenditure, either by pecuniary compensation or otherwise; and if, *e.g.*, he were a lessee under a defective lease, he might have a confirmation of his lease (*g*).

(*b.*) Person standing by must give compensation.

6. In illustration of the maxim, "*He who comes into equity must come with clean hands*," may be cited *Overton* v. *Banister* (*h*), where an infant, fraudulently concealing his age, obtained from his trustees part of a sum of stock to which he was entitled on coming of age; and when of age, a few months after, he applied for and received the residue of such stock, and then afterwards instituted a suit to compel the trustees to pay over again the portion of the stock which had been improperly paid during his minority; but the court held, that neither the infant nor his assignees could enforce payment over again of the stock paid during the minority (*i*).

6. He who comes into equity must come with clean hands,—illustration of this maxim.

(*f*) *Sturgis* v. *Champneys*, 5 My. & Cr. 105.
(*g*) *Hallett* v. *Martin*, 24 Ch. Div. 624; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Powell* v. *Thomas*, 6 Ha. 300.
(*h*) 3 Hare, 503.
(*i*) *Salvage* v. *Foster*, 9 Mod. 35; *Nelson* v. *Stocker*, 4 De G. & Jo. 458, 464.

7. Delay defeats equities, —illustration of this maxim.

7. The third of the three connected maxims, viz., "*Delay defeats equities*," or (as it is otherwise expressed) "*Equity aids the vigilant, not the indolent*," may be briefly summed up in the language of Lord Camden in *Smith* v. *Clay* (*k*):—"A court of equity, which is "never active in relief against conscience or public "convenience, has always refused its aid to *stale de-*"*mands*, where the party has slept upon his rights "for a great length of time; for nothing can call "forth this court into activity but conscience, good "faith, and reasonable diligence" (*l*). And it may be added, that even a comparatively short period of delay, not satisfactorily accounted for, also tells heavily against a plaintiff in equity suing in respect of an equitable right or for equitable relief. Also, laches is imputable to reversioners even (*m*), but not so readily.

8. Equality is equity,— illustrations of this maxim:

8. *Equality is equity*.—This maxim is perhaps nowhere so clearly illustrated as in the case of joint purchases and joint mortgages. For although if two persons advance and pay the purchase-money of an estate in EQUAL portions, and take a conveyance to them and their heirs, that is a joint-tenancy at law, and the survivor will in such a case, at law and also in equity, take the whole estate; yet wherever circumstances occur which a court of equity can lay hold of to prevent the incident of survivorship, the court will readily do so; for joint-tenancy is not favoured in equity. Thus, in *Lake* v. *Gibson* (*n*), it was laid down, that where two or more PURCHASE

(*a*.) Purchase-money advanced in *unequal* shares.

(*k*) 3 Bro. C. C. 460, note.

(*l*) *Wright* v. *Vanderplank*, 2 K. & J. 1; 8 De G. M. & G. 133; *Leaver* v. *Fielder*, 32 Beav. 1; *Strange* v. *Fooks*, 4 Giff. 408.

(*m*) *Life Association of Scotland* v. *Siddell*, 3 De G. F. & Jo. 271; and consider *How* v. *Earl Winterton*, 1896, 2 Ch. 626.

(*n*) 1 L. C. 198; and see Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 20, sub-sec. 2.

lands, and advance the purchase-money in *unequal* shares, and this appears on the deed itself, the mere circumstance of the inequality in the sums respectively advanced makes them in the nature of *partners;* and however the legal estate may survive, yet the survivor will in equity be considered as a trustee for the other in proportion to the sum advanced by him, and of course a trustee also for himself in proportion to his own original share. So, again, if two persons advance a sum of money, whether in *equal* or in *unequal* shares, by way of MORTGAGE, and take the mortgage to them jointly, and one of them dies, the survivor shall not in equity have the whole money due on the mortgage; but the representative of the deceased mortgagee shall have his proportion as a trust; for the mere circumstance that the transaction is a *loan* is considered by the court to repel the presumption of an intention to hold the mortgage as a joint-tenancy (*o*); nor will the court treat the mortgage as joint, although it should contain an express clause to the effect that the money belongs to the lenders on a joint account (*p*). Also, even in the case of a purchase, enuring both at law and in equity as a joint purchase, equity will treat a mere covenant to alien as a severance of the jointure (*q*), and so will exclude the legal incident of survivorship.

(*b.*) Money advanced on mortgage in *equal* or in *unequal* shares.

9. "*Equity looks to the intent rather than to the form.*"—Although this principle, even before the recent fusion of law and equity, was fully recognised in the common law, yet it received in equity its fullest application; for equity would in no case permit the veil of form to hide the true effect or inten-

9. Equity looks to the intent rather than to the form,—illustration of this maxim.

(*o*) *Rigden* v. *Vallier*, 2 Ves. Sr. 258; *Morley* v. *Bird*, 3 Ves. 361.
(*p*) *In re Jackson, Smith* v. *Sibthorpe*, 34 Ch. Div. 732.
(*q*) *Hewett* v. *Hallett*, 1894, 1 Ch. 362.

tion of the transaction,—*non quod dictum sed quod factum inspiciendum est.* Thus equity will in general relieve against a penalty or a forfeiture; and if, *e.g.*, it is satisfied that the sum of money specified in a bond is penal, it will refuse to enforce payment thereof in full, even though the parties may expressly state in the bond that the specified sum is not by way of penalty, but is to be held as the ascertained or "liquidated damages" for breach of the condition of the bond. And to this maxim may also be referred the equitable doctrines that govern mortgages; and nowhere perhaps more than in these latter was the ancient divergence of equity from the common law so strongly and clearly exhibited (*r*).

10. Equity looks on that as done which ought to have been done,—illustration of this maxim.

10. "*Equity looks on that as done which ought to have been done.*"—The true meaning of this maxim is, that equity will treat the subject-matter of a contract, as to its consequences and incidents, in the same manner as if the act contemplated in the contract of the parties had been completely executed. But equity will not thus act in favour of all persons, *e.g.*, not in favour of volunteers (*s*), but only in favour of a limited class of persons, chiefly purchasers for value, including lessees and mortgagees, whom equity regards with considerable affection. Thus all agreements are considered as performed which are made for a *valuable* consideration, in favour of persons entitled to insist upon their performance; and they are, in fact, considered as done at the time when, according to the tenor of the contract, they ought to have been done; and for most purposes they are deemed (as from that time) to have the same consequences attached to them as if they were completely

(*r*) *Peachy* v. *Duke of Somerset*, 2 L. C. 1100.
(*s*) *Jefferys* v. *Jefferys*, Cr. & Phil. 138; *Chetwynd* v. *Morgan*, 31 Ch. Div. 596.

executed (*t*). And so also money by deed covenanted, or by will directed, to be laid out in land, is treated as already land in equity, from the moment that the deed and will respectively take effect; and conversely, where land is by agreement contracted, or by will directed, to be sold, it is considered and treated as money,—this being a *conversion* in equity.

11. Equity imputes an intention to fulfil an obligation,—illustration of this maxim.

11. "*Equity imputes an intention to fulfil an obligation.*"—Where a man is under an obligation to do some act, and he does some other act which is of a kind capable of being considered as a fulfilment of his obligation, such latter act shall be so considered; because it is right to put the most favourable construction on the acts of others, and to presume that a man intends to be just before he is generous (*u*). Thus if, on his marriage, a husband covenants to pay to the trustees of his marriage settlement the sum of £2000, to be laid out in land in the county of D., and to be settled upon the trusts of the settlement; there, although he never pays the money to the trustees, but after the marriage he himself purchases land in the specified county, and takes a conveyance thereof to himself in fee, and then dies intestate, without bringing the lands into settlement,—yet the purchased lands shall be considered as purchased by the husband in pursuance of his covenant, and liable accordingly to the trusts of the settlement (*v*),—this being a *satisfaction* or *performance* in equity.

12. Equity acts *in personam*,—illustration of this maxim.

12. "*Equity acts* in personam."—This is a maxim which is descriptive of the procedure in a court of equity; and it is not otherwise a maxim or principle

(*t*) *Walsh* v. *Lonsdale*, 21 Ch. Div. 9; *Swain* v. *Ayres*, 21 Q. B. D. 289; *Foster* v. *Reeves*, 1892, 2 Q. B. 255.
(*u*) 2 Sp. 204.
(*v*) *Sowden* v. *Sowden*, 1 Bro. C. C. 582.

of equity itself. The maxim is one of very great importance to the student to understand, and its explanation and illustration may be very useful. In the case of *Penn* v. *Lord Baltimore* (*x*), which was a suit regarding land in the United States (*scil.* beyond the jurisdiction of the English Court of Chancery), Lord Chancellor Hardwicke stated (in effect) as follows: "The strict primary decree in this court, as a court "of equity, is *in personam;* and although this court "cannot (in the case of lands situate without the "jurisdiction of the court) issue execution *in rem, e.g.*, "by elegit, still I can enforce the judgment of the "court (which is *in personam*) by process *in personam*, "*e.g.*, by attachment of the person when the person "is within the jurisdiction, or by sequestration of the "goods or lands of the defendant when these are "within the jurisdiction of the court, until the defend-"ant do comply with the order or judgment of the "court, *which is against himself the defendant per-"sonally, to do or cause to be done or to abstain from "doing, some act.*" And agreeably with the judgment of Lord Hardwicke in that case, the court is in the habit of entertaining actions, and of giving judgment therein, for an account of rents and profits; and for specific performance, and for an injunction (*y*); and for the foreclosure of mortgages (*z*); and for the execution of conveyances, &c., regarding lands situate abroad, and whether within the Queen's dominions or not; and by the Trustee Act, 1893, s. 41 (*a*), the court is enabled to make vesting orders as to land (and personal estate) whenever situate in any part of the Queen's dominions (other than Scotland). But if

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(*x*) 1 Ves. 444; 2 L. C. 837.

(*y*) *Ex parte Pollard*, 1 Mont. & Ch. 239; *Mercantile Investment Co.* v. *River Plate Co.*, 1892, 2 Ch. 303.

(*z*) *Toller* v. *Carteret*, 2 Vern. 494; *Paget* v. *Ede*, L. R. 18 Eq. 118; *Colyer* v. *Finch*, 5 H. L. Ca. 905.

(*a*) 56 & 57 Vict. c. 53; and see 57 & 58 Vict. c. 10, s. 2.

the very title itself to the lands is in question (*b*), the court will not assert its jurisdiction, for that is a question exclusively appropriate for the law of the country in which the property is situate (*scil.*, the *lex loci rei sitæ*).

(*b*) *In re Hawthorne, Grahame* v. *Massey*, 23 Ch. Div. 743; *De Sousa* v. *British South Africa Co.*, 1892, 2 Q. B. 358.

PART II.

THE ORIGINALLY EXCLUSIVE JURISDICTION

CHAPTER I.

TRUSTS GENERALLY.

Feoffment, with livery of seisin.

ANCIENTLY, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee-simple in the lands; and no consideration was necessary for the completeness of the gift; nor was any estate then known save only the estate at law.

Uses arise temp. Edw. III.

However, about the close of the reign of Edward III., a new species of estate unknown to the common law sprung into existence; for the Statutes of Mortmain having prohibited lands from being given for religious purposes, the lawyers (true to their constant habit) hit upon a means of evading them, the device they adopted being that of taking grants or making feoffments to third persons *to the use* of the religious houses (*a*); and in process of time, such grants or feoffments to one person to the use of another became usual even where no question of religion entered. And in the case of all such grants and feoffments, although the person, and he only, to whom the seisin was delivered, was at law

(*a*) 2 Bl. Com. 328.

considered the owner of the land; still in equity the mere delivery of the seisin was not deemed at all conclusive of the beneficial rights of the feoffee. Equity was unable, it is true, to take from such feoffee the title which he possessed at law, *because equity never sets aside, however much it may avoid, the law;* but equity could and did compel the feoffee to make use of his legal title for the benefit of the person who had the better claim to the benefit thereof. Thus, if A. conveyed land to B. to the use of C., this declaration of the use was held to charge the *conscience* of B.; and therefore, if B. refused to account to his *cestui que use* [*i.e.*, he to whose use the property was conveyed, viz. C.] for the profits, this was a breach of confidence on the part of B., for which the common law indeed gave no redress, not recognising C. at all, but only B., as the owner of the land (*b*), but for which the Court of Chancery did give C. redress, extorting a disclosure from B. upon his oath of the nature and extent of the confidence reposed in him, and enforcing a strict discharge of the duties of his trust; and from the period when the right of C. became thus cognisable in the Court of Chancery, C. became in fact the equitable or true and beneficial owner, and B. remained merely the legal owner.

Chancellor's jurisdiction over the conscience.

Uses not recognised at common law.

Uses recognised in equity.

By the introduction of the device of uses, many of the rules and incidents of property were in danger of being defeated; *e.g.*, the factious baron (it was said) might vest his estate at law in friends, and afterwards commit treason with impunity; and the ordinary proprietor, adopting the same precaution, might enjoy and also dispose of the beneficial interest, regardless of his lord, and regardless also of the common law (*c*). But the legitimate advantages

Opportunities for the abuse of the use.

(*b*) 4 Edw. IV.
(*c*) Hayes' Intro. 34, 35.

arising from the use greatly outweighed its legal disadvantages; and of these advantages, the power of disposing of lands by will, a power properly incident to ownership, was one of the most valuable and important; for while the land itself was not devisable, the use of the land was so; and the legal owner was bound in equity to observe the testamentary destination of the use (*d*). However, the inroads which uses had made, and were still making, on the ancient law of tenure, induced the Legislature to pass a statute for their regulation, viz., the Statute of Uses (*e*); by which statute it was enacted, that where any person or persons should stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that *had* any such use, confidence, or trust (by which were meant the persons beneficially entitled) should be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they had the use, trust, or confidence; that is to say, the *use* became converted into the *land;* the use by virtue of the statute was the land. And it did not matter, for this purpose, whether the use was expressed in words, or was merely *implied* from the circumstances of the case; for supposing a feoffment made to A. and his heirs to the use of B. and his heirs, A., who would before the statute have had an estate in fee-simple at law, now took no permanent estate, but by virtue of the statute was a mere conduit-pipe for conveying the legal estate to B.; and supposing a feoffment made by X. to A. and his heirs simply, without any expression of the use, and without any consideration, X., the feoffor, would in this case, before the statute, have been held in equity to have the use by implication

Statute of Uses, 27 Hen. VIII. c. 10,—converted the use into the legal estate, *i.e.*, land at law.

1. Express use.

2. Resulting use.

(*d*) Hayes' Intro. 36.
(*e*) 27 Hen. VIII. c. 10.

for want of any valuable consideration to pass it to the feoffee, and for want of any express use to vest it in the *cestui que use;* therefore, after the statute, X., the feoffor, having the implied use, was deemed in lawful seisin and possession of the land. And consequently, by such latter feoffment, although livery of seisin was duly made to A., yet no estate passed to A.; for the moment A. obtained the estate, he held it as a mere conduit-pipe for conveying it back to X., the feoffor, and the same moment instantly came the statute and gave to the feoffor, who had the implied use, the seisin and possession also; and the use was said to *result* to X. (*f*),—so much so, that X. was held to be *in* again of his old estate,—the intervening feoffment, with all its heavy formalities, reckoning for nothing. And with regard to the question, what was a sufficient consideration moving from the feoffee to the feoffor to prevent the implication of such a resulting use as that lastly before exemplified, although it was anciently the rule, even in equity, that any valuable consideration, however trifling, was sufficient to entitle the feoffee to retain for his own benefit absolutely the lands of which he was enfeoffed (*g*); yet at the present day the courts of equity take a different view, and will not regard as a sufficient consideration a merely trifling or nominal consideration, *e.g.*, the customary five shillings' consideration, but will in general in such a case order the grantee, under a voluntary or practically voluntary conveyance, to hold merely as a trustee for the grantor; and at all events, the *onus* is upon the grantee in such a case to prove the intention of a *beneficial* gift to him,—failing which proof, the grantor will take back the beneficial or equitable estate, although

The consideration required to rebut a resulting use.

(*f*) 1 Sand. Us. 99, 100.
(*g*) Ibid., 59, 62.

the estate at law may continue vested in the grantee (*h*).

Statute of Uses,—failure of its object.

The professed object of the Statute of Uses was completely to extirpate the doctrine of uses and trusts; but the statute, so far from effecting that object, rather gave a fresh stimulus to uses and trusts, and in this wise, namely,—the common law judges having determined that if A., the legal owner, was directed to hold the land to the use of B., to the use of C., the statute would carry the land to B. at law, but carry it no farther; for the use in favour of C. was "a use upon a use," *i.e.*, a second use upon or after a first use, which the statute had no remaining energy to reach (*i*),—therefore equity, considering the plain intention of the gift, held that the use in favour of C. should have full effect as the equitable estate; and consequently after the passing of the statute, in order to create an interest purely equitable, nothing more was necessary than to limit *a use upon a use*, or to declare a second use. For example, if A. sold land to B., and B. desired to have the legal estate vested in C. in trust for B., the object was effected by A.'s conveying the land to X. to the use of C. to the use of B.; and by such conveyance the land passed to X. by the old common law, and the first use, being that in favour of C., carried the legal estate to C. by virtue of the statute; and the second use, being that in favour of B., was the estate in equity or equitable estate (*k*). And in this manner, under such conveyances there arise two estates, namely, the legal estate or estate at law, which is in the first usee in respect of the first use, and the equitable estate or estate in equity, which is in the second (or last) usee in respect of the second (or last) use, and which last *use* is for distinction's sake

"No use upon a use,"—at law;

but such second use is the trust estate,—in equity.

(*h*) *Coles* v. *Trecothick*, 9 Ves. 246.
(*i*) *Lloyd* v. *Passingham*, 6 B. & C. 305; Hayes' Intro. 53.
(*k*) Hayes' Intro. 53.

commonly called by the name of *trust* (*l*). Moreover, in the construction and regulation of the equitable estate or trust, equity followed and follows the law; therefore a trust for A. for his life, or for A. and the heirs of his body, or for A. and his heirs, will respectively give A. an equitable estate for life, an equitable estate in tail, or an equitable estate in fee-simple. Also, an equitable estate in fee-simple immediately belongs to every purchaser of freehold property the moment he has signed an enforceable contract for its purchase,—so much so, that if the purchaser were to die intestate the moment after such a contract is complete as a contract simply, the equitable estate in fee-simple would descend to his heir-at-law, and the vendor would be a trustee for such heir, and would be compellable to convey to him the legal estate, being first, of course, paid the purchase-money (*m*).

Equity follows the analogy of the law,—as regards equitable estates.

The Statute of Uses, it will be observed, was pointed at the extirpation of uses of *lands*, *tenements*, and *hereditaments* only, and therefore it extended not to other species of property; and further, the statute spoke, in the case of lands, &c., only of persons "*seised*" of lands, &c., to the use of another or others, and seisin, strictly so called, applied and applies to freeholds only, and not to leaseholds nor to copyhold lands; and it followed, that the statute was confined in its legal operation to freehold lands. Consequently the properties to which the Statute of Uses does not apply are much more numerous than the properties to which it does apply, and may be enumerated as being (1) pure personal property generally; (2) impure personal property,—otherwise chattels real or leasehold lands; and (3) copyhold lands (*n*). And therefore, with regard to all these three classes of properties, if

Property to which the Statute of Uses is inapplicable.

(*l*) Wms. R. Prop. 156; 1 Sand. Us. 278.
(*m*) *Lysaght* v. *Edwards*, 2 Ch. Div. 499.
(*n*) 2 Ves. Sr. 267; 1 Sand. Us. 249.

any of them are vested in A. to the use of B., the statute transfers not the legal interest to B., which therefore remains in A., and B.'s use is and remains a *trust* (*o*). And as to freeholds even, only uses of a certain description are operated on by the statute, that is to say, only *passive* uses; for in regard to *active* uses, being uses which impose some active duties on the feoffee, *e.g.*, a duty to sell the land and divide the money, or to convey the land on the *cestui que trust* attaining the age of twenty-one years, the statute is necessarily inoperative (*p*).

Statute of Frauds,—trusts originally created by parol, required henceforth in general to be created by writing.

The next important statute that has a bearing upon trusts is the Statute of Frauds (*q*); before which statute trusts of every species of property might have been created, or might have been passed from one person to another, without any writing, and without the use even of any particular form of words; but in consequence of the danger of permitting the trust to depend upon so uncertain a thing as memory, and generally to shut the door against the numerous frauds that might otherwise have entered in, the Legislature thought fit to enact that certain species of trusts should be in writing; and by the Statute of Frauds, it was accordingly enacted (by section 7), that all *declarations* or *creations* of trusts or confidences of any *lands, tenements,* or *hereditaments* should be manifested and proved by some writing, signed by the party who is by law enabled to declare such trusts, or by his last will in writing (*r*); and (by section 9) that all *grants* and *assignments* of ANY trust or confidence should likewise be in writing signed by the party granting or assigning the same, or by his last will. But the Statute of Frauds (by section 8) recog-

(*o*) Gilb. Us. 79.
(*p*) Hayes' Intro. 51.
(*q*) 29 Car. II. c. 3.
(*r*) *Kronheim* v. *Johnson*, 7 Ch. Div. 60.

nised two exceptions, namely, (1) trusts arising or resulting from any conveyance of lands or tenements by implication or construction of law (*s*); and (2) trusts transferred or extinguished by act or operation of law. And the statute clearly extends to freehold lands; and it has been decided to extend also to copyhold lands (*t*), and to leasehold lands or chattels real (*u*); but pure personal estate, *i.e.*, chattels personal, are not within the Act (*v*),—*scil.* are not within the 7th section (which treats of the declaration or original creation of the trust), but are (*semble*) within the 9th section (which treats of the grant, *i.e.*, the assignment or transfer, of an already created and subsisting trust).

Exceptions.

Property to which the Statute of Frauds is applicable.

A trust, as will be seen from the instances above given, is a beneficial interest in, or a beneficial ownership of, real or personal property unattended with the legal ownership thereof (*x*). And all trusts may be classified under three heads, namely, *express trusts*, *implied trusts*, and *constructive trusts;* and it is proposed in the next four succeeding chapters to treat of each head or class of trust in the order above enumerated, *express* trusts being either of a *private* or of a *public* (that is to say, charitable) character, and the two varieties of express trusts being treated of separately by themselves and in separate chapters.

Definition of trust.

Classification of trusts,—express, implied, and constructive.

(*s*) See *Bellasis* v. *Compton*, 2 Vern. 294; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275; *James* v. *Smith*, 1891, 1 Ch. 384; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.

(*t*) *Withers* v. *Withers*, Amb. 151.

(*u*) *Forster* v. *Hale*, 3 Ves. 669; *Riddle* v. *Emerson*, 1 Vern. 108.

(*v*) *M'Fadden* v. *Jenkins*, 1 Ph. 157; *Benbow* v. *Townsend*, 1 My. & K. 506.

(*x*) 2 Sp. 875.

CHAPTER II.

EXPRESS PRIVATE TRUSTS.

Express trusts.

AN express private trust is a trust which is clearly expressed by the author thereof, whether verbally or by writing; and these trusts are of many varieties, which it is proposed to expound in due order one after another.

I. *Executed or executory.*

Firstly, the express trust may be either *executed* or *executory;* and a trust is said to be *executed* when no act is necessary to be done to constitute it, the trust being finally declared or constituted by the instrument which evidences it; as where an estate is expressed to be conveyed to A. in trust for B., and the conveyance actually accomplishes what it professes to do. On the other hand, a trust is said to be *executory* when there is a mere direction to convey upon certain trusts, and the instrument containing the direction does not *proprio vigore* constitute the trust or effect the conveyance which it directs. "All trusts," observes Lord St. Leonards, "are in a "sense executory; but a court of equity distinguishes "an executory from an executed trust in this "manner: Has the testator been his own convey- "ancer, or has he left it to the court to make out "from *general expressions* what his intention is? If "he has so defined his intention that you have "nothing to do but to take the limitations he has "given to you, and to convert them into legal estates,

"then the trust is executed; but otherwise it is "executory" (*a*).

As to trusts executed,—equity follows the law.

Now in the case of trusts *executed*, a court of equity puts the same construction on technical words as is put by a court of law on the limitations of legal estates; *e.g.*, if an estate is vested in trustees and their heirs in trust for A. for life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder in trust for the heirs of the body of A., the trust being an executed trust, A., according to the rule in *Shelley's case*, which is a rule of law, will be held to take an estate tail (*b*); and to this rule it is believed there is no exception whatsoever in the case of *executed* trusts. On the other hand, in the case of *executory* trusts, a court of equity sometimes does, and sometimes does not, put the same construction on technical words as is put by a court of law on the limitations of legal estates, acting in this respect not capriciously or arbitrarily, but according to certain rules or distinctions which we will now explain and illustrate.

As to trusts executory,—equity may or may not follow the law.

Two guiding principles in executory trusts.

And firstly, it may be stated generally, that in the case of executory trusts, a court of equity will not invariably construe with legal strictness the technical expressions in the document, but will, in completing the executory trust, mould it according to what it collects to be the real intention of the party, although that intention should be contrary to the strict legal effect of the language used; but if no intention contrary to the legal effect of the language used can be collected, either from the document itself or from the nature of the case, a court of equity construes the technical terms in strict accordance with their legal

(*a*) *Egerton* v. *Brownlow*, 4 H. L. Ca. 210; *Sackville-West* v. *Holmesdale*, L. R. 4 H. L. 543.

(*b*) *Jervoise* v. *Duke of Northumberland*, 1 J. & W. 559.

meaning (*c*). And, secondly, it is to be mentioned, that in two documents (and it is believed in two documents only) executory trusts are found, namely, Marriage Articles and Wills; and as regards marriage articles, the very object and purpose of these furnish in themselves an indication of intention, their object being to secure that a provision shall be made for the issue of the marriage; but in the case of wills, the court has no such object or purpose necessarily before it, and the testator's intention can be known only from the words which he has used (*d*); and it is necessary, therefore, to consider marriage articles and wills separately from each other.

(*a*.) Marriage articles,—intention always implied.

(*b*.) Wills,—intention requires to be expressed.

Executory trusts under marriage articles:

(*a*.) Court will decree a strict settlement in conformity with presumed intention.

And, firstly, as to executory trusts in marriage articles:—If in these articles it is agreed that the real estate either of the intended husband or of the intended wife, or of both, shall be settled upon the heirs of the body of them, or of either of them, in such terms as would, according to the rule in *Shelley's case*, give both or either of them an estate tail,—thereby enabling both or either of them to defeat the provision intended to be secured for the issue,—courts of equity, considering that the object of the articles is to make a provision for the issue, will, in conformity with the presumed intention of the parties, decree a settlement to be made upon the husband or wife for life only, with remainder to the issue of the marriage successively in tail as purchasers. Thus in *Trevor* v. *Trevor* (*e*), where A., in consideration of a then intended marriage, covenanted with trustees *to settle* an estate to the use of himself for life, without impeachment of waste, remainder to his intended wife

(*c*) *Glenorchy* v. *Bosville*, 1 L. C. 1.

(*d*) *Blackburn* v. *Stables*, 2 V. & B. 369; *Deerhurst* v. *St. Albans*, 5 Mad. 260.

(*e*) 1 P. W. 622; 5 Brown, P. C. Toml. ed. 122; *Streatfield* v. *Streatfield*, Ca. t. Talb. 176.

for life, remainder to the use of the heirs male of him on her body begotten, and the heirs male of such heirs male issuing, remainder to the right heirs of the said A. for ever:—Lord Maecclesfield said, that articles were only minutes or heads of the agreement of the parties, and ought to be so moulded as to effectuate the intention; and that the intention was to give A. only an estate for life; *for if it had been otherwise, the settlement would have been vain and nugatory, putting it in A.'s power, as soon as the articles were made, to have destroyed them;* and he held, that A. was entitled to an estate for life only, and that his eldest son took by purchase, as tenant in tail.

(*b.*) Executory trusts in wills, —Court seeks for the expressed intention.

Secondly, as to executory trusts in wills:—In the case of these trusts, the intention of the testator must, as we have said, appear from the will itself, that he meant (if he meant) "heirs of the body," or words of similar legal import, to be words of purchase, and not of limitation; for otherwise courts of equity will in these cases direct a settlement to be made according to the strict legal meaning of the words used. Thus, in the case of a devise to trustees in trust *to convey* to A. for life, and after his decease to the heirs of his body; here, as no indication of intention appears on the face of the will that the issue of A. should take as purchasers, the rule of law will prevail, and A. will take an estate tail. Accordingly, in *Sweetapple* v. *Bindon* (*f*), where B. by will gave £300 to her daughter Mary, *to be laid out* by her executrix in lands, *and the lands to be settled* to the only use of Mary and her *children*, and if Mary died without *issue*, the land to be equally divided between her brothers and sisters then living, —Lord Cowper said, that had it been an immediate devise of land, Mary the daughter would have been,

Construed strictly, in the absence of an expressed intention to the contrary,—*Sweetapple* v. *Bindon*.

(*f*) 2 Vern. 536.

by the words of the will, tenant in tail; and in the case of a voluntary devise, the court must take it as they found it, and not lessen the estate or benefit of the devisee; and the words *children* and *issue* in the will being used interchangeably, and as so used being (according to the rule in *Wild's case*) (*g*) equivalent to *heirs of the body*, the daughter Mary was decreed to have an estate tail under the will. On the other hand, in the case of a devise to trustees, upon trust *to convey* to A. for life, and after his decease to the heirs of his body, if the will contains expressions from which it can be fairly gathered that the testator intended a strict settlement,—for example, either from the will mentioning the testator's desire that A. should marry, or from the testator expressing that A. (notwithstanding the apparent limitations aforesaid) should not have the power to bar the entail, or other like words,—then a court of equity will effectuate the intention by decreeing a strict settlement to be executed. Accordingly, in *Papillon* v. *Voice* (*h*), where A. bequeathed a sum of money to trustees in trust *to be laid out* in the purchase of lands, *to be settled* on B. for life, without impeachment of waste, remainder (to trustees and their heirs during the life of B. to preserve contingent remainders, remainder) to the heirs of the body of B., remainder over, *with power to* B. *to make a jointure;* [and by the same will A. *devised lands* to B. for his life, without impeachment of waste, remainder (to trustees and their heirs during the life of B. to preserve contingent remainders, remainder) to the heirs of the body of B., remainder over],—Lord Chancellor King declared, as to that part of the case where the lands were devised to B. for life, though said to be without impeachment of waste,

Construed according to contrary intention,—if this is expressed,—*Papillon* v. *Voice.*

(*a.*) The executed use;

(*g*) 6 Co. Rep. 16*b*.
(*h*) 2 P. W. 471.

with (remainder to trustees to preserve contingent remainders) remainder to the heirs of the body of B.,—this last remainder was in the general rule, and the words of it must operate as words of limitation, and consequently create a vested estate tail in B.; but as to the other part, he declared that the court had power over the money directed by the will to be invested in land, and that the diversity was where the will passed a legal estate, and where it was *only executory;* that in the latter case, the intention should take place, and not the rules of law,—so that as to the lands to be purchased, they should be limited to B. for life, with power to B. to make a jointure, remainder (to trustees during his life to preserve contingent remainders, remainder) to his first and every other son in tail male successively, remainder over. And the reader will have observed that, in the last-mentioned case, the already acquired lands devised by the will were so devised upon an *executed* trust,—so that the rule in *Shelley's case* could not but apply; but that the lands *to be purchased,* and then afterwards *to be settled,* devised by the will were so devised upon an *executory* trust,—so that the court was free to apply (or not to apply) the rule in *Shelley's case,* according as it found (or did not find) in the will itself some reference to a marriage, or some other indication of an intention contrary to the strict legal meaning of the words. Now, the reference to *jointuring* was a reference to marriage, and was a sufficient reference for the court to act upon,—that particular portion of the will being, by the force or effect of such reference, taken out of the category of devises altogether, and put (in effect) into the category of marriage articles. And besides, if B. was to have had an estate tail, there would have been no necessity for giving him an *express* power to jointure; for, as an incident to his estate tail and by virtue thereof, he could have made a jointure without any power in that behalf;

(*b.*) The executory use.

but if B. was only to have an estate for his life, then, of course, the express power to jointure was necessary.

What expressions have been held to show a contrary intention.

And in the following further cases on wills, it has been held that there was a sufficient indication of the testator's intention that the words, "heirs of the body," or words of similar import, should be construed as words of purchase, and not of limitation, viz., where trustees were directed to settle an estate upon A. and the heirs of his body, "taking special care that it "should not be in the power of A. to dock the entail "of the estate given to him during his life" (*i*); or, again, "in such manner and form . . . as that, if A. "should happen to die without leaving lawful issue, "the property might then after his death descend "unencumbered to B." (*k*); also a direction that the settlement shall be made "as counsel shall advise," has been held to indicate an intention that there should be a strict settlement (*l*).

II. *Voluntary trusts and trusts for value.*

Secondly, the express trust may be either a *voluntary trust* or a *trust for valuable consideration;* and for the due understanding of this group of trusts, the three general principles or rules following have to be borne in mind, namely:—

General rules. 1. *Ex nudo pacto non oritur actio*,—"No action lies upon an agreement without consideration."

1. Firstly, the rule, *Ex nudo pacto non oritur actio*, that no action lies upon an agreement without consideration,—which is a rule as universally recognised in equity as it is at law. Thus, in *Jefferys* v. *Jefferys* (*m*), where a father who had by voluntary deed conveyed certain freeholds, and *covenanted to surrender* [but had never actually surrendered] certain copyholds to trustees in trust for the benefit of his daughters, afterwards devised the same freehold and copyhold

(*i*) *Leonard* v. *Sussex*, 2 Vern. 526.
(*k*) *Thompson* v. *Fisher*, L. R. 10 Eq. 20.
(*l*) *Bastard* v. *Proby*, 2 Cox, 6.
(*m*) Cr. & Ph. 138; and see *Green* v. *Paterson*, 32 Ch. Div. 95.

estates to his widow, by a will dated subsequently to Preston's Act, 1815 (55 Geo. III. c. 192), being the Act which first rendered a surrender to the uses of the will unnecessary, so that the will, regarded as an assurance, was complete not only as to the freehold lands, but also as to the copyhold lands, while the deed, regarded as an assurance, was complete as to the freeholds, but incomplete as to the copyholds,—in a suit instituted by the daughters after the testator's death to have the trusts of the deed carried into effect, and to compel the widow to surrender to them the copyholds, to which she had meanwhile been admitted,—The Lord Chancellor said: "The title "of the plaintiffs (the daughters) to the freeholds is "complete; and being first in date, is also first in "right. But with respect to the copyholds, I have "no doubt that *the court will not execute a voluntary "contract*" (*n*). Consequently, the widow kept the copyholds, but the daughters got the freeholds.

2. Imperfect conveyance,—evidence of a contract.

2. Secondly, the rule that an imperfect conveyance is in equity regarded as evidencing a contract to convey; and such contract is accordingly binding or not binding as the case may be (*o*), that is to say,—(1.) An imperfect conveyance, if for valuable consideration, is binding; but (2.) An *imperfect* conveyance, *if voluntary*, is not binding; and reading these observations backwards, they hold equally true, that is to say,—(1.) A conveyance for value is binding, although imperfect; but (2.) A voluntary conveyance is not binding, if imperfect.

3. Trust may arise without consideration.

3. And thirdly, the rule that a voluntary conveyance, *if perfect*, will be *binding;* in other words, that a trust may be raised without any consideration; and

(*n*) *Wilkinson* v. *Wilkinson*, 4 Jur. N. S. 47.

(*o*) *Parker* v. *Taswell*, 4 Jur. N. S. 183; 2 De G. & J. 559; and e *In re Earl of Lucan, Hardinge* v. *Cobden*, 45 Ch. Div. 470.

in *Ellison* v. *Ellison* (*p*), Lord Eldon says: "I take "the distinction to be, that if you want the assistance "of the court to *constitute* you a *cestui que trust*, and "the instrument is voluntary, you shall not have that "assistance for the purpose of *constituting* you a *cestui* "*que trust*" (*q*),—implying that, if you are already completely *constituted*, then you are all right, and may enforce your rights under the deed. And it will be found, in fact, that all the cases which have been decided on voluntary trusts, whether in favour of or against volunteers, have turned upon the single inquiry,—Has the trust been completely constituted or declared? Because if so, it is binding; and if not so, it is no good at all, even as a ground of action for completely constituting it. The inquiry is, however, sometimes one of the greatest nicety, depending on certain minute distinctions, which it is now proposed to examine.

Has relation of *cestui que trust* been constituted?

I. Where donor is both legal and equitable owner.

(*a.*) Trust actually executed,—either (1.) by conveyance or assignment upon trust; or (2.) by donor's declaration of trust.

I. And firstly, in cases where the donor has the legal as well as the equitable interest in the property, —If the conveyance upon trust for the donee has been actually and effectually made, as if the donor by a complete legal conveyance has transferred land or stock, no difficulty will arise, for then equity will enforce the trust even in favour of a volunteer as against not only the donor himself, but also all subsequent volunteers (*r*). And the rule is the same, not only if the donor has effectually conveyed the property to trustees for the donee, but also where he declares himself a trustee for the donee; for in such latter case also a binding trust is created,—the complete efficacy of such a declaration being expressly recognised by Lord Eldon in the case of *Ex parte Pye* (*s*), where

(*p*) 1 L. C. 271.
(*q*) *Jones* v. *Lock*, L. R. 1 Ch. 25.
(*r*) *Ellison* v. *Ellison*, 1 L. C. 273.
(*s*) *Ex parte Pye, ex parte Dubost*, 18 Ves. 140, 145.

he says: "It is clear that this court will not assist a "volunteer,—that upon an agreement to transfer stock "this court will not interpose in favour of a volunteer; "*but if the party has declared himself to be the trustee of* "*that stock*, it becomes the property of the *cestui que trust* " without more, and the court will act upon it." And we may here mention, that in the above-cited case of *Jefferys* v. *Jefferys* (*t*), the voluntary deed which contained the covenant to surrender the copyholds did not contain any declaration by the covenantor that in the meantime and until such surrender had been made he would stand seised of the copyholds upon trust for his daughters: but according to the case of *Steele* v. *Walker* (*u*), if the voluntary deed had contained such a declaration, it would have been a perfect document, and the daughters and not the widow would have had the copyholds. For in the case of *Steele* v. *Walker*, where, in addition to the covenant to surrender, there was also a declaration of trust, Lord Romilly, M.R., said: "The covenant to surrender the copyholds con- " tained in the voluntary settlement could not be en- " forced against her (*scil.* the voluntary settlor); yet *the* " *trust declared by Mrs. Chollet* (the voluntary settlor) *of* " *the copyholds until a surrender was made* was in my " opinion perfectly good, and *constituted her a trustee* " of these copyholds upon the trusts declared by the " deed."

Jefferys v. *Jefferys*,—no declaration of trust until surrender; *Steele* v. *Walker*,—a declaration of trust until surrender,—the different effects.

The difficulty in all this group of cases arises where the donor has not made or intended to make any declaration of trust properly so called, but has attempted to make a complete legal conveyance or assignment, and has failed to do so; and in considering the effect of such ineffectual attempts, it used to be necessary to inquire whether the property was of a species which

(*b.*) Trust not actually executed,—either (1.) no declaration of trust; or (2.) incomplete conveyance or assignment on trust.

(*t*) Cr. & Ph. 138; and disting. *Green* v. *Paterson*, 32 Ch. Div. 95.
(*u*) 28 Beav. 466.

(1). Of property assignable at law.

admitted of a complete conveyance or assignment at *law;* for if it was of that character, then if the purported legal conveyance or assignment was left imperfect, the donee received no aid from the court to perfect the apparently intended gift. And accordingly, in *Antrobus* v. *Smith* (*v*), where A. made the following endorsement, under his hand only, upon the receipt for one of his subscriptions to the Forth and Clyde Navigation Company: "I do hereby "*assign* to my daughter B. all my right, title, and "interest of and in the enclosed call, and all other "calls in the F. and C. Navigation,"—the court held, that no trust was created in favour of B., the Master of the Rolls saying: "This instrument was "of itself incapable of conveying the property. Mr. "Crawford *has not in form declared himself a trustee,* "nor was that mode of doing what he proposed in "his contemplation. He meant a gift. *He says he* "ASSIGNS *the property;* but the gift was not complete; "the property was not transferred by the act. There "is no case in which a party has been compelled to "perfect a gift which, in the mode of making it, he "has left imperfect. There is a *locus pœnitentiæ,* as "long as it is incomplete." And in *Searle* v. *Law* (*x*), the mere failure of the voluntary assignor of certain turnpike bonds to *observe the formalities required by the Turnpike Road Act* which was regulative of the legal assignment, was held fatal to the intended trust, the Vice-Chancellor saying:—"As he (the "settlor) has *omitted to take the proper steps to make* "*the deed an effectual* ASSIGNMENT, both the legal and "the beneficial interest in the bonds remained vested "in him at his death, and therefore now belong to "his executors."

Antrobus v. *Smith*,—endorsement under hand only, and purporting to assign.

Searle v. *Law*,—non-compliance with the particular formalities required on an assignment.

(*v*) 12 Ves. 39; *Shillito* v. *Hobson*, 30 Ch. Div. 396.
(*x*) 15 Sim. 95. See and distinguish *Nanney* v. *Morgan*, 37 Ch. Div. 346.

(2.) Of property not assignable at law.

On the other hand, if the property purporting to be assigned was such that it could not be completely transferred at law, the rule was that the purported conveyance or assignment of it was good *if the donor had done all that he could to perfect the assignment;* and it was only when he left anything imperfect which he might have perfected or made more nearly perfect that the purported conveyance or assignment was bad. Therefore, in *Fortescue* v. *Barnett* (*y*), where J. B. made a voluntary assignment by deed of a policy of assurance upon his own life for £1000 to trustees, upon trust for the benefit of his sister and her children if she or they should outlive him; and he duly delivered the deed to one of the trustees, but kept the policy in his own possession; and no notice of the assignment having been given by the trustees to the assurance office, J. B. afterwards surrendered to the assurance company, for valuable consideration, the policy and a bonus declared upon it,—Upon a bill filed by the surviving trustee of the deed against the executors of J. B., then deceased, to have the value of the policy replaced out of his estate, the court held that, upon the delivery of the deed, no act remained to be done by the grantor to give effect (*scil.* as against himself) to the assignment of the policy, and that his estate was liable to make good the amount of the value of the policy assigned by the deed. And in the somewhat similar case of *Pearson* v. *Amicable Assurance Office* (*z*), the court arrived at the same conclusion, viz., that the assignment, *being by deed*, was complete, and the gift perfect and binding. And so also, in *Fox* v. *Hanks* (*a*), where a husband assigned by deed certain leaseholds

Fortescue v. *Barnett*,—policy of assurance, purported assignment of, by *deed*.

(*y*) 3 My. & K. 36; and see *In re Walhampton Estate*, 26 Ch. Div. 391
(*z*) 27 Beav. 229.
(*a*) 13 Ch. Div. 822, following in effect *Baddeley* v. *Baddeley*, 9 Ch. Div. 113; and see Conveyancing Act, 1881, s. 50.

to his wife without the intervention of trustees, the court held that the assignment was complete, although, by the then state of the law, it left the husband still possessed of the legal estate,—the defect here being *not a neglect of the party*, but merely an imperfection in the legal consequences of a complete legal act. But when a deed was not used, there could be no legal assignment; wherefore in *Edwards* v. *Jones* (*b*), where the obligee of a bond, five days before her death, signed a memorandum *not under seal*, which was endorsed upon the bond, and which purported to be an *assignment* of the bond without consideration to a person to whom at the same time the bond was delivered, the gift was held to be incomplete, and the court could not give effect to it, the Lord Chancellor saying: "The memorandum "being inoperative for the purpose of transferring "the bond, which was a mere chose in action, the "mere delivery or handing over of the bond does "not constitute a good gift *inter vivos* of the bond; "and the intended gift being purely voluntary and "*incomplete*, this court will not complete it" (*c*). And in conclusion of this branch of the subject, it may be observed that all varieties of property not formerly assignable at law have been now made assignable at law (*d*); consequently the distinction aforesaid between property that is, and property that is not, properly assignable at law, is for the future rendered unnecessary; and the question in all cases now is simply, whether the property has been in fact completely assigned at law.

Edwards v. *Jones*,—bond purporting to be assigned by memorandum under hand only.

Assignment of policies and legal choses in action.

(*b*) 1 My. & Cr. 226.

(*c*) *Blakely* v. *Brady*, 2 Dr. & Walsh, 311; and distinguish *Baddeley* v. *Baddeley*, 9 Ch. Div. 113.

(*d*) Policies of life assurance are assignable under 30 & 31 Vict. c. 144; policies of marine insurance, under 31 & 32 Vict. c. 86; and debts and other legal choses in action generally, under 36 & 37 Vict. c. 66, s. 25, sub-sec. 6.

II. Secondly, in cases where the donor has only an equitable interest in the property, the legal estate being vested in trustees,—In these cases, the settlor may either, firstly, direct the trustees to hold the property in trust for the donee; and by such a direction, though without consideration, a trust is well and irrevocably created (*e*),—the direction being in writing as regards lands, whether freeholds, leaseholds, or copyholds, and being either in writing or oral as regards pure personal property (*f*); and for the validity of the trust so created, no notice of the direction need be given to the trustees, in whom the legal interest is vested (*g*), such notice being only necessary to protect the new *cestui que trust* as against third parties (*h*). Or, secondly, the settlor may, instead of making such a direction as aforesaid, purport to assign his equitable interest in the property,—in the case of lands, by conveying his equitable interest therein; and in the case of personality, by assigning his equitable interest therein; and as regards the donor's conveyance of his equitable interest in lands, if a deed is used, that will make a complete gift (*i*); and as regards the donor's assignment of his equitable interest in personal estate, the rule is the same, namely, that if a deed is used, the gift will be complete (*k*). And the whole law as to voluntary trusts is thus summarised by Lord Justice Turner in *Milroy* v. *Lord* (*l*): "In order to render a voluntary settlement valid

II. Where donor is only equitable owner.

(a.) Trust actually executed, —either (1.) by direction to trustees to hold in trust;

Or (2.) by conveyance or assignment of equitable interest.

Milroy v. *Lord*,—summary of the law.

(*e*) *Bill* v. *Cureton*, 2 My. & K. 503.
(*f*) *M'Fadden* v. *Jenkins*, 1 Ph. 153; *Penfold* v. *Mould*, L. R. 4 Eq. 562.
(*g*) *Tierney* v. *Wood*, 19 Beav. 330; *Donaldson* v. *Donaldson*, Kay, 711; *Kronheim* v. *Johnson*, 7 Ch. Div. 60.
(*h*) *Donaldson* v. *Donaldson*, Kay, 719.
(*i*) *Gilbert* v. *Overton*, 2 H. & M. 110; *Nanney* v. *Morgan*, 37 Ch. Div. 346; *Bridge* v. *Bridge*, 16 Beav. 322.
(*k*) *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Meek* v. *Kettlewell*, 1 Ha. 464; *Donaldson* v. *Donaldson*, Kay, 711; *Hardinge* v. *Cobden*, 45 Ch. Div. 470.
(*l*) 4 De G. F. & J. 264; *In re King, Sewell* v. *King*, 14 Ch. Div. 179; *Paul* v. *Paul*, 19 Ch. Div. 47; 20 Ch. Div. 742.

"and effectual, the settlor must have done everything "which, according to the nature of the property "comprised in the settlement, was necessary to be "done in order to transfer the property and render "the settlement binding upon him. He may, of "course, do this by actually transferring the property "to the persons for whom he intends to provide, and "the provision will then be effectual; and it will be "equally effectual if he transfers the property to a "trustee for the purposes of the settlement, or declares "that he himself holds it in trust for those purposes; "and if the property be personal, the trust may, as I "apprehend, be declared either in writing or by parol. "But in order to render the settlement binding, one "or other of these modes must, as I understand the "law of this court, be resorted to, for there is no "equity in this court *to perfect an imperfect* gift;" and where the facts show an intention to transfer property, and not to declare a trust, the court will not give effect to an imperfect transfer by treating it as a declaration of trust (*m*), excepting (as we have seen) between husband and wife; but an assignment of, *e.g.*, mortgage debts, being complete as such, would not be an imperfect assignment within this rule, merely because the deed of assignment did not contain also an assignment of the securities for the same debts (*n*),—for the debts may be given, although the securities therefor are not also given.

(*b.*) Trust not actually executed,—either (1.) by direction to trustees; or (2.) by conveyance or assignment of equitable interest.

III. *Fraudulent trusts*,—principally in relation to marriage.

Thirdly, a conveyance upon trust may (or may not) be fraudulent, and ineffectual (or effectual) accordingly. Further, various species of frauds, arising either at common law or under the provisions of particular statutes, have to be considered, and

(*m*) *Warriner* v. *Rogers*, L. R. 16 Eq. 340; *Richards* v. *Delbridge*, 22 W. R. 584; *Breton* v. *Woolven*, 17 Ch. Div. 416; *Shillito* v. *Hobson*, 30 Ch. Div. 396.

(*n*) *In re Patrick*, *Bills* v. *Tatham*, 1891, 1 Ch. 82.

principally in connection with marriage settlements, in order to determine whether the settlement (being otherwise good and perfect) is to stand or fall. We propose to indicate the principal provisions of the relevant statutes.

(*a*.) By the statute 13 Eliz. c. 5, all covinous conveyances, gifts, or alienations of lands or goods, whereby *creditors* might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared *utterly void;* but the Act is not to extend to any estate or interests in lands, &c., *on good consideration* and *bonâ fide* conveyed to any person not having notice of such covin; and under this statute we have to consider both voluntary conveyances and conveyances for value.

(*a*.) 13 Eliz. c. 5,—frauds under.

Firstly, As regards voluntary conveyances:—The statute 13 Eliz. c. 5, does not declare voluntary conveyances as such to be void, but only fraudulent voluntary conveyances to be void (*o*); but a voluntary conveyance, *if it tend to defeat or delay the creditors* (*p*), is deemed fraudulent within the statute. It was for some time thought, that the mere fact of the settlor being indebted at the time of the voluntary conveyance was sufficient to invalidate that conveyance under the statute; and certain dicta of Lord Westbury in *Spirett* v. *Willows* (*q*) were supposed to support that view. It was there said, "that if the "debt of the creditor by whom the voluntary con- "veyance is impeached *existed at the date of the settle- "ment, and it is shown that the remedy of the creditor "is defeated or delayed by the existence of the settlement,* "it is immaterial whether the debtor was or was not

(A.) Voluntary conveyances.

Settlement must be *bonâ fide.*

Settlor being indebted does not *per se* invalidate conveyance.

Doctrine in *Spirett* v. *Willows* stated and explained.

(*o*) *Holloway* v. *Millard*, 1 Mad. 414.
(*p*) *Ex parte Elliott*, 2 Ch. Div. 104; *Ex parte Chaplin*, 26 Ch. Div. 319.
(*q*) 3 De G. J. & S. 293; 34 L. J. Ch. 367.

"solvent after making the settlement." His Lordship meant, of course, that having shown so much, you had shown enough, and it was not necessary to go on and show further that the settlor was also insolvent; but his Lordship did not intend to say, that the voluntary conveyance might not have been supported by proof of the settlor's solvency; for it seldom happens that a man is not indebted to some extent when he makes a voluntary settlement, but then he is usually able, both after the settlement and before it, to pay all his creditors without difficulty; and it is only when the creditors are delayed seriously by the settlement in getting paid their debts that the settlement is made void under the statute (*r*). Moreover, the principle laid down in *Spirett* v. *Willows* has been approved, and also extended, in the recent case of *Freeman* v. *Pope* (*s*). The bill there was filed for the administration of the estate of A., and to set aside a voluntary settlement executed by him some years previous to his death, *by a creditor whose claim had accrued since the date of the settlement;* and it was proved that A. was perfectly solvent up to the date of the settlement, but that the *effect of the settlement was to deprive him of the means of paying certain* THEN EXISTING *debts.* Lord Hatherley decided against the validity of the settlement, and held in effect that *the subsequent creditors,* upon showing that the money lent by them must have been applied towards paying the former creditors who were in existence at the date of the settlement, but had subsequently been paid off, had an equity to "*stand in the shoes*" of the previously existing creditors, for the purpose of impeaching the settle-

Freeman v. *Pope*,—extension of decision in *Spirett* v. *Willows*

(*r*) Compare sect. 47 (Bankruptcy Act, 1883, 46 & 47 Vict. c. 52), and *In re Tetley*, W. N. 1896, p. 86.

(*s*) L. R. 5 Ch. 538; and see *Taylor* v. *Cœnen*, 1 Ch. Div. 636; *Ex parte Russell, in re Butterworth*, 19 Ch. Div. 588; *Golden* v. *Gillam*, 20 Ch. Div. 389.

ment (*t*). And upon the question what amount of indebtedness will raise the presumption of fraudulent intent within the meaning of the statute, a question which is clearly one of evidence to be decided upon the facts of each case, it may be answered that mere indebtedness will not suffice, nor yet is it necessary to prove absolute insolvency; but, to quote the words of Lord Hatherley in *Holmes* v. *Penny* (*u*),—"The "settlor must have been at the time so largely in- "debted as to induce the court to believe that the "intention of the settlement was to defraud the "persons who at the time of making the settlement "were creditors of the settlor" (*v*).

What amount of indebtedness will raise presumption of fraudulent intent within the meaning of 13 Eliz. c. 5.

Secondly, As regards conveyances for value:— These conveyances may be either (*a.*) Mortgages, or (*b.*) Sales out and out. As regards Mortgages, when these are given by a trader (or, in fact, by any one), they may be either of the whole, or substantially of the whole, property of the debtor, or they may be of part only of such property; and again, they may be in consideration either of a past advance, with or without some further substantial advance, or wholly in consideration of a future (or present) advance; and where the conveyance is a sale out and out, the like distinctions may be found. Now, when the conveyance in question, being for value as aforesaid, is impeached as fraudulent under the statute 13 Eliz. c. 5, what is the test of fraud? According to Mellish, L.J., in *Ex parte Ellis* (*x*),—and his opinion was adopted by Bowen, L.J., in *Ex parte Chaplin* (*y*), where a debtor assigns the whole of his property as a security for a past debt only, it is an act of bank-

(B.) Conveyances for value.

Either of whole property or of part only thereof.

Either for a past or for a present advance.

Conveyance, when fraudulent and when not.

(*t*) *Ex parte Mercer, in re Wise*, 17 Q. B. D. 290.
(*u*) 3 K. & J. 90.
(*v*) See *Ridler* v. *Ridler*, 22 Ch. Div. 74.
(*x*) 2 Ch. Div. 798.
(*y*) 26 Ch. Div. 333.

ruptcy, whatever the motives of the parties may have been; but if there is also a further advance, it is then not a question of whether the further advance is great or small, but whether there was a *bonâ fide* intention of carrying on the business of the debtor (*scil.* in the case of a trader). And according to Giffard, L.J., in *Alton* v. *Harrison* (*z*), if no bankruptcy supervenes, then it makes no difference, so far as regards the statute of Elizabeth, whether the conveyance is of the whole or of only a part of the debtor's property; that is to say, if the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the debtor (*a*), it is a good deed under the statute of Elizabeth. And as regards Sales out and out, the like remarks, it may be assumed, will hold good, so that, in fact, when the conveyance is for value and is *bonâ fide*, the express words of the statute of Elizabeth are complied with, and the deed is not fraudulent; and an *express* intent to defraud, or express *mala fides*, must be proved in such a case in order to defeat the deed (*b*). Moreover, it is further to be observed, that if the person entitled under a settlement which is fraudulent within the 13 Eliz. c. 5, should before the settlement is avoided, and for a valuable consideration, have conveyed away or charged his estate or interest thereunder, then to the extent of such conveyance or charge the settlement will remain good (*c*); and apparently, also, a settlement which is in the first instance voluntary may, by matter *ex post facto*, become a settlement for value (*d*); and in such a case, its validity or invalidity must be determined as if it was originally for value;

According as subsequent bankruptcy or not.

Subsequent purchaser for value protected.

(*z*) L. R. 4 Ch. App. 626.
(*a*) *Twyne's Case*, 1 Sm. L. C. p. 1.
(*b*) *Harman* v. *Richards*, 10 Ha. 89; *Golden* v. *Gillam*, 20 Ch. Div. 389.
(*c*) *Halifax Bank* v. *Gledhill*, 1891, 1 Ch. 31; *In re Vansittart, ex parte Brown*, 1893, 2 Q. B. 377; *In re Brall, ex parte Norton*, ib. 381.
(*d*) *Prodgers* v. *Langham*, Sid. 133.

but the decision in *Price* v. *Jenkins* hereinafter mentioned, as regards leaseholds subject to rents and onerous covenants, is not applicable upon this question of value (*e*).

(*b*.) 27 Eliz. c. 4,—frauds under.

(*b*.) The statute 27 Eliz. c. 4, which was passed for the protection of *purchasers*, enacted that every conveyance, grant, charge, lease, limitation of use, of in or out of any lands, tenements, or other hereditaments whatsoever, for the intent and purpose to defraud and deceive such persons, &c., as should purchase the said lands, or any rent or profit out of the same, should be deemed, as against such purchasers, to be *wholly void*, frustrate, and of none effect. And upon this statute it was decided, that a voluntary settlement of lands, whether freehold, copyhold, or leasehold, made on consideration only of natural love and affection, or for no consideration, was void as against a subsequent purchaser of the same lands for valuable consideration, even though with notice (*f*); for the very execution of a subsequent conveyance of the same lands sufficiently evinced (it was said) the fraudulent intent of the former one. The meritorious or voluntary settlement was, however, good as against the grantor (*g*), who therefore could not himself have compelled specific performance of a subsequent contract entered into by him for the sale of the lands so settled (*h*), though the purchaser from him might do so (*i*). And it was further decided on this statute, that chattels personal were not within it; and therefore a voluntary settlement of chattels personal was not defeated by a subsequent sale of the same

Voluntary settlement formerly void against subsequent purchaser.

Chattels personal not within the statute.

(*e*) *Ridler* v. *Ridler*, 22 Ch. Div. 74.
(*f*) *Doe* v. *Manning*, 9 East. 59.
(*g*) See *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.
(*h*) *Smith* v. *Garland*, 2 Mer. 123; and see *In re Briggs and Spicer*, 1891, 2 Ch. 127; and *In re Carter and Kenderdine*, 1897, 1 Ch. 776.
(*i*) *Daking* v. *Whimper*, 26 Beav. 568.

chattels (*k*); and as regards chattels real, *i.e.*, leasehold properties, it was decided in *Price* v. *Jenkins* (*l*), that if the volunteer undertook to observe the covenants comprised in the lease, and such covenants were of an onerous character, then the deed of gift was not, in fact, voluntary. Also, a mortgagee (*m*), and likewise a lessee, was esteemed a purchaser (*scil.*, *pro tanto*) within the meaning of the statute; but a judgment creditor was not so (*n*); and when it was said that a mortgagee or a lessee was a purchaser *pro tanto*, it was meant and intended, that the mortgage or lease prevailed over the voluntary settlement, to the extent (and only to the extent) required to give full effect to the mortgage or lease; and subject to such mortgage or to such lease, the voluntary settlement remained good; and the doctrine of consolidation (hereinafter considered in the chapter on Mortgages) was never applicable as against the voluntary settlement (*o*). Also, a *bonâ fide* purchaser for value from the heir-at-law or from the devisee of the voluntary settlor was not within the statute; nor was a *bonâ fide* purchaser for value from one claiming under a second voluntary conveyance (*p*),—*scil.* because the intermediary vendor in all three cases was but a volunteer himself, and could not by selling convey a better or higher estate than he himself had; and the rule was absolute, that the person who (whether as subsequent purchaser, mortgagee, or lessee) claimed by virtue of the statute to set aside

Purchaser,—who?

Settlement held good, subject to mortgage or lease.

Subsequent purchase must have been from the very settlor himself, and express or direct.

(*k*) *Bill* v. *Cureton*, 2 My. & K. 503; *M'Donnell* v. *Hesilrige*, 16 Beav. 346.

(*l*) 5 Ch. Div. 919; see also *Gale* v. *Gale*, 6 Ch. Div. 144; *Ex parte Hillman, in re Pumfrey*, 10 Ch. Div. 622; *Harris* v. *Tubb*, 42 Ch. Div. 79.

(*m*) *Chapman* v. *Emery*, Cowp. 279; *Cracknall* v. *Janson*, 11 Ch. Div. 1; *In re Walhampton Estate*, 26 Ch. Div. 391.

(*n*) *Bevan* v. *Earl of Oxford*, 6 De G. M. & G. 507.

(*o*) *In re Walhampton Estate*, 26 Ch. Div. 391.

(*p*) *Doe* v. *Rusham*, 17 Q. B. 723; *Lewis* v. *Rees*, 3 K. & J. 132; *Richards* v. *Lewis*, 11 C. B. 1035; *General Meat Supply Association* v. *Boufler*, W. N. 1879, 26.

the prior voluntary settlement, must have claimed under and through the voluntary settlor himself, and through or under no other person whatsoever (*q*), and such claim must have been directly and proximately through or under the settlor, and not indirectly or by inference of law or rule of equity (*r*). It was a rule also, that where the voluntary settlement was set aside in favour of a subsequent purchaser, the volunteers had no right to the specific purchase-money (*s*); but if the settlement had contained a covenant for quiet enjoyment, the settlor would have been liable thereon for damages, amounting (in effect) to the amount of the specific purchase-money (*t*). Also, if the person or persons entitled under the voluntary settlement should, before any subsequent sale or mortgage of the property had been made by the voluntary settlor, and for a valuable consideration, have conveyed away or charged his or their estate or interest thereunder, then to the extent of such conveyance or charge the settlement remained good (*u*); and such settlement might also, by reason of matters *ex post facto*, have become a settlement for value (*v*).

Volunteers,—their right to the purchase-money?

Volunteers,—their power to alienate or charge.

But now all these decisions upon the statute 27 Eliz. c. 4, have been, in large measure, deprived of their relevancy or importance, it having been enacted by the Voluntary Conveyances Act, 1893 (*x*), that (save as regards subsequent purchasers, mortgagees, and lessees who have become such before the 29th June 1893) no voluntary conveyance which shall have been in fact made *bonâ fide* and without any

Voluntary Conveyances Act, 1893,—effect of.

(*q*) *Godfrey* v. *Poole*, 13 App. Ca. 497.
(*r*) *In re Walhampton Estate*, supra.
(*s*) *Daking* v. *Whimper*, 26 Beav. 568; *In re Walhampton Estate*, supra.
(*t*) *Hales* v. *Cox*, 1 N. R. 344; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.
(*u*) *Halifax Bank* v. *Gledhill*, supra.
(*v*) *Prodgers* v. *Langham*, Sid. 133; *George* v. *Milbanke*, 9 Ves. 190.
(*x*) 56 & 57 Vict. c. 21.

actual fraudulent intent shall henceforth be deemed fraudulent and void within the meaning of the 27 Eliz. c. 4,—so that now a voluntary settlement of land is as favourably situated as a voluntary settlement of pure personal estate made on any lawful consideration. And here we will observe, that lawful considerations generally may be divided into two classes, namely, (1) Meritorious considerations (sometimes called *good* considerations), being considerations of blood or natural affection, or of generosity or moral duty; and (2) Valuable considerations, such as *money*, *marriage*, or the like, which the law esteems an equivalent for money. The consideration of marriage in particular has always been recognised by courts of law and equity as a valuable one; and previously to the Statute of Frauds, a mere oral promise by the intended husband to settle property upon the intended wife was upheld by the subsequent marriage; and the Statute of Frauds, 29 Car. II. c. 3, s. 4, did not change this principle, but only required, by way of *evidence*, that the ante-nuptial agreement should be in writing, in order to bind the husband, or other the party signing it. In the case, therefore, of an ante-nuptial *written* agreement *followed by marriage*, the wife was esteemed a purchaser for value (*y*); and an ante-nuptial *parol* agreement, subsequently embodied in and evidenced by a post-nuptial settlement made in pursuance of the agreement, appears to be also good as a purchase for value (*z*), it being sufficient if the written evidence is forthcoming before action brought; but a mere post-nuptial voluntary settlement without any ante-nuptial agreement, either verbal or written, was void

Considerations are either,—(1.) Meritorious;

Or (2.) Valuable.

Marriage consideration under 27 Eliz. c. 4.

Post-nuptial settlement in pursuance of ante-nuptial parol agreement.

(*y*) *Kirk* v. *Clark*, Prec. in Ch. 275.

(*z*) *Dundas* v. *Dutens*, 2 Cox, 235; *Spurgeon* v. *Collier*, 1 Eden, 55; *Warden* v. *Jones*, 2 De G. & Jo. 76; *Hope* v. *Hope*, W. N. 1893, p. 20; and see the principle in *Bailey* v. *Sweeting*, 9 C. B. N. S. 843; 30 L. J. C. P. 150.

under the statute 27 Eliz. c. 4, as against a subsequent purchaser for value, even with notice (*a*); but of course, such a settlement will now be within the protection given to it by the Voluntary Conveyances Act, 1893, already mentioned.

Bonâ fide post-nuptial settlement supported on slight consideration.

Even before the last-mentioned Act, a court of equity supported post-nuptial settlements on very slight valuable consideration. Thus, in *Hewison* v. *Negus* (*b*), it was decided that if the wife's real estate, of which her husband would be entitled to receive the rents and profits during the coverture, was settled by merely post-nuptial settlement on her for life, for *her separate use*, &c., with remainder to the children, the post-nuptial settlement was not void under the statute 27 Eliz. c. 4, as against a subsequent purchaser from the husband and wife, but that the interests of the children under the settlement held good,—for the husband had purchased these interests for his children by giving up his own life-estate in consideration of the estates limited to his children. On the other hand, even an ante-nuptial voluntary settlement, for which the marriage was the sole consideration on the part of the wife, could not have been supported as against a subsequent purchaser, if the marriage was in effect no consideration emanating from the wife. Thus, in *Colombine* v. *Penhall* (*c*), where a gentleman went through a valid ceremony of marriage with a female who had previously lived with him in concubinage for a period of years, and settled considerable property upon her prior to and in purported consideration

Malâ fide prænuptial settlement not supported.

(*a*) *Butterfield* v. *Heath*, 15 Beav. 408; *Warden* v. *Jones*, 2 De G. & Jo. 76.

(*b*) 16 Beav. 594; *Bayspoole* v. *Collins*, L. R. 6 Ch. App. 228; *Teasdale* v. *Braithwaite*, 5 Ch. Div. 630; *Shurmur* v. *Sedgwick*, 24 Ch. Div. 597.

(*c*) 1 Sm. & Giff. 228; *Bulmer* v. *Hunter*, L. R. 8 Eq. 46.

of the marriage,—the court, being of opinion that the marriage was wholly illusory *as a consideration*, and that the female was aware of the real character of the transaction, set aside the settlement as fraudulent against a subsequent purchaser; and the decision of the court in such a case would, *semble*, still be the same, notwithstanding the Voluntary Conveyances Act, 1893; for here there is *mala fides* and an actual fraudulent intent.

(c.) The Bills of Sale Acts, 1878, 41 & 42 Vict. c. 31, and 1882, 45 & 46 Vict. c. 43,—frauds under.

(*c.*) A very factitious and artificial species of fraud has been introduced, for the protection primarily of the general creditors of the grantor, and secondarily (since 1882) for the protection of the grantor himself, by the Bills of Sale Acts, 1878 and 1882 (*d*); but as the provisions of these Acts are epitomised in Chapter xviii. *infra*, on Mortgages and Pledges of Personal Property, it is sufficient in this place to mention, that the Act of 1878, like the Bills of Sale Acts, 1854 and 1866, which it repealed, expressly exempts marriage settlements from its operation,—an exemption which extends, however, only to antenuptial, and not also to post-nuptial settlements (*e*), or agreements for a settlement (*f*). By the 20th section of the 1878 Act, it was also expressly provided, that the chattels comprised in a bill of sale which had been and continued to be duly registered under the Act, should not be deemed to be in the possession, order, or disposition of the grantor of the bill within the meaning of the Bankruptcy Act, 1869,—a provision which has been repealed by the 15th section of the Act of 1882 as regards bills of sale given by way of security for money lent (*g*); but the provision remains in force as regards post-

(*d*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.
(*e*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.
(*f*) *Wenman* v. *Lyon*, 1891, 2 Q. B. D. 192.
(*g*) *Swift* v. *Pannell*, 24 Ch. Div. 210.

nuptial marriage settlements, or agreements for a settlement, and as regards all bills of sale save only mortgages.

(*d.*) By the Bankruptcy Act, 1883 (*h*), s. 47, repealing and extending to non-traders as well as to traders a similar provision contained in the Bankruptcy Act, 1869 (*i*), s. 91, the following provisions have been made, but with reference only to voluntary post-nuptial settlements or agreements (*k*); that is to say; Firstly, with reference to the husband's property in his own right—(1.) Any post-nuptial settlement made within two years of the subsequent bankruptcy of the settlor is, *ipso facto*, void upon the bankruptcy (*scil.* as against the trustee in the bankruptcy); and (2.) Any post-nuptial settlement made within ten years of the subsequent bankruptcy of the settlor, and outside the first two of such ten years, is also void upon the bankruptcy (*scil.* as against the trustee in the bankruptcy), unless and until the *cestuis que trustent* under the settlement prove that the same was not in fact fraudulent as against the creditors of the settlor (*l*), and that the interest of the settlor in the property passed to the trustees of the settlement on the execution thereof (*m*); but, upon the construction of these provisions of the statute, it has been held, that the settlement is not void *until there is a trustee in the bankruptcy*, so that any *bonâ fide* alienation in the meantime of the property comprised in the settlement is and remains good (*n*). And,

(*d.*) The Bankruptcy Act, 1883, s. 47,—frauds under.

(1.) Voluntary settlements.

(*a.*) Of husband's own property.

(*h*) 46 & 47 Vict. c. 52.
(*i*) 32 & 33 Vict. c. 71.
(*k*) *Hance* v. *Harding*, 20 Q. B. D. 732; *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505.
(*l*) *In re Tetley*, 1896, W. N. p. 86.
(*m*) *In re Holden*, 20 Q. B. D. 43; *Hance* v. *Harding*. ib. 732; *In re Vansittart, ex parte Brown*, 1893, 2 Q. B. 377; *In re Brall, ex parte Norton*, 1893, 2 C. B. 381.
(*n*) *In re Vansittart*, supra; *In re Brall*, supra; *In re Carter and Kenderdine's contract*, 1897, 1 Ch. 776, overruling *In re Briggs* v. *Spicer*, 1891, 2 Ch. 127.

(b.) Of wife's property.

Secondly, with reference to the husband's property in right of his wife,—Any post-nuptial settlement on the wife and children of the settlor is good (no matter how soon the bankruptcy of the settlor may come about), provided it be of property that has accrued to him through his wife during the coverture (*o*).

(1a.) Voluntary covenants to settle.

And, Thirdly, with reference to ante-nuptial covenants and contracts by any one (trader or not) to settle property of his own yet to be acquired,—All such covenants and contracts shall be void upon subsequent bankruptcy, unless prior to such bankruptcy the property referred to has been both acquired, and also in fact settled pursuant to the covenant or contract (*p*).

(2.) Fraudulent preferences, &c.

The Bankruptcy Act, 1883, s. 48, has also provided that every conveyance or transfer of property or charge thereon made . . . by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with the view of giving such creditor a preference over the other creditors, shall, if the person making . . . the same, is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making . . . the same, be deemed fraudulent and void as against the trustee in the bankruptcy (*q*).

(3.) Acts of bankruptcy.

Also, the same Act, s. 4, provides that (among other things) the three following conveyances by a debtor shall be deemed acts of bankruptcy, that is to say: (1.) A conveyance or assignment of his (the debtor's) property to a trustee or trustees for the benefit of his creditors generally; (2.) A fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof; and (3.) Any conveyance or transfer of his property, or any part thereof, or any

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(*o*) *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505.
(*p*) *Ex parte Bishop, in re Tönnies*, L. R. 8 Ch. App. 718.
(*q*) *In re Pollitt, ex parte Minor*, 1863, 1 Q. B. 175.

charge thereon, which would under the Bankruptcy Act, 1883, or any other Act, be void as a fraudulent preference, if the debtor making such conveyance, &c., was adjudged bankrupt.

Who are within the scope of the marriage consideration.

In some cases the question has been raised, how far the consideration of marriage would extend, and whether limitations in favour of somewhat remote objects were valid or not as against subsequent purchasers. A limitation to the issue of the settlor by a prospective second marriage was held *not* to be voluntary (*r*), or at least not to be defeasible as voluntary, where the other limitations (which in themselves were for value) would also have been defeated if such voluntary limitations were defeated (*s*),—the maintenance of such latter limitations being regarded as a special ground for the maintenance also of the voluntary limitations. So a settlement on her marriage, made by a woman of her property as a provision for her illegitimate child, was (on the like special ground) upheld as against a subsequent mortgagee (*t*); as also (and on the like special ground) a settlement in favour of the children of her former marriage, made by her when about to contract a second marriage (*u*). But apparently, save for such special ground as aforesaid, all those limitations would have been merely voluntary, and bad accordingly (*v*); and apparently also the like settlement by a widower in favour of his children by a former marriage, made by him when about to remarry, would have been voluntary (*x*); and a limitation to the brothers of the settlor, or to more distant

(*r*) *Clayton* v. *Earl of Winton*, 3 Mad. 302, n.; *Newstead* v. *Searles*, 1 Atk. 265.

(*s*) *De Mestre* v. *West*, 1891, A. C. 264.

(*t*) *Clarke* v. *Wright*, 6 H. & N. 849; see *De Mestre* v. *West*, supra; *Gale* v. *Gale*, 6 Ch. Div. 144; *Harris* v. *Tubb*, 42 Ch. Div. 79.

(*u*) *Newstead* v. *Searles*, supra; *De Mestre* v. *West*, supra.

(*v*) *De Mestre* v. *West*, supra; *Mackie* v. *Herbertson*, 9 App. Ca. 303; *Att.-Gen.* v. *Jacobs Smith*, 1895, 2 Q. B. 341.

(*x*) *In re Cameron & Wells*, 37 Ch. Div. 32.

collaterals, was voluntary as a general rule (*y*), they not being damnified, *i.e.*, "*damnously* affected," by the marriage; but all such limitations in favour of collaterals would have been supported, if there was any party to the settlement who *bonâ fide* purchased on their behalf (*z*); and *semble*, the Voluntary Conveyances Act, 1893, above referred to, will now come in to aid all these settlements, when they are in fact made without any actual fraudulent intent.

IV. *Trust in favour of creditors,*— revocable, as a general rule.

Fourthly, conveyances upon trust may be upon trust for creditors; and although (as we have seen) a simple declaration of trust in favour of volunteers is irrevocable, yet where a debtor, with or without the knowledge of his creditors, makes a transfer of his property to trustees for the payment of his debts, and uses a solemn deed for the purpose, that amounts, in general, merely to a direction to the trustees as to the mode in which they are to apply the property vested in them for the benefit of the owner of the property; and inasmuch as, under such a deed, the debtor alone is, in general, the *cestui que trust*, he may vary or revoke the trusts at his pleasure (*a*). Thus in *Garrard* v. *Lauderdale* (*b*), which was an assignment of personal property to trustees for the payment of certain scheduled creditors who did not execute the deed, the Vice-Chancellor said: "I take the real nature of the deed to be "not so much a conveyance vesting a trust in A. for "the benefit of the creditors of the grantor, but rather "an arrangement made by the debtor for the payment "of his own debts in an order prescribed by himself, "over which he retains power and control, and with

Amounts to a mere direction to trustees as to mode of disposition.

And is an arrangement for the debtor's own benefit and convenience.

(*y*) *Johnson* v. *Legard*, 6 M. & S. 60; *Stackpoole* v. *Stackpoole*, 4 Dru. & Warr. 320.

(*z*) *Heap* v. *Tonge*, 9 Hare, 104; *Mackie* v. *Herbertson*, App. Ca. 303; *Hance* v. *Harding*, 20 Q. B. D. 732.

(*a*) *Walwyn* v. *Coutts*, 3 Sim. 14.

(*b*) 3 Sim. 1.

"respect to which the creditors can have no right to "complain, inasmuch as they are not injured by it— "they *waive no right of action*, and are *not executing* "*parties* to it." And in *Acton* v. *Woodgate* (*c*), the law is thus stated: "If a debtor conveys property "in trust for the benefit of his creditors, and the "creditors are not in any manner privy to the con- "veyance, the deed merely operates as a power to "the trustees, *which is revocable by the debtor;* and it "has the same effect as if the debtor had delivered "money to an agent to pay his creditors, and before "any payment or communication made to the credi- "tors had recalled the money." But inasmuch as the general rule proceeds on the principle that the deed is an arrangement for the debtor's own convenience, it seems to follow, that where the so-called trust for creditors is not to arise until after the death of the settlor, it is not within the rule at all, at least after the settlor's death,—for he personally is no longer in a position to recall it (*d*), and it is not competent for any *cestui que trust* claiming under the deceased settlor to exercise the right of revocation vested in the settlor (*e*); but such *cestui que trust* will take, subject to the provision made by the settlor for the payment of his debts, at least when the debts are specified in a schedule to the deed (*f*). Also, such a deed may, even in the settlor's lifetime, be from the first irrevocable,—*scil.* when it constitutes the true relation of trustee and *cestuis que trustent* (*g*). However, the surplus assets (if any), after satisfying the primary purposes of the deed, will, in the general case, result to the estate of the debtor, or (if he be dead) to his legal representative,

The right to revoke is personal to settlor.

(*c*) 2 My. & K. 495.
(*d*) *Fitzgerald* v. *White*, 37 Ch. Div. 18.
(*e*) *Fitzgerald* v. *White*, supra.
(*f*) *Synnot* v. *Simpson*, 5 Ho. Lo. Ca, 121; and *Priestley* v. *Ellis*, 1897, 1 Ch. 489.
(*g*) *New's Trustee* v. *Hunting*, 1897, 1 Q. B. 607; 2 Q. B. 19.

or to the *cestui que trust* (if any) next entitled under the deed (*h*),—*secus*, if the deed is in reality an absolute disposition of the entire assets in favour of the creditors, for there can be no surplus at all in such a case (*i*).

Effect of communication of deed to creditors, followed by forbearance on the faith of the deed.

Upon the question, What is the effect of communicating the trust to the creditors, and in particular whether such communication will deprive the debtor of his power of revocation,—Sir John Leach, M.R., in *Acton* v. *Woodgate* (*k*), says, that the trust *after communication* is irrevocable, *if the creditors have been thereby* "*induced to a forbearance* in respect of their "claims;" and Sir J. Romilly, M.R., in *Biron* v. *Mount* (*l*), citing these words of Lord St. Leonards in *Field* v. *Donoughmore* (*m*), "It is not absolutely "essential that the creditor should execute the "deed; *if he has assented to it, and if he has ac-* "*quiesced in it, or acted under its provisions and com-* "*plied with its terms*, the settled law of the court "is that he is entitled to its benefit," says,—"About "that I entertain no doubt; but I apprehend *he must* "*do some acts* which amount to acquiescence, and it is "not sufficient if he merely stands by and takes no "part at all in the matter, unless it should happen, "as in *Nicholson* v. *Tutin* (*n*), that from standing by "he has lost some remedy; but, in the general case, "*he must do some act*" (*o*). But there has never been a doubt that, if a creditor is a *party* to the trust deed, and executes it, the deed is, *as to that creditor*,

Forbearance should be evidenced by some positive act.

Effect of the creditor being a party to the deed.

(*h*) *Northampton* (*Marquis*) v. *Pollock*, 45 Ch. Div. 190; and S. C. (sub nom. *Salt* v. *Northampton*), 1892, A. C. 1.
(*i*) *Cooke* v. *Smith*, 1891, App. Ca. 297.
(*k*) 1 My. & K. 495.
(*l*) 24 Beav. 649.
(*m*) 1 Dru. & War. 227.
(*n*) 2 K. & J. 23.
(*o*) *Kirwan* v. *Daniel*, 5 Hare, 499; *Griffith* v. *Ricketts*, 7 Hare, 307; *Siggers* v. *Evans*, 5 Ell. & B. 367.

irrevocable (*p*); a creditor, however, who for a long time delays to execute the deed (*q*), or who sets up a title adverse to the deed (*r*), will not be allowed to claim the benefit of its provisions, any more than a creditor to whom the existence of the deed has not even been communicated (*s*). And here we must observe, that trust deeds in favour of creditors are (in effect) "deeds of arrangement;" and by the Deeds of Arrangement Act, 1887 (*t*), they must, like bills of sale of personal chattels, be registered within seven days of their first execution, or else they are void; also, if and so far as they comprise lands of any tenure, they must, under the provisions of the Land Charges Registration, &c. Act, 1888 (*u*), be registered in the Land Registry Office, in the proper register for such deeds, or else they will be void as against a subsequent purchaser or mortgagee or lessee of the debtor.

Effect of claiming adversely to the deed.

Trust deeds for creditors,—registration of.

v. *Equitable assignments.*

Regarding equitable assignments, although Lord Coke says, "The great wisdom and policy of the "sages and founders of our law have provided that "no possibility, right, title, nor thing in action shall "be granted or assigned to strangers;" still, in equity, from a very early period, assignments of a mere naked possibility, or of a chose in action, provided they were for valuable consideration, have been held valid,—upon the principle that equity enforces the performance of all agreements which are for value, and which are not contrary to public policy, and provided only they are

General rule of the old common law.

Respects in which equity infringed upon the rule of the old common law.

(*p*) *Mackinnon* v. *Stewart*, 1 Sim. N. S. 88; *Cosser* v. *Radford*, 1 D. J. & S. 585; *Montefiore* v. *Brown*, 7 H. L. Cas. 241–266; and *Cooke* v. *Smith*, supra.

(*q*) *Gould* v. *Robertson*, 4 De G. & Sm. 509.

(*r*) *Watson* v. *Knight*, 19 Beav. 369; *Meredith* v. *Facey*, 29 Ch. Div. 745.

(*s*) *Johns* v. *James*, 8 Ch. Div. 744.

(*t*) 50 & 51 Vict. c. 57.

(*u*) 51 & 52 Vict. c. 51.

sufficiently definite (*v*). A mere expectancy, therefore, as that of an heir-at-law to the estate of his ancestor (*x*); or the interest which a person may take under the will of another who is living (*y*); also, a misfeasance claim against directors (*z*); also, non-existing property to be acquired at a future time, as the future cargo of a ship (*a*), or future stock-in-trade to be brought on the mortgaged premises (*b*), or the future book-debts of a business (*c*), are assignable in equity for valuable consideration; and where after such an assignment for value,—but not where the assignment was purely voluntary (*d*),—the expectancy or other future or contingent interest or right has fallen into possession or otherwise has matured, the assignment will be enforced (*e*), subject to the question (if any) as to the effect of the bankruptcy of the assignor intervening (*f*).

Respects in which the common law even has infringed upon its own rule.

Even the common law from time to time broke in upon the old rule which prohibited the assignment of choses in action,—*e.g.*, in the case of negotiable instruments; also, where the debtor assented to the transfer of the debt, so as to enable the assignee to maintain a direct action against him on the implied promise which resulted from such an assent (*g*); but in the case of assignments of bonds or other debts, it used to be necessary to sue in the name of the original credi-

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(*v*) *Squib* v. *Wyn*, 1 P. Wms. 378; *In re Clarke, Combe* v. *Carter*, 35 Ch. Div. 109; 36 Ch. Div. 348.
(*x*) *Hobson* v. *Trevor*, 2 P. W. 191.
(*y*) *Bennett* v. *Cooper*, 9 Beav. 252; *Combe* v. *Carter*, supra.
(*z*) *Wood* v. *Woodhouse & Rawson*, W. N. 1896, p. 4.
(*a*) *Lindsay* v. *Gibbs*, 22 Beav. 522.
(*b*) *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, 15 Q. B. D. 288.
(*c*) *Official Receiver* v. *Tailby*, 13 App. Ca. 523.
(*d*) *Lampet* v. *Kennedy*, W. N. 1896, p. 9.
(*e*) *Holroyd* v. *Marshall*, 10 H. L. Cas. 191.
(*f*) *Ex parte Nichols, in re Jones*, 22 Ch. Div. 782; *Wilmot* v. *Alton*, 1897, 1 Q. B. 17.
(*g*) *Baron* v. *Husband*, 4 B. & Ad. 611.

tor, the transferee being regarded rather as his attorney than as his assignee (*h*). More recently, other future interests and choses in action were, by statute, made assignable at law; that is to say, by 8 & 9 Vict. c. 106, s. 6, contingent and future interests and possibilities coupled with an interest in *real* estate; also, by 30 & 31 Vict. c. 144, policies of life assurance; and by 31 & 32 Vict. c. 86, policies of marine assurance. Lastly, by the Judicature Act, 1873 (*i*), s. 25, sub-sect. 6, debts and other legal choses in action, without any distinction, were made assignable at law, "*where the "assignment is absolute, and not by way of charge only;*" and that provision would, of course, extend to, *e.g.*, accident assurance policies,—although these are (in the nature of) a series of successive contracts for the successive periods of the assurances (*k*); but, as regards all assignments depending upon the Judicature Act for their efficacy, the assignment is subject to all (if any) equities affecting the assignor in respect of the subject-matter of the assignment (*l*); and the assignment under that Act must be in writing, and must be completed by a written notice to the debtor. However, in equity, there may be other valid assignments, that is to say, assignments not complying with the provisions of the last-mentioned Act; for example, an order given by a debtor to his creditor, upon a third person having funds of the debtor, to pay the creditor out of such funds, has always been considered a binding equitable assignment, or (speaking more accurately) a binding appropriation of so much money to or in favour of the creditor (*m*); and the title arising

Contingent interests and possibilities.

Policies of life and marine insurance.

Debts and other legal choses in action, under Supreme Court of Judicature Act.

Order given by debtor to his creditor upon a third person, a good equitable assignment, *i.e.*, appropriation.

(*h*) *De Pothonier* v. *De Mattos*, Ell. Bl. & Ell. 467.

(*i*) 36 & 37 Vict. c. 66; and see *In re Park Gate Waggon Works Co.*, 17 Ch. Div. 234; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; *Tancred* v. *Delagoa Bay, &c. Rail. Co.*, 23 Q. B. D. 239.

(*k*) *In re Turcan*, 40 Ch. Div. 5; *Stokell* v. *Heywood*, 1897, 1 Ch. 459.

(*l*) *In re Milan Tramways, ex parte Theys*, 22 Ch. Div. 122.

(*m*) *Diplock* v. *Hammond*, 5 De G. M. & G. 320; *Buck* v. *Robson*, 3 Q. B. D. 686; *Harding* v. *Harding*, 17 Q. B. D. 442.

by such an equitable assignment or appropriation will hold good as against the title of the trustee under the subsequently accruing bankruptcy of the assignor (*n*); and also against the title of the executor or administrator of the assignor upon his death, and (in the latter case) although the notice required to perfect the assignment as against third parties may not have been given till after the death (*o*).

Mandate from principal to agent,—confers no right on the creditor.

But a mere mandate will not amount to an equitable assignment or appropriation, for such a mandate may be revoked at any time before it is executed (*p*). Thus in *Rodick* v. *Gandell* (*q*), where a railway company was indebted to the defendant, their engineer, and he was greatly indebted to his bankers, and the bankers having pressed for payment or security, the defendant, by letter to the *solicitors* of the company, authorised them to receive the money due to him from the company, and requested them to pay it to the bankers; and the solicitors, by letter, promised the bankers to pay them such money, *on raising it*,—The court held that this did not amount to an equitable assignment or appropriation of the debt, but was a mere revocable *authority to the solicitors to receive the debt* due from the company, *and to pay* what should be received to the bank,—it was, in fact, but a step towards realising the debt, and the appropriation (if any) was still to follow. And there can be no effective appropriation if no specific fund out of which the payment directed to be made is specified (*r*); and any purported appropriation which amounts only to a mandate will be revoked

Other cases in which appropriation is incomplete.

(*n*) *Burn* v. *Carvalho*, 4 My. & Cr. 690.

(*o*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; and *Western Waggon Co.* v. *West*, 1892, 1 Ch. 271.

(*p*) *Morrell* v. *Wooten*, 16 Beav. 197.

(*q*) 1 De G. M. & G. 763; and see *Ex parte Hall, in re Whitting*, 10 Ch. Div. 615.

(*r*) *Percival* v. *Dunn*, 29 Ch. Div. 128.

by the bankruptcy of the debtor (*s*); but if bills of exchange are drawn against goods (by way of providing for the payment of the price of the goods), and the consignee of the goods directs his agent to realise the goods and to apply the proceeds in or towards payment of the price, this direction, if communicated to the bill-holder, operates as an equitable appropriation (*t*); *secus*, if the direction is not so communicated (*u*).

Notice to legal holder by assignee of chose in action necessary to perfect title as against third person.

In order that third parties may be bound, it is necessary, with regard to a chose in action, for the assignee to do everything towards having possession which the subject admits of; and for this purpose he must give notice to the legal holder of the fund, *e.g.*, to the debtor himself or (as the case may be) to his legal personal representative, or other the legal hand to receive the debt (*v*); and such notice in the case of a debt, for instance, is for many purposes tantamount to possession,—for the notice perfects the title and gives a complete right *in rem*; and this doctrine of equity is commonly called the rule in *Dearle* v. *Hall* (*x*); and the trustee in bankruptcy as general (assignee) must give the notice equally with the particular assignee (*y*). Then, if the debtor or (as the case may be) his legal personal representative or other the legal hand aforesaid should, after receiving notice of the assignment, pay the debt or any part thereof to the original creditor, or in fact to any one other than the assignee himself who has given the notice, he will (as a result of the doctrine

Such notice is tantamount to possession; and gives a right *in rem*.

(*s*) *Ex parte Hall, in re Whitting*, 10 Ch. Div. 615.
(*t*) *Ranken* v. *Alfaro*, 5 Ch. Div. 786.
(*u*) *Brown, Shipley & Co.* v. *Kough*, 29 Ch. Div. 848.
(*v*) *Stephens* v. *Green* and *Green* v. *Knight*, 1895, 2 Ch. 148; and see (as to notice to War Office), *In re Seaman*, 1896, 1 Q.B. 412.
(*x*) 3 Russ. 1.
(*y*) *Palmer* v. *Locke*, 18 Ch. Div. 381; *In re Stone's will*, W. N. 1893, p. 50; *In re Seaman*, 1896, 1 Q. B. 412.

in question) be liable to pay it over again out of his own moneys to the assignee (*z*). If indeed the assignee is satisfied that the assignor will make no improper use of the possession in which he is allowed to remain, notice of the assignment is not necessary, for against the assignor the title is perfect without notice; but if the assignor should subsequently be made a bankrupt,—or if, availing himself of the possession as a means of obtaining credit, he should induce third persons to purchase from him as the actual owner, and they part with their money before the assignee's so-called pocket-conveyance is notified,—the assignee must be postponed; and that will be so,—even where (having omitted to give notice of his assignment) he has taken proceedings in court to realise his assignment and has registered the proceeding as a *lis pendens* (*a*), and even when he has obtained the appointment of a receiver in his action (*b*),—for in both these cases notice still continues necessary; and on being thus postponed, the assignee's security, it is true, is not invalidated; he had priority, but that priority he has not followed up, but has permitted another to acquire a prior, because a better title, to the legal possession (*c*). Where, however, an assignee is unable to give the necessary notice, but has otherwise done all in his power towards taking possession, he will not lose his priority (*d*); and when, *semble*, through infancy or otherwise, he or she is unable to give the necessary notice, his or her priority will remain, at least as against the trustee in bankruptcy of the assignor (*e*). Also, the

Notice,—form of.

(*z*) *Brice* v. *Bannister*, 3 Q. B. D. 569; *In re Wyatt*, *White* v. *Ellis*, 1892, 1 Ch. 188; S. C. (sub nom. *Ward* v. *Duncombe*), 1893, A. C. 369.
(*a*) *Wigram* v. *Buckley*, 1894, 3 Ch. 483.
(*b*) *Rutter* v. *Everett*, 1896, 2 Ch. 872.
(*c*) *Ryall* v. *Rowles*, 2 L. C. 729; *Dearle* v. *Hall*, 3 Russ. 1; *In re Freshfield's Trust*, 11 Ch. Div. 198; *Buller* v. *Plunkett*, 1 J. & H. 441.
(*d*) *Feltham* v. *Clark*, 1 De G. & Sm. 307; *Langton* v. *Horton*, 1 Hare, 549; *Johnstone* v. *Cox*, 16 Ch. Div. 571.
(*e*) *In re Mills*, 1895, 2 Ch. 564.

notice need not be, *e.g.*, the formal notice prescribed by the statute 30 & 31 Vict. c. 144, for assignments of policies of life assurance,—except as against the assurance office itself (*f*),—but may be any informal (but otherwise sufficient) notice as between the successive assignees (*g*); and even where the assignment operates under the Judicature Act, 1873, s. 25, sub-sect. 6, the notice, although (as we have seen) it must be *in writing*, is not otherwise formal (*h*). The rule in *Dearle* v. *Hall* is not, however, applicable to shares in companies registered under the Companies Act, 1862 (*i*),—nor, *semble*, to shares even in companies that are not so registered; and the rule is not applicable to chattel interests in real estate (*k*); but it is applicable to the proceeds of the sale of real estate (*l*), and to moneys secured by debentures containing a charge on real estate (*m*). And note, that when the chose in action is in court, then, in lieu of giving notice of the assignment to the officer of the court, a stop order on the fund must be obtained by or on behalf of the assignee, and such stop order will have all the effect of notice (*n*),—provided it be obtained in the proper suit, but not otherwise (*o*); and such stop order appears still to be necessary in the case of all voluntary assignments of funds in court, notwithstanding that it may not now be necessary in the case of a charging order (*p*).

When notice is not requisite; or not available.

(*f*) *Newman* v. *Newman*, 28 Ch. Div. 674.
(*g*) *Newman* v. *Newman*, supra.
(*h*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; *Izon* v. *Tailby*, 18 Q. B. D. 25, and S. C. (sub nom. *Tailby* v. *Official Receiver*), 13 App. Ca. 523; *Western Waggon Co.* v. *West*, 1892, 1 Ch. 271.
(*i*) *Société Générale* v. *Tramways Union*, 11 App. Ca. 20; and see *Colonial Bank* v. *Whinney*, ib. 426.
(*k*) *Wiltshire* v. *Rabbits*, 14 Sim. 76.
(*l*) *Lee* v. *Howlett*, 2 K. & J. 531; *Arden* v. *Arden*, 29 Ch. Div. 702.
(*m*) *Christie* v. *Taunton & Co.*, 1893, 2 Ch. 175.
(*n*) *Greening* v. *Beckford*, 5 Sim. 195; *Warburton* v. *Hill*, Kay, 470; *Pinnock* v. *Bailey*, 23 Ch. Div. 497; *Mack* v. *Postle*, 1894, 2 Ch. 449.
(*o*) *Stephens* v. *Green* and *Green* v. *Knight*, 1895, 2 Ch. 148.
(*p*) *Brereton* v. *Edwards*, 21 Q. B. D. 488.

Assignee of chose in action takes subject to equities;

The assignee of a chose in action, although without notice, in general takes it subject to all the equities which subsist against the assignor (*scil.* being equities affecting or attaching to the subject-matter) (*q*). Thus in *Turton* v. *Benson* (*r*), where a son on his marriage was to have from his mother, as a portion with his wife, exactly as much as his intended father-in-law should allow to his daughter; and privately, without notice to his mother who treated for the marriage, the son gave a bond to the wife's father to pay back £1000 of the wife's portion seven years after, in consideration that the father-in-law should make the wife's portion £3000, instead of (as he had intended) £2000 only; and the bond was afterwards assigned for the benefit of the creditors of the father-in-law; it was held, that the bond, being void in equity in the hands of the father-in-law, could not be made better by the assignment (*s*) in the hands of his creditors, although taken without notice of the son's fraud. And again, in *Knapman* v. *Wreford* (*t*), where certain legatees (who were also the testator's next of kin) commenced an action in the Probate division against the executor of the will claiming a revocation of the probate, and pending that action assigned (some of them by way of purchase, and the others of them by way of mortgage) all their shares whether as legatees or as next of kin, and subsequently had their action dismissed with costs to be paid to the executor-defendant, the court held that these costs were proper to be set off against the amount of the legacies, and that the assignees of the legatees took their assignments subject to

as, *e.g.*, fraud,

or set-off.

(*q*) *In re Milan Tramways, ex parte Theys*, 22 Ch. Div. 122.
(*r*) 1 P. Wms. 496.
(*s*) *Barnett* v. *Sheffield*, 1 De G. M. & G. 371; *Athenæum Life Assurance Society* v. *Pooley*, 3 De G. & Jo. 294; *Graham* v. *Johnson*, L. R. 8 Eq. 36.
(*t*) 18 Ch. Div. 310; *Doering* v. *Doering*, 42 Ch. Div. 128; *Christmas* v. *Jones*, 1897, 2 Ch. 190.

such set-off. And here it is to be noted generally, that the assignee of a residue (or of any share of the residue) takes subject to the payment thereout of the general costs of an action for the administration of the estate, and subject also to the payment of all the "testamentary expenses" as well as of the debts properly so called; and that the provision contained in Order lxv. Rule 14*b*, to the effect that the costs of ascertaining the persons entitled to legacies are to be paid out of such legacies, and not (unless the court so directs) out of the residue, is in general of little advantage to the residuary legatee or his assignee (*u*).

Exceptions to the general rule:

However, length of time and other circumstances will occasionally take the case of the assignee out of the general rule (*v*). And the rule does not apply to negotiable instruments, because if it did, then, as Lord Keeper Somers observed, "it would tend to "destroy trade, which is carried on everywhere by "bills of exchange, and he would not lessen an honest "creditor's security" (*x*). The rule will also yield in equity where a contrary intention appears from the nature and terms of the contract between the original contracting parties; *e.g.*, debentures made payable to *bearer* were held to bind the company issuing them in the hands of transferees for value, irrespective of any equities between the company and the original holders (*y*); for generally, documents which of themselves are not negotiable in the strict sense of that phrase (*z*), may become negotiable (as between the

(1.) Special circumstances.

(2.) Negotiable instruments,—*e.g.*, (*a.*) Bills and notes;

(*b.*) Debentures payable to bearer.

(*u*) *Booty* v. *Groom*, 1897, 2 Ch. 407.
(*v*) *Hill* v. *Caillovel*, 1 Ves. Sr. 123; *Ex parte Chorley*, L. R. 11 Eq. 157.
(*x*) *Anon.*, Com. Rep. 43; *London and County Banking Co.* v. *London and River Plate Bank*, 21 Q. B. D. 535.
(*y*) *In re Blakely Ordnance Company*, L. R. 3 Ch. App. 154 *Crouch* v. *Credit Foncier of England*, L. R. 8 Q. B. 374.
(*z*) *London and County Bank* v. *River Plate Bank*, 20 Q. B. D. 232.

parties) by estoppel (*a*),—provided the estoppel be consistent with the terms of the document (*b*).

Assignments void for illegality: (1.) Assignments contrary to public policy.

A court of equity will, upon the ground of public policy, refuse to give effect to assignments of the pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to ensure a due discharge of their official duties. Thus, the pay of an officer in the army (*c*), or in the navy (*d*), and the salary of a judge given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased (*e*),—unless by the express terms subject to which the pay or pension is granted it is rendered inalienable (*f*), or unless it is a voluntary grant subject to withdrawal or discontinuance (*g*); but the salary of a workhouse chaplain, paid out of the poor-rates, is assignable (*h*). As regards alimony (*i*), or an allowance in the nature of alimony (*k*), that is not assignable; nor is it "capable of valuation" in bankruptcy (*l*); and the arrears are not "provable" in bankruptcy (*m*), not even when such

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(*a*) *Goodwin* v. *Robarts*, 1 App. Ca. 476; *Venables* v. *Baring Brothers*, 1892, 3 Ch. 527; *Burkinshaw* v. *Nicolls*, 3 App. Ca. 1016.

(*b*) *Sheffield* v. *London Joint Stock Bank*, 13 App. Ca. 333, and S. C. (sub nom. *Easton* v. *London Joint Stock Bank*), 34 Ch. Div. 59; *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201; *Bentinck* v. *London Joint Stock Bank*, 1893, 2 Ch. 120.

(*c*) *Birch* v. *Birch*, 8 P. D. 163; *Crowe* v. *Price*, 22 Q. B. D. 429.

(*d*) *Apthorpe* v. *Apthorpe*, 12 P. D. 192.

(*e*) *Arbuthnot* v. *Norton*, 5 Moore's P. C. C. 219; *Grenfell* v. *The Dean and Canons of Windsor*, 2 Beav. 550; *Willcock* v. *Terrell*, 3 Exch. Div. 323; *In re Ward, ex parte Ward*, 1897, 1 Q. B. 266; and Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53.

(*f*) *Lucas* v. *Harris*, 18 Q. B. D. 127; and see *in re Saunders, ex parte Saunders*, 1895, 2 Q. B. 424.

(*g*) *Ex parte Webber, in re Webber*, 18 Q. B. D. 111.

(*h*) *In re Mirams*, 1891, 1 Q. B. 594.

(*i*) *In re Robinson*, 27 Ch. Div. 160.

(*k*) *Watkins* v. *Watkins*, 1896, P. 222.

(*l*) *Linton* v. *Linton*, 15 Q. B. D. 239.

(*m*) *In re Hawkins*, 1894, 1 Q. B. 25.

arrears have accrued due before the date of the receiving order (*n*).

(2.) Assignments affected by champerty and maintenance.

Courts of equity, on the like principles of public policy, will also refuse to give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles (*o*). Thus, in *Stevens* v. *Bagwell* (*p*), where the one-fifth part of a share of prize-money, the subject of a suit *then depending* in the Admiralty Court, was assigned by the executrix of one of the captors and her husband to a navy agent, in consideration of his indemnifying them from all costs on account of any suit touching the said prize-money, and paying to them the remaining four-fifths, if it should be recovered,—the court held, that the assignment was void, as amounting to that species of maintenance which is called champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for part of the thing or for some profit out of it (*q*).

(3.) Assignments of mere *lites pendentes*.

Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, equity will not enforce the assignment of a *mere* naked right to litigate, *i.e.*, of a right which, from its very nature, is incapable of conferring any benefit except through the medium of a suit, such as a mere naked right to set aside a conveyance for fraud (*r*); and the buying of a "pretended title" to lands was not only void as a contract, but, under the statute 32 Hen. VIII. c. 9, s. 2, subjected the

(*n*) *Kerr* v. *Kerr*, 1897, 2 Q. B. 439.

(*o*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660; *Prosser* v. *Edmonds*, 1 Y. & C. Exch. 481; *James* v. *Kerr*, 40 Ch. Div. 449; *In re Park Gate Waggon Works Co.*, 17 Ch. Div. 234; *Guy* v. *Churchill*, 40 Ch. Div. 481; *Rees* v. *De Bernardy*, 1896, 2 Ch. 437.

(*p*) 15 Ves. 139.

(*q*) *Searle* v. *Hopwood*, 9 C. B., N. S., 566.

(*r*) *Prosser* v. *Edmonds*, 1 Y. & C. Exch. Ca. 481; *Powell* v. *Knowler*, 2 Atk. 226; *In re Paris Skating Rink Co.*, 5 Ch. Div. 959.

parties thereto to penalties and forfeitures (*s*); but that statutory provision has been recently repealed (*t*). But the purchase of an interest *pendente lite* (*u*), or a mortgage *pendente lite* (*v*), or the advance of money for carrying on a suit, if the parties have a common interest (*x*), or if there exists between the parties the relation of father and son (*y*), or master and servant (*z*), will not be considered as maintenance or champerty (*a*). Moreover, a purchase from the defendant is always valid, he having the possession, and therefore something more than a *mere* naked right to litigate; also, under the Bankruptcy Act, 1883, the trustee in the bankruptcy (*b*), and under the Companies Act, 1862, the liquidator in the winding up (*c*), can assign a *lis pendens* of the bankrupt or company; and to an action for maintenance, "charity" is esteemed a good defence (*d*).

(4.) Assignments by incapacitated persons.

A purchase by an attorney *pendente lite* of the subject-matter of the suit is invalid (*e*),—if he be the vendor's attorney at the time of purchasing; *secus*, if he do not become attorney for the vendor until after the sale is complete (*f*); and a purported assignment by a husband of his right to administer to his wife is invalid (*g*); and an undischarged bankrupt's assignment of his expectation of a surplus in the admini-

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(*s*) *Kennedy* v. *Lyell*, 15 Q. B. D. 491; and see the statutes (and the decisions thereon) there cited.
(*t*) 60 & 61 Vict. c. 65, s. 11.
(*u*) *Knight* v. *Bowyer*, 2 De G. & Jo. 421, 455.
(*v*) *Cockell* v. *Taylor*, 15 Beav. 103, 117.
(*x*) *Hunter* v. *Daniel*, 4 Hare, 420.
(*y*) *Burke* v. *Green*, 2 Ball & B. 521.
(*z*) *Wallis* v. *Duke of Portland*, 3 Ves. 503.
(*a*) *Dickenson* v. *Burrell*, 14 W. R. 412.
(*b*) *Secar* v. *Lawson*, 15 Ch. Div. 426.
(*c*) *In re Park Gate Waggon Works Co.*, 17 Ch. Div. 234.
(*d*) *Harris* v. *Briscoe*, 17 Q. B. D. 504.
(*e*) *Simpson* v. *Lamb*, 7 Ell. & Bl. 84; *Anderson* v. *Radcliffe*, 6 Jur. N. S. 578.
(*f*) *Davis* v. *Freethy*, 24 Q. B. D. 519.
(*g*) *Re Jane Turner*, 12 P. D. 18.

stration of his estate does not confer on the assignee any right to interfere in that administration (*h*). Also, when the assignee is incapacitated by the law regulating the assignment, *e.g.*, where (by the law of a husband's domicile) an assignment by him to his wife is invalid, then of course the assignment is invalid, although it should be of an English policy of assurance (*i*).

VI. *Trusts,—how created.*

Sixthly, it remains to consider the constituents of a valid trust, or the elements required for its creation. Now, no particular form of expression is necessary to the creation of a trust, if, on the whole, it can be gathered that a trust was intended. There is usually little difficulty in the case of deeds; but in the case of wills, it is very difficult in many cases to determine whether or not a trust was intended to be created. "As a general rule," observes Lord Langdale, speaking of wills, "when property is given absolutely to any "person, and the same person is by the giver recommended or entreated to dispose of it in favour of "another, the recommendation, entreaty, or wish shall "be held to create a trust,—(1.) If the words are so used "that on the whole they ought to be construed as "imperative or certain; (2.) If the subject-matter of "the recommendation or wish be certain; and (3.) If "the objects or persons intended to have the benefit "of the recommendation or wish be also certain. On "the other hand, (1.) If the giver accompanies his "wish or request with other words from which it is to "be collected that he did *not* intend the wish to be "*imperative;* or (2.) If it appears from the context "that the first taker was intended to have a discretionary power to withdraw or to consume any "*indefinite* part of the subject-matter of the gift; or

"The three certainties" required for the creation of a trust.

No trust if there is a want of any one or more of the "three certainties."

(*h*) *Ex parte Sheffield, in re Austin*, 10 Ch. Div. 434.
(*i*) *Lee* v. *Abdy*, 17 Q. B. D. 309.

"(3.) If the objects are *not* such as may be *ascertained* "with sufficient certainty, no trust is created. Thus, "(1.) The words 'free and unfettered,' accompanying "the strongest expression of request, prevent the "words of request being imperative; and (2.) Any "words by which it is expressed, or from which it "may be implied, that the first taker may apply the "whole or any *indefinite* part of the subject to his "own use, prevent the subject of the gift from being "considered certain; and (3.) A vague description of "the objects, that is, a description by which the giver "neither clearly defines the objects himself, nor names "a distinct class out of which the first taker is to "select, prevents the objects from being certain within "the meaning of the rule" (*k*).

(1.) Recommendation must be imperative, *i.e.*, certain.

Firstly, The words of recommendation used must be such that, upon the whole, they ought to be construed as imperative; but technical words are not necessary; *e.g.*, the words "willing or desiring," if reasonably certain, will be construed as imperative and as amounting to a trust; so also the phrases "wish and request" (*l*), "have fullest confidence" (*m*), "heartily beseech" (*n*), "well know" (*o*), "of course he will give" (*p*), have all been taken as imperative, *in the absence of other words depriving them of that effect.* On the other hand, the words above cited, and words of that class, will not be construed as imperative, if there are other words which, fairly interpreted, deprive them of that effect: Therefore, where, *e.g.*, a testator gives all his

(*k*) *Knight* v. *Knight*, 3 Beav. 172, 11 C. & F. 513; and see *Meggison* v. *Moore*, 2 Ves. Jr. 632; *Bernard* v. *Minshull*, Johnson, 276; *In re Bond, Cole* v. *Hawes*, 4 Ch. Div. 238; *Williams* v. *Williams*, 1897, 2 Ch. 12.

(*l*) *Godfrey* v. *Godfrey*, 11 W. R. 554; *Liddard* v. *Liddard*, 28 Beav. 266.

(*m*) *Shovelton* v. *Shovelton*, 32 Beav. 143.

(*n*) *Meredith* v. *Heneage*, 1 Sm. 553.

(*o*) *Bardswell* v. *Bardswell*, 9 Sim. 319.

(*p*) *Robinson* v. *Smith*, Mad. & Geld. 194.

real and personal estate unto and to the "*absolute*" use of his wife in fee-simple, "in full confidence" that she will do what is right with it among the children, no trust will be created (*q*); and again, where a testator gives all his property to his wife "*absolutely*," with full power to dispose of the same as she may think fit for the benefit of testator's family, "having full confidence" that she will do so, no trust will be created (*r*).

(2.) Subject-matter must be certain.

Secondly, The subject-matter of the recommendation or wish must be certain. Therefore, where, as in *Buggins* v. *Yates* (*s*), a testator devised real property to his wife, to be sold for payment of his debts and legacies in aid of his personal estate, and declared that he did not doubt but his wife would be *kind to his children*, the court, being of opinion that these words gave a right to no child in particular, or a right to no particular part of the estate, held, that the clause was void for uncertainty. And again, in *Curtis* v. *Rippon* (*t*), where the testator, after appointing his wife guardian of his children, gave all his property to her, "trusting that she would, in fear "of God and in love to the children committed to "her care, make such use of it as should be for her "own and their spiritual and temporal good, re-"membering always, according to circumstances, the "Church of God and the poor,"—the court held, that the wife was absolutely entitled to the property, there being no ascertained part of it provided for the children, and the wife being at liberty to diminish

(*q*) *In re Adams and Kensington Vestry*, 24 Ch. Div. 199; 27 Ch. Div. 394; *Lamb* v. *Eames*, 6 L. R. Ch. App. 597; *Dawkins* v. *Lord Penrhyn*, 4 App. Ca. 51; *Williams* v. *Williams*, 1897, 2 Ch. 12.

(*r*) *In re Hutchinson and Tennant*, 8 Ch. Div. 540; *In re Bond, Cole* v. *Hawes*, 4 Ch. Div. 238; *In re Hamilton, French* v. *Hamilton*, 1895; 1 Ch. 373.

(*s*) 9 Mod. 122.

(*t*) 5 Mad. 434.

the capital either for the Church or for the poor. And generally, where there is an absolute gift of property to one person, and a recommendation that he or she should give to a certain other person "*what shall be left*" at his death, "*or what he shall die possessed of*," the subject will be considered uncertain (*u*); but this class of cases must not be confounded with that very different class of cases in which the will gives only a life-estate to the first taker with a power of disposition over the capital, with remainder over failing (or subject to) such disposition; for in this latter class of cases, if there is either no exercise of the power, or only a partial exercise thereof, the gift over will take effect, but not as a trust (*v*).

(3.) The object must be certain.

Thirdly, The objects of the recommendation or wish must be certain. Thus, in *Sale* v. *Moore* (*x*), where a testator bequeathed the residue of his property to his wife, not doubting that she would consider *his near relations*, as he would have done if he had survived her, the court held that the objects were uncertain, saying,—"Who were the objects of the "trust? Did the testator mean relations at his own "death, or at his wife's death?" And we will here observe, that the tendency of the later decisions has been against construing precatory words as trusts (*y*); therefore, where there was a gift of stock to a person, the testator adding parenthetically, "*to enable him to* "*assist such children of my deceased brother as he may*

Leaning against construing precatory words as trusts.

(*u*) *Pope* v. *Pope*, 10 Sim. 1; *Green* v. *Marsden*, 1 Drew. 646; *Constable* v. *Bull*, 3 De G. & Sm. 411.

(*v*) *Pennock* v. *Pennock*, L. R. 13 Eq. 144; *Perry* v. *Merrit*, L. R. 18 Eq. 152; *Herring* v. *Barrow*, 14 Ch. Div. 263.

(*x*) 1 Sim. 534.

(*y*) *Howorth* v. *Dewell*, 29 Beav. 18; *Lambe* v. *Eames*, L. R. 10 Eq. 267; *Mussoorie Bank* v. *Raynor*, 7 App. Ca. 321; *In re Hamilton, French* v. *Hamilton*, 1895, 1 Ch. 373; *Hill* v. *Hill*, 1897, 1 Q. B. 483.

"*find deserving of encouragement*," it was held, that no trust was created for the children (*z*).

If trust be intended, but not validly created, it enures for the benefit not of the trustee, but of the heir-at-law or next of kin.

But the legatee or devisee does not, as a rule, take for his own benefit where the court fails to find a valid trust; on the contrary, he is in general excluded,—in favour either of the heir or of the next of kin of the testator, according as the property is real estate or is personal estate; and in order to exclude him, it is only necessary that it should appear that a trust was intended. Therefore where, in *Briggs* v. *Penny* (*a*), the testatrix, after giving, among other legacies, a sum of £3000 to Sarah Penny, and in addition a like sum of £3000 for the trouble she would have as executrix, bequeathed all her residuary personal estate to the said Sarah Penny, "well knowing that she will make a good "use, and dispose of it in a manner in accordance "with my views and wishes,"—it was held by Lord Truro, that Sarah Penny did not take the residue for her own benefit, but that it devolved upon the next of kin of the testatrix. His Lordship said:— "*Once establish that a trust was* INTENDED, *and the* "*legatee cannot take beneficially*; in this case, the fact "that, besides a legacy of £3000, another legacy of "that amount is expressly given to Miss Penny for "the trouble she will have in acting as executrix, "clearly shows that Miss Penny was not intended "to take the *residue* beneficially,—because otherwise "the testatrix could have had no object in taking "out of that residue the legacy of £3000 for her "trouble" (*b*).

Briggs v. *Penny*.

(*z*) *Benson* v. *Whittam*, 5 Sim. 22; *Rowbotham* v. *Dunnet*, 8 Ch. Div. 430; *Gregory* v. *Edmundson*, 39 Ch. Div. 253.

(*a*) 3 Mac. & G. 546; *In re Fleetwood*, *Sidgreaves* v. *Brewer*, 15 Ch. Div. 594; *Cooper-Dean* v. *Stevens*, 41 Ch. Div. 552.

(*b*) *Langley* v. *Thomas*, 6 De G. M. & G. 645; *Bernard* v. *Minshull*, Johns. 276; and disting. *Stead* v. *Mellor*, 5 Ch. Div. 225.

VII. *Secret trusts*,—when and when not enforced.

Where property (real or personal) is given by will to a trustee, or, being personal, is bequeathed to or vests in the executor, and there is nothing on the face of the will suggesting that the beneficial interest is to be taken by such trustee or executor,—and *d fortiori* if the contrary intention appears on the face of the will,—then the beneficial interest is undisposed of by the will, and a further writing to be executed as a will is necessary to dispose of the beneficial interest; and therefore no trust declared by word of mouth only, or even declared by writing (unless such writing is duly executed and attested as a will, or, being in existence at the date of, is incorporated in, the will), is permitted to be valid (*c*); but the property attempted to be subjected to such ineffective trust will go, so far as it consists of real estate, to the heir-at law or residuary devisee, and, so far as it consists of personal estate, to the next of kin or the residuary legatee. On the other hand, if the legal devisee or executor-legatee appears on the face of the will to be intended to take the beneficial interest also, then, as a general rule, no parol evidence to contradict or vary the plain effect of the will is admissible,—so that, in such latter case, the legal devisee or executor-legatee will take the beneficial interest to himself absolutely. But to this general rule there is one great exception, namely, the usual exception on the ground of fraud, viz., that *parol evidence may be admitted to prove a fraud on the part of such devisee or legatee in procuring the gift to be made to him for his own benefit by the will*, in that he undertook a certain *secret trust*, and that such undertaking on his part was the cause of the will being made as it is made; and in that case, the court will enforce discovery of the secret trust; and if it find

(*c*) *Adlington* v. *Cann*, 3 Atk. 141; *Muckleston* v. *Brown*, 6 Ves. 52; *Allen* v. *Maddock*, 11 Moo. P. C. 427; *Singleton* v. *Tomlinson*, 3 App. Ca. 404; *Boyes* v. *Carritt*, 26 Ch. Div. 531.

the secret trust lawful, it will decree execution thereof (*d*); and if it find the secret trust unlawful, it will give the property, if real, to the heir-a-law or residuary devisee, and if personal, to the next of kin or residuary legatee of the testator (*e*); and the court will also, if necessary, sever (when it can) the lawful trust from the unlawful one (*f*). But if no trust is imposed by the will, and no communication of any secret trust was made in the testator's lifetime to the devisee or legatee, the devise or bequest will hold good for the benefit of the devisee or legatee, —although he may, notwithstanding the absence of legal obligation, be disposed, from the bent and impulse of his own mind, to carry out what he believes to have been the testator's wishes (*g*).

VIII. *Powers in the nature of trusts;* otherwise, trusts in the garb (or under the disguise) of powers.

There remains to be, *eighthly*, considered a class of cases in which powers are given to persons accompanied with such words of recommendation in favour of certain specified objects as to render them powers in the nature of trusts; so that the failure of the donee of the power to exercise the power in favour of the intended objects will not prejudice the latter, for the court will in such a case take upon itself the duties of the donee of the power (*h*). It is perfectly clear, that where there is a mere power of disposing, and that power is not executed, the court cannot execute it (*i*); and it is equally clear, that wherever a trust is created, and the execution of that trust fails by the death of the trustee or by accident, the court will execute the trust (*k*); but

(*d*) *O'Brien* v. *Tyssen*, 26 Ch. Div. 372.
(*e*) *Strickland* v. *Aldridge*, 9 Ves. 519.
(*f*) *Re Birkett*, 9 Ch. Div. 576.
(*g*) *Cullen* v. *Attorney-General*, L. R. 1 H. L. 190; *M'Cormick* v. *Grogan*, L. R. 4 H. L. 82; *Rowbotham* v. *Dunnett*, 8 Ch. Div. 430.
(*h*) *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Izod* v. *Izod*, 32 Beav. 242.
(*i*) *Brown* v. *Higgs*, 8 Ves. 570.
(*k*) Ibid.

there is also a power which the court considers as partaking so much of the nature and qualities of a trust, that if the person who has the power does not discharge the duty which the power imposes, the court will discharge the duty in his place (*l*). Therefore, in *Burrough* v. *Philcox* (*m*), where the testator, after giving life-interests in certain stock and real estate to his two children, with remainder to their issue, declared that in case his two children should both die without leaving lawful issue, the survivor of his two children should have power to dispose by will of the real and personal estate, "amongst my "nephews and nieces or their children, either all to "one of them, or to as many of them as my surviving "child shall think proper,"—it was held by Lord Cottenham, that a trust was created in favour of the testator's nephews and nieces and their children, subject to a power of *selection* and distribution only in the surviving child of the testator. So again, in *Salusbury* v. *Denton* (*n*), where a testator by will gave a fund to be at the disposal of his widow by her will, wherewith to apply a part for charity, the remainder to be at her disposal among my "relations, in such proportions as she may be pleased to "direct;" and the widow died without exercising the power of determining the proportions in which each beneficiary was to take,—the court held, that the bequest was not void for uncertainty, but that the fund should be divided in moieties, one of such moieties to be for charitable purposes, and the other moiety to be for such of the testator's relatives as were capable of taking under the statutes of distribution (*o*),—for when equity executes an unexecuted

Burrough v. *Philcox*,—power equal to a trust subject to right of *selection*.

Salusbury v. *Denton*,—to same effect.

The shares of the appointees are equal.

(*l*) *Brown* v. *Higgs*, 8 Ves. 561; and see *Tweedale* v. *Tweedale*, 7 Ch. Div. 633, following *Wheeler* v. *Warner*, 1 S. & S. 304.

(*m*) 5 My. & Cr. 72; and see *In re Weekes's Settlement*, 1897, 1 Ch. 269.

(*n*) 3 K. & J. 529.

(*o*) *Little* v. *Neil*, 10 W. R. 592; *Gough* v. *Bult*, 16 Sim. 45.

power-trust or trust-power of this sort, she applies her own maxim, that equality is equity, and divides the property equally, although the trustee, if he had chosen to exercise the power, might have used his discretion to give unequal shares (*p*).

IX. *Liability of purchaser to see to the application of purchase-money*, where there are *cestuis que trustent.*

A *cestui que trust* is (or used to be) the peculiar favourite of courts of equity, and has been by the most stringent rules protected against the *mala fides* or carelessness of his trustee; and in furtherance of this object, the doctrine was early established, that as a trustee for sale had to pay over the purchase-money to other persons in given shares, the purchaser was bound to see that the trustee applied the purchase-money accordingly,—unless indeed the instrument by which the trust was created contained an express declaration that the trustee's receipt should be a good discharge; but as this rule in certain cases bore very hardly on purchasers, various statutes were from time to time passed with a view to their relief; and it will be convenient, firstly, to state the old rules by which the purchaser's liability was regulated, and then, secondly, to state the provisions and applicability of the various recent statutes.

(1.) Personalty, —purchaser exonerated.

Firstly, by the old rules, a purchaser of the whole or any part of the *personal* estate was not bound to see that his purchase-money was applied in discharge of the debts (*q*); but if there was any fraud or participation in fraud on the part of the purchaser, he would not be exonerated,—*e.g.*, where an executor disposed of his testator's assets in payment of a debt of his own, and the purchaser knew of such intended

(*p*) *Willis* v. *Kymer*, 7 Ch. Div. 181.
(*q*) *Ewer* v. *Corbet*, 2 P. W. 149; *Keane* v. *Robarts*, 4 Mad. 356.

(2.) Realty,—(a.) Trust or charge for payment of debts and legacies generally,—purchaser exonerated. (b.) Trust for payment of certain debts or legacies only,—purchaser formerly not exonerated.

misapplication beforehand (*r*); also a purchaser of *real* estate devised to trustees upon trust to sell for the payment of debts or of debts and legacies generally, or merely *charged* with such payment, was exonerated (*s*). On the other hand, if the trust directed the real estate to be sold, or if the will contained a charge upon, or a trust of, the lands for the payment of certain debts, mentioning in particular to whom those debts were owing,—or if there was a trust or a charge for the payment of legacies or annuities only,—the purchaser was bound to see to the proper application of the purchase-money (*t*).

Lord St. Leonards' Act, 22 & 23 Vict. c. 35,—purchase or mortgage money only.

And, *secondly*, under the provisions of various statutes, purchasers (including mortgagees) have been recently more and more exonerated from all liability to see to the application of their purchase-money,—(1.) By Lord St. Leonards' Act, which enacted that "the *bonâ fide* payment to, and the receipt of, any "person to whom any *purchase* or *mortgage* money "was payable upon any express or implied trust, "should effectually discharge the person paying the "same from seeing to the application or being answer-"able for the misapplication thereof, *unless the contrary* "*should be expressly declared by the instrument creating* "*the trust or security*" (*u*),—but the statute applied only to instruments executed on or after the 13th August 1859; (2.) By Lord Cranworth's Act, which enacted that "the receipt in writing of any trustees or trustee "for ANY money payable to them or him by reason "or in the exercise of any trusts or powers reposed "or vested in them or him, should be a sufficient dis-

Lord Cranworth's Act, 23 & 24 Vict. c. 145,—any trust money whatsoever.

(*r*) *Hill* v. *Simpson*, 7 Ves. 152; *Pearson* v. *Scott*, 9 Ch. Div. 198; *In re Cope, Cope* v. *Cope*, 16 Ch. Div. 49.

(*s*) *Jebb* v. *Abbot*, cited Co. Litt. 290*b*.; *Dowling* v. *Hudson*, 17 Beav. 248; *In re Dyson and Fowke*, 1896, 2 Ch. 720.

(*t*) *Elliot* v. *Merryman*, 1 L. C. 64; *Johnson* v. *Kennet*, 3 My. & K. 630.

(*u*) *Bennett* v. *Lytton*, 2 J. & H. 158.

"charge for the money therein expressed to be received, "and should effectually exonerate the persons paying "such money from seeing to the application thereof, "or from being answerable for any loss or misapplica- "tion thereof,"—but the statute applied only to instruments coming into operation on or after the 28th August 1860; and finally (3.) By the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 20, repeating the like provision contained in the Conveyancing Act, 1881, it is enacted, that "the receipt in writing of any "trustees or trustee for ANY money, securities, or other "personal property or effects, payable, transferable, or "deliverable to them or him under ANY TRUST OR "POWER, shall be a sufficient discharge for the same, "and shall effectually exonerate the person paying, "transferring, or delivering the same from seeing to "the application or being answerable for any loss "or misapplication thereof,"—and the Conveyancing Act, 1881, was, and the Trustee Act, 1893, is, in this particular retrospective; and it may be mentioned that the Settled Land Act, 1882, s. 40, contains a similar power as regards funds arising under that Act, and that Act also is retrospective.

Conveyancing Act, 1881, Trustee Act, 1893,—any trust moneys, securities, &c.

Settled Land Act, 1882,—capital moneys.

Since the changes successively effected by these enactments, a *bonâ fide* purchaser paying his purchase-money to the trustee and obtaining his written receipt for same, and not knowingly participating in any fraud of the trustee's, is now in all cases exonerated from seeing to the application of his purchase-money so far as regards all charges not only of debts, but also of legacies and annuities made or given by the will (*v*). But of course as regards mortgages and other charges which exist independently of the will,—and which are, in fact, paramount to the will,—the purchaser would not be exonerated, but would require to obtain the

General conclusion on the Acts,—that the purchaser is now in all cases exonerated;

(*v*) *In re Dyson and Fowke*, 1896, 2 Ch. 720.

concurrence of such mortgagees or other incumbrancers in the conveyance to himself, or else to have recourse to the provisions contained in the 5th section of the Conveyancing Act, 1881, for the discharge of such *incumbrances* upon a sale, or otherwise to see to their being properly discharged. Also, under exceptional circumstances, it would still be prudent to require legatees and annuitants, and even specified creditors, to concur in the conveyance for the purpose of releasing their charges (*x*); thus, for example, the presumption arises after twenty years in the case of real estate (*y*), where the beneficial devisee is in possession, that the debts have been paid, and therefore in such a case the power in the trustees to sell may be wholly at an end, and with it of course the power also to give receipts, and the concurrence of the legatees and annuitants would in such a case be required. But the presumption aforesaid appears not to arise in the case of leasehold property (*z*), so that an executor or administrator can effectually dispose of such leaseholds, without the concurrence of any of the beneficiaries (*a*),—unless of course he has assented to the bequest of the leaseholds, in which latter case the executor or administrator can no longer sell them. The power or trust for sale may also have come to an end, by natural causes; *e.g.*, when the real estate has vested in fee-simple absolutely, and there is no continuing purpose for which the trust or power is wanted (*b*). Also,—unless, of course, when the sale is by the tenant for life in possession under the Settled Land Act, 1882, or is by

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(*x*) *Price* v. *Price*, 35 Ch. Div. 297.
(*y*) *Re Tanqueray Willaume*, 20 Ch. Div. 465.
(*z*) *Re Whistler*, 35 Ch. Div. 561.
(*a*) *In re Venn and Furze*, 1894, 2 Ch. 101.
(*b*) *Peters* v. *Lewes, &c. R. C.*, 18 Ch. D. 429; *In re Cotton's Trustees and London School Board*, 19 Ch. D. 624; *In re Lord Sudeley and Baines & Co.*, 1894, 1 Ch. 334; and *In re Dyson and Fowke*, 1896, 2 Ch. 720.

the absolute fee-simple owner,—the purchaser must in all cases ascertain that the person professing to sell land, *i.e.*, real estate, as trustee, is in fact the person authorised for that purpose,—a question not always very easy to determine; but the answer to it is to be gathered from the provisions in that behalf contained in Lord St. Leonards' Act above cited, which distinguishes the cases in which the *trustee* of the will is to sell the real estate from the cases in which the *executor* is to sell it, the trustee being made the vendor where the charged lands are devised to him in fee-simple or for other the testator's *whole* estate therein, and the executor being made the vendor in all other cases—in the absence, of course, of a properly qualified beneficiary entitled and able to sell. And here note, that "executor" in Lord St. Leonards' Act does not include "administrator" (*c*), —a distinction which for this purpose is in no way affected by the Trustee Act, 1893, although for all the general purposes of that Act executors and administrators are now on a level (*d*). Also, *nota bene*, where the sale purports to be in exercise of the express power of sale contained in a mortgage deed, and the transferee of the mortgage is selling, it must be seen that the power is exercisable (as it usually will be) by the *assign* of the mortgagee (*e*).

provided he purchase from the true vendor.

And before leaving this subject, reference should be made to the 55th and 56th sections of the Conveyancing Act, 1881,—by the former of which sections it was provided (in favour of subsequent *bonâ fide* purchasers), that the usual receipt clause in the body of the deed or the usual indorsement of such receipt on the back thereof should be sufficient evidence of

On a purchase from trustees,—sec. 56, Conveyancing Act, 1881, was not applicable, as a general rule;

(*c*) *In re Clay and Tetley*, 16 Ch. Div. 3; *In re Cope, Cope* v. *Cope*, 16 Ch. Div. 49.
(*d*) 56 & 57 Vict. c. 53, s. 50.
(*e*) *In re Rumney and Smith*, 1897, 2 Ch. 351.

the payment of the money in such receipt expressed to have been received; and by section 56 it was provided, that such receipt occurring either in the body or on the back of the deed should be a sufficient authority (without any other or distinct authority in that behalf) to the solicitor of the vendor to receive and to give a receipt for the purchase-money. It was held, however, that the 56th section was not applicable to vendors who were trustees, with power to sell and give receipts, but was applicable only to vendors who were themselves beneficially entitled to the purchase-moneys,—the court of appeal pointing out in *In re Bellamy* (*f*), that the only effect of the 56th section was to make a special authority to the solicitor to receive the money unnecessary, that section being itself the special authority, *but trustees had, as a general rule, no power to give or grant any such special authority to their solicitor*, although under special circumstances they might have such a power; but now, under the Trustee Act, 1893, s. 17 (*g*), repeating the like provision contained in the Trustee Act, 1888, s. 2 (*h*), trustee-vendors (including executors and administrators) are entitled to the benefit of section 56 equally with ordinary vendors (*i*); but even still an *attorney* appointed to sell real estate and to receive the purchase-money is not (in the absence of an express clause to that effect contained in his power of attorney) authorised to appoint his solicitor to receive the purchase-money (*k*). Also, let it be mentioned here, that, as a matter of *prudence*, although not a matter of legal necessity, a purchaser should not rest content with the usual receipt clause occurring in the body of the deed, but should (as he may)

but is now applicable.

(*f*) 24 Ch. Div. 387; *Ghost* v. *Waller*, 9 Beav. 497; *Viney* v. *Chaplin*, 2 De G. & Jo. 468.
(*g*) 56 & 57 Vict. c. 53.
(*h*) 51 & 52 Vict. c. 59.
(*i*) *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192.
(*k*) *Hetley's Case*, 9 Times Law Rep. 553.

insist also on the receipt being indorsed on the back of the deed,—a precaution which will prevent the vendor from afterwards alleging that the deed, although executed by him, is *not his deed;* for the court would hardly listen to him if he were to say that the receipt indorsed and signed by him was not his receipt (*l*),—unless, *semble*, the deed was proved to have been delivered as an *escrow* simply (*m*).

(*l*) *Foster* v. *Mackinnon*, L. R. 4 C. P. 710; *Hunter* v. *Walters*, L. R. 7 Ch. App. 75; *Edwards* v. *Brown*, 1 C. & J. 310; *Onward Building Society* v. *Smithson*, 1893, 1 Ch. 1; *Greenslade* v. *Dare*, 20 Beav. 284.

(*m*) *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192.

CHAPTER III.

EXPRESS PUBLIC [OR CHARITABLE] TRUSTS.

Charities,—favoured by law.

TRUSTS in favour of charities, in other words, Express Public Trusts, are, in respect as well of their creation as also of their construction and execution, subject in general to the like rules as express private trusts; nevertheless, charities are highly favoured in the law, and charitable gifts sometimes receive a more liberal construction than gifts to individuals; while in some few respects to be hereafter specified, charities have been treated with some little disfavour.

Charities,—definition of, according to law.

(1.) The objects specified in 43 Eliz. c. 4.

The term "charities," in its legal acceptation (*a*), comprises the following objects or purposes, namely, (1) The charitable uses specified in the statute 43 Eliz. c. 4, that is to say, the relief of aged, impotent, and poor people (*b*); the maintenance of the sick and of maimed soldiers and mariners; of schools of learning, free schools, and scholars in the universities; the repair of bridges, posts, houses, causeways, sea-banks, and highways; the repair of churches; the maintenance of houses of correction; the education and preferment of orphans; the marriages of poor maids; the support, aid, and help of young tradesmen, handicraftsmen, and decayed persons; the relief and redemption of prisoners and captives; and the relief of the poor (even the poor in foreign states)

(*a*) *The Queen* v. *Income Tax Commissioners*, 1891, App. Ca. 531; *In re Foveaux, Cross* v. *London Anti-Vivisection Society*, 1895, 2 Ch. 501.
(*b*) *In re Wall, Pomeroy* v. *Willway*, 42 Ch. Div. 510.

(*c*) in respect of taxes and the like; and (2) The charitable uses similar to those specified in the statute which the courts have at various times held to be within the "spirit and intendment,"—and which are now to be described as being "within the meaning, purview, and interpretation of the preamble" (*d*),—of the Act, that is to say, *e.g.*, the repair of memorial windows in churches (*e*) and of monuments in churches (*f*), but not in churchyards (*g*); the repair of a church organ; the maintenance of church-chimes and of worship generally (*h*); the foundation of lectureships and professorships (*i*), but not of prizes for yacht-racing or the like (*k*); the supplying of towns with water, or generally the sanitation or ornamentation of towns (*l*); the encouragement of good domestics (*m*), or of poor emigrants (*n*); the care and cure of useful quadrupeds (*o*); and the like. But it is to be observed, that objects which, although charitable in a popular sense, are merely for the benefit of individuals, are not charitable in the legal sense of that word; *e.g.*, a bequest to ten poor clergymen of the Church of England to be selected by J. S. (*p*), is not a charitable gift; as neither is a bequest to a private institution (*e.g.*, an orphanage),

And (2.) Objects analogous thereto.

Charities,—are objects of a *public* character.

(*c*) *Freund* v. *Steward*, W. N. 1893, p. 161.
(*d*) 51 & 52 Vict. c. 42, s. 13, sub-sec. 2.
(*e*) *Att.-Gen.* v. *Ruper*, 2 P. Wms. 125.
(*f*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585.
(*g*) *Dawson* v. *Small*, L. R. 18 Eq. 114; *Vaughan* v. *Thomas*, 33 Ch. Div. 187; *Tyler* v. *Tyler*, 1891, 3 Ch. 252; *Pirbright* v. *Salvey*, W. N. 1896, p. 86.
(*h*) *Att.-Gen.* v. *Pearson*, 3 Mer. 353; *Wright* v. *Tugwell*, 1892, 1 Ch. 95; *Farquhar* v. *Dowling*, 1896, 1 Ch. 50.
(*i*) *Yates* v. *University College*, L. R. 7 H. L. 438.
(*k*) *Jones* v. *Palmer*, 1895, 2 Ch. 649.
(*l*) *Jones* v. *Williams*, Amb. 651; *Faversham* (*Mayor*) v. *Ryder*, 5 De G. M. & G. 350.
(*m*) *Loscombe* v. *Wintringham*, 13 Beav. 87.
(*n*) *Barclay* v. *Maskelyne*, 4 Jur. N. S. 1294.
(*o*) *London University* v. *Yarrow*, 23 Beav. 159.
(*p*) *Thomas* v. *Howell*, L. R. 18 Eq. 198; *Pease* v. *Pattinson*, 32 Ch. Div. 154; *In re Botolph without Bishopsgate Parish Estates*, 35 Ch. Div. 142.

maintained at the expense of an individual (*q*); and yet a bequest to "General William Booth" (of the Salvation Army) "for the spread of the gospel" is distinctly charitable (*r*).

Charitable scheme,—when and when not settled.

The court in general settles a "*scheme*" for the administration of charitable bequests (*s*); but no such scheme will be directed when the legatee is evidently intended by the testator to have an absolute discretion in his application of the fund (*t*). Also, the Charity Commissioners, subject always to the control of the court, may settle schemes for charitable endowments; and may, with the aid of the court, summarily enforce the provisions of the scheme so settled by them (*u*). But a charity which is supported entirely by voluntary contributions is not liable to be controlled by the Commissioners (*v*). Occasionally, the trusts of the charity are contained in the original deed of donation or foundation, or in a deed executed simultaneously therewith; and such deed would be regulative of the charity, although it would not be properly described as a "scheme" (*x*); and the trusts of the deed may be varied by a "scheme legally established;" and a "scheme" is otherwise, in many particulars, more convenient than the original deed of foundation (*y*). An *eleemosynary* charity is, in general, administered irrespectively of the religious

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(*q*) *In re Slevin, Slevin* v. *Hepburn*, 1891, 1 Ch. 373.
(*r*) *Lea* v. *Cooke*, 34 Ch. Div. 528.
(*s*) *White* v. *White*, 1893, 2 Ch. 41; *In re Delmar Charity*, 1897, 2 Ch. 163.
(*t*) *Lea* v. *Cooke*, supra; *Walsh* v. *Gladstone*, 1 Phil. 200.
(*u*) *Sons of Clergy (Corporation)* v. *Skinner*, 1893, 1 Ch. 178; *John Street Chapel Case*, 1893, 2 Ch. 618.
(*v*) *Re Clergy Orphan Corporation*, 1894, 3 Ch. 145; *Re Gilchrist's Trusts*, 1895, 1 Ch. 367.
(*x*) *Re Mason Orphanage*, 1896, 1 Ch. 54, 596; and see the Charitable Trusts Act, 1855 (18 & 19 Vict. c. 124), s. 29.
(*y*) *Re Mason Orphanage*, supra.

belief of its recipients (*z*), and any scheme for its regulation would have regard to that principle of administration.

I. Respects in which charities are favoured,—

We will now enumerate some of the principal characteristics appertaining to charitable gifts; and *Firstly*, charities are favoured above individuals in the respects following :—

(1.) General intention effectuated.

(1.) If the testator has expressed an absolute intention to give a legacy to charitable purposes, but has left uncertain the particular mode by which his intention is to be carried into effect, the Court of Chancery will supply the defect and enforce the charity (*a*),—although if the *cestui que trust* in such a case had been a private individual, the trust would have failed for want of certainty in the object. It is, in fact, a well-established principle, that if the bequest be for a charity, it matters not how uncertain the objects may be, or whether the persons who are to take are *in esse* or not, or whether the legatee be a corporation capable in law of taking or not, or whether the bequest can be carried into operation or not; for in all these and the like cases, the Court of Chancery will treat the bequest as valid, and will dispose of it for such charitable purposes as it shall think fit. But for these purposes the object must be distinctly charitable; for if the bequest may, in conformity with the will, either be disposed of in charity of a discretionary private nature, or be employed for any general, benevolent, or useful purpose, or for any general purpose, whether charitable *or otherwise*, or for charitable *or other general purposes* at discretion, the bequest will be

If gift be for charity, equity will effectuate it at all events.

(*z*) *Att.-Gen.* v. *Calvert*, 23 Beav. 248; *In re Ross's Charity*, 1897, 2 Ch. 397.
(*a*) *Pocock* v. *Att.-Gen.*, 3 Ch. Div. 342.

void, as being not exclusively charitable, and as being too indefinite for the Court of Chancery to execute; and the property will in all such cases devolve on the residuary legatee or next of kin of the testator (*b*). On the other hand, if the purposes are exclusively charitable, it will not render the gift void merely to leave to the discretion of the executors the choice of the charitable objects,—for in such a case the proving executors would (and they alone would) exercise the discretion (*c*). And objects described as "charitable and deserving" would be construed simply as charitable objects of a deserving character, the words "and deserving" being regarded as merely restrictive of the class of charities (*d*); but a gift expressed to be "for some one or more purposes, charitable or philanthropic," would not be so construed, but would be void as not being exclusively for charitable purposes (*e*). And here note, that a friendly society is not a charity; and therefore a bequest made to it in aid of its funds will not, on the society being wound up and dissolved, become applicable for charitable purposes (*f*); also, an advowson, *semble*, is not a charity (*g*).

(1*a*.) Doctrine of *Cy-pres*.

(1*a*.) Where the literal execution of specific charitable trusts either originally is or afterwards becomes inexpedient or impracticable, the court will execute them *cy-pres, i.e., as nearly as it can to the original purpose*, and so as to execute them in substance,—the general principle upon which the court acts in such

(*b*) *Morice* v. *Bishop of Durham*, 10 Ves. 522; *Leaver* v. *Clayton*, 8 Ch. Div. 584; *In re Slevin*, *Slevin* v. *Hepburn*, supra.

(*c*) *Crawford* v. *Forshaw*, 1891, 2 Ch. 261.

(*d*) *In re Sutton*, *Stone* v. *Att.-Gen.*, 28 Ch. Div. 464; *Obert* v. *Barrow*, 35 Ch. Div. 472.

(*e*) *Macduff* v. *Macduff*, 1896, 2 Ch. 451.

(*f*) *In re Clarke's Trust*, 1 Ch. Div. 497; *Re Dutton*, 4 Exch. Div. 54; and consider *Cunnack* v. *Edwards*, 1896, 2 Ch. 679, and *Bruty* v. *Mackey*, 1896, 2 Ch. 727.

(*g*) *Hood* v. *Att.-Gen.*, 1897, 1 Ch. 518; 2 Ch. 105.

cases being thus laid down by Lord Eldon in *Moggridge* v. *Thackwell* (*h*), viz., "that if the testator has "manifested a general intention to give to a charity, "the failure of the particular mode in which the "charity is to be effectuated shall not destroy the "charity; that is to say, if the substantial intention "is charity, the law will substitute another mode of "devoting the property to charitable purposes, where "the formal intention as to the mode cannot be "accomplished;" in other words, the court will execute the trust *cy-pres*, approving of a scheme which *as nearly as possible* executes the intention of the donor (*i*). So also, if a legacy be given to a charity, and the charity survives the testator, and afterwards (and before receiving the legacy) ceases to exist, the legacy will be applied *cy-pres* (*k*); *secus*, if the legatee ceases to exist before the testator's death, unless there is (in that case) such general charitable intent as aforesaid. But the doctrine of *cy-pres* is only applicable where the testator has manifested a *general* intention of charity; and therefore if the testator has had but one *particular* object in his mind,—as, for example, to build a church at W.,—and that object cannot (by reason of some legal objection or otherwise) be answered, no application *cy-pres* will be directed, but the next of kin will take (*l*). And again, if the bequest is upon trust to pay the income to the incumbent of the church at H. for the time being, so long as he permits the sittings to be occupied free, there is in such a case no general intention of charity; and therefore, subject to the trust, and

Applies only where there is a general intention of charity.

Limit to the *Cy-pres* doctrine.

(*h*) 7 Ves. 69.

(*i*) *Att.-Gen.* v. *The Ironmongers' Co.*, 2 Beav. 313; *Pease* v. *Pattinson*, 32 Ch. Div. 154; *Spiller* v. *Maude*, ibid. 158*n.*; *Vaughan* v. *Thomas*, 33 Ch. Div. 187; *Biscoe* v. *Jackson*, 35 Ch. Div. 460; and *Re Mason Orphanage*, supra.

(*k*) *In re Slevin*, *Slevin* v. *Hepburn*, 1891, 2 Ch. 236, explaining *Hayter* v. *Trego*, 5 Russ. 113.

(*l*) *Loscombe* v. *Wintringham*, 13 Beav. 87; *Broadbent* v. *Barrow*, 29 Ch. Div. 560; *In re White's Trust*, 33 Ch. Div. 449.

on its determination, the capital of the trust fund will in that case go to the residuary legatee or next of kin (*m*).

(2.) Defects in conveyances supplied.

(2.) In further aid of charities, the court will supply all defects in conveyances, where the donor hath a capacity and a disposable estate, and his mode of donation does not contravene the provisions of any statute (*n*),—although in the case of private individuals, the imperfection of the conveyance, being voluntary, would be fatal to the creation of the trust.

(3.) Resulting trusts in gifts to charities.

(3.) A third respect in which charities are favoured is in respect of resulting trusts, the following rules being in these cases applicable in the case of charities, namely:—

(*a.*) Where a general charitable intention, no resulting trust.

(*a.*) Where a person makes a valid gift, whether by deed or will, and expresses a general intention of charity, but either particularises no objects (*o*), or such as do not exhaust the proceeds (*p*), the court will not suffer the property in the first case, or the surplus in the second, to result to the settlor or his representatives, but will take upon itself to execute the general intention, by declaring the particular purposes to which the fund or the surplus shall be applied.

(*b.*) So too where rents are exhausted by the object indicated, but subsequently increase.

Also (*b.*) Where a person settles lands, or the rents and profits of lands, to purposes which at the time exhaust the whole proceeds, but in consequence of an increase in the value of the estate, an excess of income subsequently arises, the court will order the excess or surplus, instead of resulting, to be applied in the same or a similar manner with the original amount (*q*).

Exception,—where rents are not exhausted at time of gift.

But to these two rules there is the following exception, viz., even in the case of

(*m*) *In re Randell, Randell* v. *Dixon*, 38 Ch. Div. 213.
(*n*) *Sayer* v. *Sayer*, 7 Hare, 377; *Innes* v. *Sayer*, 3 Mac. & G. 606.
(*o*) *Att.-Gen.* v. *Herrick*, Amb. 712.
(*p*) *Att.-Gen.* v. *Tonna*, 2 Ves. Jr. 1.
(*q*) *Beverley* v. *Att.-Gen.*, 6 H. L. Cas. 310; *Att.-Gen.* v. *Caius College* 2 Kee. 150; *Att.-Gen.* v. *Marchant*, L. R. 3 Eq. 424.

charity, if the settlor do not give the land, or the whole rent of the land, but noticing the property to be of a certain value, appropriates part only to the charity, the residue will then, according to the circumstances, either result to the heir-at-law (*r*), or belong to the donee of the property, subject to the charge (*s*).

(4.) Gifts to charities are not within or subject to the rule of law against perpetuities (*t*), but gifts in perpetuity to individuals (not being merely gifts in fee-simple) would be void (*u*). But when it is said, that gifts in favour of charities are not within the rule against perpetuities, it is intended merely, that where there is a valid immediate gift to one charity, a gift over to another charity is not subject to the rule; and it is not intended thereby, that the gift to a charity to take effect for the first time upon the happening of a contingency which is obnoxious to the rule of perpetuities would be valid, the contrary being the fact (*v*); and similarly, a gift over to a charity following after a gift to individuals would be invalid, if it was expressed to take effect upon the happening of some event which might possibly not happen within the limit of time appointed by the rule against perpetuities (*x*).

(4.) Charities exempted from Rule of Perpetuities.

(5.) Also, voluntary conveyances of lands to charities were not within the statute 27 Eliz. c. 4 (*y*),

(5.) Voluntary conveyances to charities,

(*r*) *Att.-Gen.* v. *Mayor of Bristol*, 2 J. & W. 308.
(*s*) *Att.-Gen.* v. *Southmoulton*, 5 H. L. Cas. 1; *Att.-Gen.* v. *Trin. Coll. Camb.*, 24 Beav. 383.
(*t*) *Att.-Gen.* v. *Price*, 17 Ves. 371; *Gillam* v. *Taylor*, L. R. 16 Eq. 581.
(*u*) *Thomas* v. *Howell*, L. R. 18 Eq. 198; *Re Dutton*, 4 Exch. Div. 54.
(*v*) *Chamberlayne* v. *Brockett*, L. R. 8 Ch. 211; *Alt* v. *Stratheden*, 1894, 3 Ch. 265.
(*x*) *In re Bowen, Lloyd Phillips* v. *Davis*, 1893, 2 Ch. 491.
(*y*) *Att.-Gen.* v. *Newcastle*, 5 Beav. 307; *Ramsay* v. *Gilchrist*, 1892, A. C. 412.

good notwithstanding 27 Eliz. c. 4.

although, of course, the like conveyances would, in the case of individuals, have been void as against subsequent purchasers and mortgagees,—*scil.* prior to the Voluntary Conveyances Act, 1893, of which we treated in the preceding chapter.

II. Respects in which charities are treated on a level with private individuals.

Secondly, Charities are treated on a level exactly with individuals in the respects following:—

(1.) Want of executor supplied.

(1.) If a testator gives his property to such person (upon trust) as he shall hereafter name to be his executor, and afterwards he appoints no executor; or if an estate is devised (upon trust) to such person as the executor shall name, and no executor is appointed; or if, an executor being appointed, he dies in the testator's lifetime, and no other is appointed in his place,—in all these cases, if the bequest be in favour either of a charity or of an individual, the Court of Chancery will assume the office of an executor, and carry into effect that bequest—that is to say, *will appoint a trustee to discharge the duties of an executor* (*z*); *scil.*, because the beneficiary is certain, although the legal owner is uncertain (*a*); and an executor *according to the tenor* might even be constituted (*b*), or administration with the will annexed would be granted (*c*), by the Probate Division of the High Court in such a case.

(2.) Lapse of time a bar.

(2.) And again, lapse of time in equity is a bar in the case of charitable trusts, exactly as it is (where it is) in the case of mere private trusts, and no further; but of course, in the case of the breach of an express trust of which the purchaser has notice, lapse of time is no bar either in the case of charities or in the case of individuals. Thus, in

(*z*) *In re Moore, M'Alpine* v. *Moore*, 21 Ch. Div. 778.
(*a*) *Mills* v. *Farmer*, 1 Mer. 55, 96.
(*b*) *Re Bell*, 4 Prob. Div. 85; *Re Wm. Bradley*, 8 Prob. Div. 215.
(*c*) *Re M'Auliffe*, 1896, p. 290.

the case of a charitable trust, where a corporation had purchased *with notice of the trust*, and had held the property under an adverse title for one hundred and fifty years, it was decided that the corporation should reconvey the property upon the original trusts (*d*). But under the Trustee Act, 1888 (*e*), sec. 8, lapse of time may now, in certain cases, be pleaded in bar of an action for such breaches of trust (*f*); and apparently, where it can be so pleaded, it will make no difference whether the trust is a private trust or is a public (or charitable) trust.

(3.) Illegal, severance of, from legal.

(3.) So also where a gift is made upon trust for charitable and other purposes, and the charitable purposes are legal, but the other purposes are not,—if the proportion attributable to the charitable purposes can be ascertained and the legal separated from the illegal, the court will not suffer the intended charitable bequest to fail, but will uphold the gift to the extent of the ascertainable proportion (*g*); but if the proportion cannot be ascertained, or if the legal cannot be severed from the illegal purposes, then in the case of charities, as in the case of individuals, the whole gift will fail (*h*),—unless upon the construction of the bequest what is given for the illegal purposes becoming void, the whole bequest should happen to enure in favour of the legal purposes (*i*). Also, where a gift is in ambiguous language, and according to one interpretation of it it would be illegal, and according to the other inter-

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(*d*) *Att.-Gen.* v. *Christ's Hospital*, 3 My. & K. 344.
(*e*) 51 & 52 Vict. c. 59, s. 8.
(*f*) *In re Bowden, Andrew* v. *Cooper*, 45 Ch. Div. 444; *In re Swain, Swain* v. *Bringeman*, 1891, 3 Ch. 233; *How* v. *Winterton*, 1896, 2 Ch. 626.
(*g*) *Hoare* v. *Osborne*, L. R. 1 Eq. 585.
(*h*) *Chapman* v. *Brown*, 6 Ves. 404; *Cramp* v. *Playfoot*, 4 K. & J. 479.
(*i*) *Fisk* v. *Att.-Gen.*, L. R. 4 Eq. 521; *Dawson* v. *Small*, L. R. 18 Eq. 714; *Re Williams*, 5 Ch. Div. 735.

pretation it would be legal, the legal interpretation will prevail, in the case of charities as of individuals, —*ut res magis valeat quam pereat.*

(4.) Accumulation of income, —trusts for, disregarded when title to *corpus* becomes indefeasible.

(4.) The rule in *Saunders* v. *Vautier* (*k*) is equally applicable to legatees or donees who are charities as to legatees or donees who are private individuals (*l*), —that is to say, wherever there is a gift (by deed or will) to a charity or to an individual, and the gift is absolutely vested, but the payment over to the donee or legatee of the property comprised in the gift is postponed to a future day, and there is a direction to accumulate the income in the meantime, and no one (save only the donee or legatee) has any interest in the accumulations,—the donee or legatee may, whether it be a charity or an individual, demand immediate payment over of the gift, putting an end to the accumulation of the income, the trust or direction for accumulation being one which the court will not, under the circumstances, enforce. In other words, when a legacy is directed to accumulate for a certain period (say, till the legatee attains the age of twenty-five years), the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of the period, but may require payment the moment he is competent (*e.g.*, on attaining the age of twenty-one years) to give a valid discharge; and, of course, a charity is always competent to give such discharge.

III. Two respects in which charities are, or were, disfavoured,—

Thirdly, It remains to specify the respects in which charities are (or used to be) treated with disfavour compared with individuals. These are the following:—

(*k*) 4 Beav. 115; Cr. & Ph. 240; *Gosling* v. *Gosling*, John. 285.
(*l*) *Harbin* v. *Masterman*, 1894, 2 Ch. 184; and S. C. (sub nom. *Wharton* v. *Masterman*), 1895, A. C. 186.

(1.) Assets would not have been marshalled by a court of equity in favour of charities; for to do so would have been to offend against the Mortmain Acts. Thus, if a testator gave his real and personal estate (consisting of personalty savouring of realty, as leaseholds, and also of pure personalty) to trustees, upon trust to sell and pay his debts and legacies, and bequeathed the residue to a charity, equity would not have marshalled the assets by throwing the debts and ordinary legacies upon the proceeds of the real estate and of the personalty savouring of realty, in order to have left the pure personalty for the charity (*m*); but the rule of the court in such cases was to appropriate the fund, as if no legal objection existed as to applying any portion of it to the charity legacies; and then to hold such proportion of the charity legacies to fail as would in that way have fallen to be paid out of the prohibited fund (*n*). But the court rather disliked its own rule; and therefore, if the testator had himself directed his property to be marshalled in favour of the charity, the court carried out his direction in a manner most favourable for the charity (*o*); also, when a testator gave and devised the residue of his estate, both real and personal, to his trustees (whom he also appointed his executors) upon trust thereout in the first place to pay certain specified sums to specified persons, and as to the residue thereof,—or such part or parts thereof as might lawfully be appropriated for the purpose,—for such one or more charities and in such proportions as the trustees in their uncontrolled discretion might think fit, the trustees were entitled to appropriate the surplus (even the proceeds of the

(1.) Assets used not to be marshalled in favour of charities.

Unless by express direction of the testator.

Or unless (in the case of charities authorised to take real estate by devise) under discretionary gifts to executors.

(*m*) *Ashworth* v. *Munn*, 34 Ch. Div. 391.
(*n*) *Williams* v. *Kershaw*, 1 Keen, 274 *n.*; *Robinson* v. *Governors of London Hospital*, 10 Hare, 19.
(*o*) *Miles* v. *Harrison*, L. R. 9 Ch. App. 316; *Beaumont* v. *Oliveira*, L. R. 4 Ch. App. 309.

Marshalling in case of charitable legacies, —no necessity for, in future.

real estate sold) to charities duly authorised to take land by devise (*p*). All which rules as to marshalling will now for the future continue to exist, but only, *semble*, as regards the wills of testators who shall have died before the 5th August 1891,—for by the Mortmain and Charitable Uses Act, 1891 (*q*), it has been enacted (but only as regards the wills of testators who shall have died after the 5th of August 1891) (*r*), that (in effect) land may now be given by will to a charity (subject to the duty of selling it within a year); and that money secured on land, or arising out of or connected with land, shall not (as regards charitable bequests) be considered as land at all, within the Mortmain Acts; and that where money is given by will to a charity with a direction superadded to lay the money out in land, the gift shall be good, and the superadded direction only shall be void; and the court may even (by order) authorise the retention of the land unsold, or the acquisition of the land directed to be purchased (*s*),—*scil.* when it is wanted for occupation by the charity.

(2.) Gifts to charities, of an obnoxious character, not allowed to be valid.

(2.) Also, generally, all professed charitable purposes must be such as offend neither against any statute nor against the common sense of the country, morally and politically. Wherefore gifts for superstitious purposes, *e.g.*, for saying masses for the dead, have long been and are still void, as offending not only against the statute 23 Hen. VIII. c. 10, but also against the (for the time being) prevailing moral and political sense of the country (*t*); and this is so, notwithstanding the statute 23 & 24 Vict. c. 134, regulating Roman Catholic charities. Whether a

(*p*) *Broadbent* v. *Barrow*, 31 Ch. Div. 113.
(*q*) 54 & 55 Vict. c. 73.
(*r*) *Forbes* v. *Hume*, W. N. 1894, p. 198.
(*s*) *Brompton Hospital* v. *Lewis*, 1894, 1 Ch. 297.
(*t*) *In re Blundell*, 10 W. R. 34; *Heath* v. *Chapman*, 2 Drew, 417.

gift to a society for the total suppression of vivisection is a gift which offends the moral sense of the public is at present more or less doubtful (*u*),—but the tendency now is to regard all such gifts as good charitable bequests (*v*); and doubtless all these purposes, or some of them, may in time cease to be deemed offensive, and may even come to recommend themselves to the public conscience; and in that case, the gifts in aid of them will become lawful and valid as charitable bequests. In the case of gifts to individuals, there is of course no room for the public conscience to interfere.

(*u*) *In re Douglas, Obert* v. *Barrow*, 35 Ch. Div. 472.
(*v*) *In re Foveaux, Cross* v. *London Anti-Vivisection Society*, 1895, 2 Ch. 501.

CHAPTER IV.

IMPLIED AND RESULTING TRUSTS.

Implied trusts, —definition of.

AN implied trust, as the name denotes, is a trust which is founded on an unexpressed but presumed, *i.e.*, implied, intention of the party creating it. The following are the principal instances of implied trusts, viz.:—

(1.) Resulting trust to purchaser upon conveyance to stranger.

(1.) Resulting trust to purchaser of property conveyed or assigned to a stranger, *i.e.*, a third person. "The clear result of all the cases is, that the trust "of a legal estate, whether freehold, copyhold, or "leasehold, whether taken in the names of the "purchaser and others, or in the names of others "without that of the purchaser, and whether in one "name or in several, and whether jointly or *successivè*, ". . . results to the man who advances the purchase-"money" (*a*); and the doctrine is applicable to personal as well as to real estate (*b*); and, of course, also to cases where two or more persons advance the purchase-money jointly, and the purchase is taken in the name of one only of them,—for there will be in that case a resulting trust in favour of both or all proportioned to the money which they have respectively advanced (*c*). And although the advance of the purchase-money by the real purchaser does not appear on the face of the deed, and

(*a*) *Dyer* v. *Dyer*, 1 L. C. 223.
(*b*) *Ebrand* v. *Dancer*, 2 Ch. Ca. 26.
(*c*) *Wray* v. *Steele*, 2 V. & B. 388.

even if the deed states it to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was in fact actually made (*d*); for the evidence is used for the purpose of showing that the nominal or ostensible purchaser in the deed was (in a sense) but the nominee or *agent* of the true purchaser, for which purpose parol or extrinsic evidence is in all cases admissible, notwithstanding the Statute of Frauds (*e*).

Parol evidence is admissible to show actual purchaser.

But no trust will result under this doctrine where the policy of an Act of Parliament would be thereby defeated,—as where the subject-matter of the conveyance is a British ship (*f*); or is land given to qualify the grantee to vote for a Member of Parliament (*g*); or is money deposited in a third party's name in evasion of the Savings Bank Acts (*h*); for in all these cases the apparent donee retains the benefit for himself, and is not a trustee for the donor or true purchaser. Nevertheless, as regards the beneficial ownership of British ships, the register not being conclusive, the court will, when no evasion of the policy of the Merchant Shipping Acts is intended, administer such relief in favour of the beneficial owner as the circumstances of the case may require; and it will certainly not suffer the register to be made an engine of fraud (*i*). Also, where a parent insures the life of his child, in the child's own name, but for his the parent's own benefit, if the child dies and the father obtains the policy moneys from the insurance office (the office not objecting to the policy

No resulting trust which would defeat the policy of the law.

(*d*) *Ryall* v. *Ryall*, 1 Atk. 59; *Bartlett* v. *Pickersgill*, 1 Eden. 515.
(*e*) *Higgins* v. *Senior*, 8 Mee. & W. 834; *James* v. *Smith*, 1891, 1 Ch. 834.
(*f*) *Ex parte Yallop*, 15 Ves. 68; *Holderness* v. *Lampert*, 29 Beav. 129.
(*g*) *Groves* v. *Groves*, 3 Y. & J. 163, 175; *Childers* v. *Childers*, 1 De G. & Jo. 482.
(*h*) *Field* v. *Lonsdale*, 13 Beav. 78.
(*i*) *Holderness* v. *Lampert*, supra.

as void for want of any insurable interest), the policy moneys belong to the parent for his (or her) own benefit, and not to the estate of the child (*k*).

Resulting trust may be rebutted by evidence of purchaser's intention;

e.g., By the contrary presumption of advancement.

Resulting trusts, however, as they arise from an equitable presumption, may be rebutted by parol evidence to the contrary of such presumption (*l*); and where the purchaser is under a legal obligation to maintain or otherwise provide for the person in whose name the purchase is made, equity raises a presumption,—at least, a *primâ facie* presumption,—that the purchase was intended as an advancement; *e.g.*, in the case of purchases made in the name of children or of persons similarly favoured, there will in general be no resulting trust for the purchaser, but the contrary presumption will arise that an advancement was intended; in other words, the equitable presumption of a resulting trust in favour of the actual purchaser is in such cases met and defeated by the other and contrary equitable presumption of advancement, and in that case the plain effect of the deed will be restored (*m*). And the presumption of advancement will be raised: (1.) In favour of a legitimate child (*n*); (2.) In favour of any person with regard to whom the person advancing the money has placed himself *in loco parentis; e.g.*, in *Beckford* v. *Beckford* (*o*), an illegitimate son; in *Ebrand* v. *Dancer* (*p*), a grandchild whose father was dead (*q*); in *Currant* v. *Jago* (*r*), the *nephew* of a wife; and in *Standing* v. *Bowring* (*s*), a

(*a.*) In whose favour the presumption will be raised,—
1. Legitimate child;
2. One to whom the purchaser has placed himself *in loco parentis;*

(*k*) *Worthington* v. *Curtis*, 1 Ch. Div. 419; *Cleaver* v. *Mutual Reserve*, 1892, 2 Q. B. 147; *Newbold Friendly Society* v. *Barlow*, 1893, 2 Q. B. 128.
(*l*) *Deacon* v. *Colquhoun*, 2 Drew, 21; *Lane* v. *Dighton*, Amb. 409; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.
(*m*) *Whitehouse* v. *Edwards*, 37 Ch. Div. 683.
(*n*) *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Dyer* v. *Dyer*, 2 Cox, 92.
(*o*) Lofft, 490.
(*p*) 2 Ch. Ca. 26.
(*q*) *Soar* v. *Foster*, 4 K. & J. 152.
(*r*) 1 Coll. Ca. 261.
(*s*) 31 Ch. Div. 282.

godson,—provided always the party advancing the money has put himself *in loco parentis*, but not otherwise (*t*); and (3.) In favour of a wife (*u*),—*e.g.*, where, as in *Drew* v. *Martin* (*v*), a husband entered into an agreement for the purchase of land in the name of himself and his wife, and died before the whole of the purchase-money was paid, the purchase was held to enure for the benefit of the widow, and the unpaid purchase-money was (as the law then stood) payable out of the husband's personal estate. But the presumption of advancement has not been extended to the illegitimate children of a daughter of the actual purchaser, that is to say, to (in a sense) illegitimate grandchildren (*x*); nor will the presumption arise when the purchaser makes the purchase in the names of himself and a woman, or in the name of the woman alone, with whom he has contracted an illegal marriage, as in the case of a marriage with a deceased wife's sister (*y*), or with whom he has contracted no marriage at all, as in the case of a mere kept woman (*z*). Also, in *In re De Visme* (*a*), it was decided, that where a married woman had, out of her separate property, made a purchase in the names of her children, no presumption of advancement arose,—inasmuch as a married woman was under no obligation, as the law then stood, to maintain her children (*b*); and, in the general case, the decision of the court would, *semble*, be the same still, notwithstanding that by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman having separate property under that

3. A wife.

(*b.*) In whose favour the presumption will not be raised.

Mother is different from father,—liability being different.

(*t*) *Standing* v. *Bowring*, 31 Ch. Div. 282.
(*u*) *Drew* v. *Martin*, 2 H. & M. 130; *Trye* v. *Sullivan*, 28 Ch. Div. 705.
(*v*) 2 H. & M. 130.
(*x*) *Tucker* v. *Burrow*, 2 H. & M. 515; *Forrest* v. *Forrest*, 13 W. R. 380.
(*y*) *Soar* v. *Foster*, 4 K. & J. 152.
(*z*) *Rider* v. *Kidder*, 10 Ves. 360.
(*a*) 2 De G. Jo. & S. 17.
(*b*) *Holt* v. *Frederick*, 2 P. Wms. 356.

Act is now laid under a contingent liability to maintain her lawful children (*c*), — for such statutory liability is of a special and limited character.

The presumption of advancement is rebuttable by parol evidence.

The presumption of advancement being only a presumption of equity may be rebutted by parol evidence, just as we have seen that the equitable presumption of a resulting trust may be rebutted. "The advance-
"ment of a son is a mere question of intention, and,
"therefore, facts antecedent to or contemporaneous
"with the purchase, or so immediately after it as
"to constitute a part of the same transaction, may
"properly be put in evidence for the purpose of
"rebutting the presumption" (*d*). And, *per contra*, parol evidence may be given by the son to show the intention of the father to advance him; for such evidence is in support both of the legal interest of the son and of the equitable presumption (*e*). But the acts and declarations of the father *subsequent* to the purchase, although they may be used in evidence against him by the son, cannot be used by the father against the son (*f*); therefore the presumption of advancement will not be rebutted by the mere circumstance that the father retains the property under his control, and receives the rents and profits or interest, even though the son is no longer an infant (*g*). As regards the subsequent acts and declarations of the son, these apparently may be used against him by the father, at least where there is nothing showing the intention of the father at the time of the purchase sufficient to counteract the effect of those declarations (*h*). It has also been considered, that if the

His contemporaneous acts and declarations are evidence both for and against the purchaser.

His subsequent acts and declarations are evidence against, but not for, the purchaser.

(*c*) *Bennett* v. *Bennett*, 10 Ch. Div. 474.
(*d*) *Williams* v. *Williams*, 32 Beav. 370.
(*e*) *Lamplugh* v. *Lamplugh*, 1 P. Wms. 113; *Lloyd* v. *Pughe*, L. R. 8 Ch. App. 88; *Fowkes* v. *Pascoe*, L. R. 10 Ch. App. 343.
(*f*) *Reddington* v. *Reddington*, 3 Ridg. P. C. 195, 197.
(*g*) *Sidmouth* v. *Sidmouth*, 2 Beav. 447; *Grey* v. *Grey*, 2 Swanst. 594; *Williams* v. *Williams*, 32 Beav. 370.
(*h*) *Scawin* v. *Scawin*, 1 Y. & C. C. C. 65.

son has been already fully advanced and provided for, that is a strong circumstance against the presumption of a further advancement in his favour (*i*); but who is to limit the parent's own ideas of what is a full provision? (*k*); and in one case (*l*), where the son was the solicitor for the father, that circumstance alone was held sufficient to defeat the presumption of an intended advancement; and generally, considerations of mere convenience may be sufficient (especially in the case of purchases of stocks and the opening of banking accounts, or in the discharge of mortgage debts on settled estates) (*m*), to defeat the presumption of advancement in favour of the child or wife in whose name (either alone or jointly with the father or husband) the purchase is made or the account is opened (*n*),—for in all cases the whole of the surrounding circumstances are to be considered (*o*).

Circumstances which may rebut the presumption of advancement.

(2.) Resulting trust of unexhausted residue. A very common case of resulting trust arises where a settlor conveys property on trusts which do not exhaust the whole property; in that case, as to so much of the property respecting which no trust is declared, there will in general be (*p*),—but there will not invariably be (*q*),—a resulting trust in favour of the settlor; and if the settlor be dead, and there is a resulting trust of the unexhausted residue, the trust will result as regards the realty in favour of his heir or residuary devisee, and as regards the personalty in favour of his next of kin or residuary legatee; and the same rule, subject to the same exception,

(2.) Resulting trust of unexhausted residue.

(*i*) *Hepworth* v. *Hepworth*, L. R. 11 Eq. 10.
(*k*) *Reddington* v. *Reddington*, 3 Ridg. P. C. 196.
(*l*) *Garrett* v. *Wilkinson*, 2 De G. & Sm. 244.
(*m*) *Harvey* v. *Hobday*, 1896, 1 Ch. 137.
(*n*) *Marshall* v. *Cruttwell*, L. R. 20 Eq. 328.
(*o*) *Whitehouse* v. *Edwards*, 37 Ch. Div. 683.
(*p*) *Parnell* v. *Hingston*, 3 Sm. & Giff. 344.
(*q*) *Cooke* v. *Smith*, 1891, A. C. 297.

would apply to a testator giving property by will; and also, of course, to co-settlors equally as to the case of a sole settlor (*r*). And similarly, when three estates, A., B., and C., are devised to trustees, and the will declares trusts of one of the three estates only, the other estates result to the testator, and therefore pass to his heir or residuary devisee (*s*); and although the words of an assignment are absolute, yet if the purpose of the assignment should be *ab initio* capable of being (and should in fact be or become) satisfied without exhausting the whole of the property comprised in the assignment, there will in general be a resulting trust as to the surplus (*t*),—but not invariably so (*u*); but where, by deed or will, a trust is created in favour of an individual who is (or who must be presumed to be) alive when the deed or will first operates, there is no resulting trust merely because that individual dies or disappears, but his representatives will be entitled (*v*). And it is a leading rule with regard to resulting trusts, that, where property is given simply upon trust, the trustee is excluded by that fact from taking beneficially, in case of failure of the whole or part of the purpose for which the trust was directed; for, as was observed in *King* v. *Denison* (*x*),—"If I give to A. and his "heirs all my real estate charged with my debts, "that is a devise to him for a particular purpose, but "not for that purpose alone; but if the devise is on "trust to pay my debts, that is a devise for a par-"ticular purpose, and for that purpose alone; and "the difference between the two is this, namely, "the former devise gives the devisee the beneficial

Devise with a charge.—devisee takes beneficially. Devise on trust,—devisee takes no benefit.

(*r*) *Cunnack* v. *Edwards*, 1895, 1 Ch. 489; 1896, 2 Ch. 679.
(*s*) *Patrick* v. *Simpson*, 24 Q. B. D. 123.
(*t*) *Northampton* (*Marquis*) v. *Pollock*, 45 Ch. Div. 190; and S. C. (sub nom. *Salt* v. *Northampton*), 1892, A. C. 1.
(*u*) *Cooke* v. *Smith*, supra.
(*v*) *In re Corbishley's Trust*, 14 Ch. Div. 846.
(*x*) 1 Ves. & Bea. 272.

"interest, subject to the particular purpose; the "latter devise gives him no beneficial interest what-"ever; and in the latter case, therefore, where the "whole legal interest is given for the purpose of "satisfying trusts expressed, and those trusts do not "exhaust the whole, so much of the beneficial interest "as is not exhausted belongs to the heir, and not to "the devisee." And in the case of any unexhausted residue so resulting,—whether of real estate or of personal estate,—if there is no one in whose favour the trust can result,—that is to say, no heir as to the realty and no next of kin as to the personalty,—then prior to the Intestates' Estates Act, 1884, to be presently mentioned, the rule used to be that, as to realty (*y*), the trustee took beneficially,—for the legal estate in him excluded the crown's title by escheat: and for the like reason, a legal mortgagee in fee took beneficially in the like case (*z*); and copyhold lands were in all these respects like freehold lands, merely substituting the lord for the crown (*a*). However, under the Intestates' Estates Act, 1884 (*b*), which came into force the 14th day of August 1884, the "real estate" would in all these cases now escheat to the crown, or, in the case of copyholds, to the lord; and the Act extends to the unexhausted residue of the proceeds of the sale of real estate (*c*); and apparently also to money directed to be converted into real estate,—such money being "equitable realty" within the fourth section of the Act, so that *Denne* v. *Walker* (*d*) is no longer law. But as to personal estate,—being ordinary personal estate,—

Death of settlor intestate and without representatives.

(*a.*) As to realty, trustee used to take for his own benefit;

crown, or lord, now entitled in all cases.

(*b.*) As to personalty, the crown takes as *bona vacantia*.

(*y*) *Burgess* v. *Wheate*, Eden, 177; *Sperling* v. *Rochfort*, 16 Ch. Div. 18.
(*z*) *Beale* v. *Symonds*, 16 Beav. 406.
(*a*) *Gallard* v. *Hawkins*, 27 Ch. Div. 298; *In re Lashmar*, *Moody* v. *Penfold*, 1891, 1 Ch. 258.
(*b*) 47 & 48 Vict. c. 71.
(*c*) *Att.-Gen.* v. *Anderson*, 1896, 2 Ch. 596.
(*d*) 2 Ves. 169.

the rule always was and is, that the crown by virtue of its prerogative, or the lord by virtue of his franchise, might claim that as *bona vacantia* (*e*),—subject only to this, namely, that where the executor was executor simply, and not also a trustee, then and in that case the executor would have taken, and would still take, beneficially the unexhausted residue (*f*).

Executors took undisposed-of residue before 1 Will. IV. c. 40,—

Except where excluded by testator's intention, express or implied.

(3.) Where a testator made no express disposition of the residue of his personal estate, then and in that case, prior to the statute 1 Will. IV. c. 40, the executors (subject to the debts being paid) were at law entitled to such residue; and equity so far followed the law in this particular as to hold them entitled to retain such residue for their own use, unless an intention to exclude them appeared; but if such an intention appeared, then in equity the executors were held to be trustees merely of such residue. Moreover, a court of equity laid hold of any expression in the will which appeared to rebut the presumption of a beneficial gift to the executors; *e.g.*, an intention to exclude them from taking the residue beneficially would have been inferred from an express legacy being given to them (*g*). And, in adoption of these views of the courts of equity, the statute 1 Will. IV. c. 40 has enacted, that as to wills made after the 1st September 1830, the executors shall be deemed to be trustees for the persons (if any) who would be entitled, under the Statutes of Distribution, in respect of any residue not expressly disposed of, unless it shall appear by the will itself that the executors are intended to take such residue beneficially; and the effect of the statute appears

(3.) Executors now trustees for representatives of deceased.

(*e*) *Taylor* v. *Haygarth*, 14 Sim. 8; *In re Gosman*, 15 Ch. Div. 67; *Cunnack* v. *Edwards*, supra.

(*f*) *Camp* v. *Coe*, 31 Ch. Div. 460.

(*g*) *Lynn* v. *Beaver*, T. & R. 63; *Blinkhorn* v. *Feast*, 2 Ves. Sr. 26.

therefore to be, that while before the statute the presumption was in favour of the executors, the presumption is now the other way, and the onus is now on the executors to prove that, *as against the next of kin*, the testator intended the executors to take beneficially (*h*); but the old presumption in favour of the executor still remains *as against the crown* (*i*),—it being always remembered, that the presumption in question is (since the Intestates' Estates Act, 1884) inapplicable as regards the unexhausted proceeds of the sale of land (*k*).

(4.) Resulting trusts under the doctrine of Conversion are another important group of implied trusts, and these are fully considered in Chapter IX., *infra*.

(4.) Resulting trusts under the doctrine of Conversion.

(5.) Implied trusts arising out of joint-tenancies remain to be considered; and it will be remembered that, according to the maxim "Equity follows the law," limitations which confer an estate in joint-tenancy at law have the same effect in equity,—where there are no circumstances which afford ground for a departure from the rule of law; so that where two or more persons purchase lands, and advance the money in *equal* shares, and take a conveyance to themselves and their heirs, they will be joint-tenants in equity as well as at law, and upon the death of one of them the estate will go to the survivor (*l*), unless there has been a severance in the meantime (*m*). But equity leans strongly against joint-tenancy, with its one-sided right of survivorship; for though each joint-tenant may have an equal chance of being the survivor, and thus of taking the

(5.) Implied trusts arising out of joint-tenancies.

Equity leans against survivorship in joint-tenancy.

(*h*) *Harrison* v. *Harrison*, 2 H. & M. 237.
(*i*) *Camp* v. *Coe*, 31 Ch. Div. 460.
(*k*) *Att.-Gen.* v. *Anderson*, supra.
(*l*) Litt. s. 280.
(*m*) *Palmer* v. *Rich*, 1897, 1 Ch. 134.

Slight circumstances defeat survivorship.

(*a.*) Advance of purchase-money unequally.

(*b.*) Joint-mortgages.

(*c.*) No survivorship in commercial purchases.

(*d.*) Land devised in joint-tenancy to partners.

whole, yet this is but an equality of chances, and an equal share is better than an equal chance (*n*); and courts of equity, therefore, lay hold of almost any circumstance from which a tenancy in common can be reasonably implied. Therefore, where two or more persons purchase lands and advance the purchase-moneys in *unequal* proportions, and this appears on the deed itself, the survivor will be deemed in equity a trustee for the other, in proportion to the sum advanced by him (*o*); and where money is advanced by way of loan, either in *equal* or in *unequal* shares, in equity there will be no survivorship although the mortgage should be joint (*p*); and the same rule is applied to joint-purchases in the way of trade, *e.g.*, to partnership and other commercial transactions; and this is by analogy to, and in expansion and furtherance of, the great maxim of the common law:—*Jus accrescendi inter mercatores, pro beneficio commercii, locum non habet* (*q*). And although, where land is not purchased by, but is devised to, two partners as joint-tenants, and they make no use of it for partnership purposes, they will not be held tenants in common in equity; yet if an intention to hold the land in common can be inferred from their mode of dealing with it for a long period of time (*r*),—*e.g.*, if, in their yearly and other accounts, they have consistently treated the devised land as *portion of the assets of the partnership*,—the right of survivorship will be excluded (*s*).

(*n*) *Rigden* v. *Vallier*, 2 Ves. Sr. 258.
(*o*) *Lake* v. *Gibson*, 1 L. C. 198.
(*p*) *Morley* v. *Bird*, 3 Ves. 631; *Robinson* v. *Preston*, 4 K. & J. 505.
(*q*) *Lake* v. *Gibson*, 1 L. C. 198; *Jefferys* v. *Small*, 1 Vern. 217.
(*r*) *Jackson* v. *Jackson*, 9 Ves. 591.
(*s*) *Waterer* v. *Waterer*, L. R. 15 Eq. 402; 53 & 54 Vict. c. 39, s. 20.

CHAPTER V.

CONSTRUCTIVE TRUSTS.

A CONSTRUCTIVE trust is a trust which is raised by *construction* of equity, without reference to (and irrespectively of) any intention of the parties, either expressed or presumed; and the following are the principal instances of such trusts, viz.:— Constructive trusts,—definition of.

(1.) The vendor's lien on land sold:—This lien is not a *jus in re*, such as an easement would be; nor yet is it a *jus ad rem*, or mere right of action against the person; but it is a *charge* upon the land sold, although a charge in the view of a court of equity only; or, in the words of Lord Eldon (*a*), "Where "the vendor conveys, though the consideration is "upon the face of the instrument, and by a receipt "endorsed upon it, expressed to be paid, the money "or some part of it not being in fact paid, a lien "shall prevail in the one case for the whole con- "sideration, in the other for the part of the money "which remains unpaid." And although the unpaid vendor may, of course, waive or abandon his lien, such waiver or abandonment will not be readily inferred; and it is settled, that a mere personal security for the purchase-money, *e.g.*, a bond (*b*), or a bill, or a promissory-note (*c*), or the granting of an annuity secured by bond or covenant (*d*), will not of itself (1.) Lien on land sold,—(*a.*) Vendor's lien for unpaid purchase-money. Waiver or abandonment of lien,—what is, and what is not.

(*a*) *Mackreth* v. *Symmons*, 1 L. C. 330.
(*b*) *Collins* v. *Collins*, 31 Beav. 346.
(*c*) *Hughes* v. *Kearney*, 1 Sch. & Lefr. 135.
(*d*) *Clarke* v. *Royle*, 3 Sim. 499.

be sufficient to discharge the equitable lien. But if there are circumstances which show an intention to look merely to the personal credit of the purchaser (*e*),—or if it appears that the note, bond, covenant, or annuity was *substituted* for the consideration-money, or was, in fact, the consideration bargained for,—the lien will be lost; and this was the case in *Buckland* v. *Pocknell* (*f*), where the Vice-Chancellor Shadwell held that the sale in that case had been made, not in consideration of the *two annuities*, but in consideration of *the deed granting the two annuities*, —so that for the arrears of the annuities the vendor's remedy was by action on the deed of covenant granting the annuities, and not by suit in equity to realise any lien or charge. And so also, if lands are sold in consideration of £3000 in cash and the purchaser's promissory-note for £3000 more, it is clear that the vendor has no lien when the £3000 cash and the £3000 note are respectively paid and given; but if the lands had been sold in consideration of £6000 to be paid as follows, that is to say, by £3000 cash and by promissory-note for £3000 more, then the lien for the amount of the £3000 note would have remained a good and valid lien upon the lands, and taking the promissory-note would have been in such a case no abandonment of the lien (*g*).

Against whom the lien may be enforced.

The vendor's lien, when it has not been waived or abandoned, binds the estate in the hands of the following individuals, namely,—(1.) The purchaser himself, and his heirs, and all persons taking under him or them as volunteers; also, (2.) Subsequent purchasers for valuable consideration who bought *with notice* of

(*e*) *In re Taylor, Stileman & Co.*, 1891, 1 Ch. 590.
(*f*) 13 Sim. 406; *Nives* v. *Nives*, 15 Ch. Div. 649.
(*g*) *Dixon* v. *Gayfere*, 21 Beav. 118; *Dyke* v. *Rendall*, 2 De G. M. & G. 209; *In re Brentwood Brick and Coal Co.*, 4 Ch. Div. 562.

the purchase-money remaining unpaid (*h*); and where the first purchaser has sold the estate to a *bonâ fide* second purchaser without notice, if the second purchase-money or part thereof has not been paid, the original vendor may proceed either against the estate for his lien, or against the second purchase-money remaining in the hands of such second purchaser for satisfaction,—for in such a case, the latter not having yet paid his money, and getting notice of the lien before he pays it, becomes in fact a purchaser *with notice*, and with the usual consequence, viz., he takes the estate *cum onere* to the extent of the unpaid portion of the original purchase-money (*i*); also (3.) The assignees, *i.e.*, trustee in bankruptcy, although they may have had no notice of the lien,—for the assignees, *i.e.*, trustee in bankruptcy, take subject to all the equities attaching to the bankrupt (*k*); also (4.) If the legal estate be outstanding, then, as the second purchaser for value, whether with or without notice, has only an equitable interest, he will in general be postponed to the equitable lien, which comes earlier in date, in accordance with the maxim, "*Qui prior est tempore potior est jure.*" On the other hand, the lien will not prevail against a *bonâ fide* purchaser for valuable consideration without notice, who has the legal estate in him (*l*),—for "Where the equities are equal, the law shall prevail." Also, the vendor may find his lien postponed through his own negligence; for in *Rice* v. *Rice* (*m*), as we saw on p. 21, *supra*, the defendants, the equitable mortgagees, although having only an equity, and although being posterior in point of date, were held entitled to payment out of the estate in priority to the unpaid

Against whom the lien is not enforced.

Vendor may lose his lien by negligence, —*Rice* v. *Rice*.

(*h*) *Walker* v. *Preswick*, 2 Ves. Sr. 652; *Hughes* v. *Kearney*, 1 Sch. & Lefr. 135; *Morris* v. *Chambers*, 29 Beav. 246.
(*i*) *Ex parte Golding, Davis & Co., In re Knight*, 13 Ch. Div. 628.
(*k*) *Ex parte Hanson*, 12 Ves. 349; *Fawell* v. *Heelis*, Amb. 724.
(*l*) *Cater* v. *Pembroke*, 1 Bro. C. C. 302.
(*m*) 2 Drew, 73.

vendor, on the ground that the latter had lost his priority by his own negligence, having executed and delivered to the purchaser a conveyance by which he declared, both in the body of the deed and by a receipt endorsed thereon, that the whole purchase-money had been paid (*n*). And, in adoption and furtherance of this same principle of equity, it has now been provided by the Conveyancing Act, 1881 (*o*), sec. 55, that, so far as regards a purchaser who subsequently buys an estate that remains subject to the lien of a previous vendor for his unpaid purchase-money, the acknowledgment in the body of the deed of the last-mentioned purchase-money having been paid, or the receipt for same on the back of such deed,—the acknowledgment or receipt being duly executed, and being in or on a deed executed after the 31st December 1881,—shall effectively protect him (being a *bonâ fide* purchaser) against such lien; and the term "purchaser" includes for this purpose a subsequent mortgagee (*p*).

Or under Conveyancing Act, 1881.

(*b.*) Somewhat analogous to the lien of the vendor for his unpaid purchase-money is the lien of the vendee upon the estate in the hands of the vendor for the whole or part of his purchase-money prematurely paid (*q*); and this happens when the purchaser has in the usual course paid his deposit, and afterwards the purchase (through no fault of the purchaser) (*r*) goes off; and this lien of the purchaser will exist not only as against the vendor, but also as against a subsequent mortgagee who had notice of the payment having been made (*s*),—and in fact

(*b.*) Vendee's lien for prematurely paid purchase-money.

(*n*) *Wilson* v. *Keating*, 4 De G. & Jo. 588; *Gordon* v. *James*, 30 Ch. Div. 249; *National Provincial Bank* v. *Jackson*, 33 Ch. Div. 1.
(*o*) 44 & 45 Vict. c. 41.
(*p*) 44 & 45 Vict. c. 41, s. 2.
(*q*) *Wythes* v. *Lee*, 3 Drew. 396; *Turner* v. *Marriott*, L. R. 3 Eq. 744.
(*r*) *Dinn* v. *Grant*, 5 De G. & Sm. 451.
(*s*) *Watson* v. *Rose*, 10 H. L. Cas. 672.

generally against all the like persons above enumerated, against whom the vendor's lien would prevail, subject always (where subject) to the provisions of the Conveyancing Act, 1881, above stated.

Registration of vendor's lien,—none in Middlesex;

As regards lands in the register counties, no provision exists under the Middlesex Registry Acts for the registry of any memorandum of a vendor's lien as regards lands in Middlesex,—consequently, what is above stated regarding the priority or posteriority of such a lien on lands in Middlesex holds good, although the lien is unregistered. But as regards lands in Yorkshire, it has now been provided by the Yorkshire Registries Act, 1884 (*t*), sec. 7, as regards any lien arising on or after 1st January 1885, that a memorandum of such lien not only may, but must, be registered,—for that no such lien shall, unless and until a memorandum of it is registered, have any effect or priority as against any purchase deed or mortgage deed duly registered; and that priority of registration shall determine priority of title (sec. 14), except in the case of actual fraud (*u*); but the Act does not apply to copyhold lands (sec. 28).

Secus,—in Yorkshire.

(2.) Renewal of lease by trustee in his own name;

(2.) Another common instance of a constructive trust arises upon the renewal of leases, the invariable rule being that a lease renewed by a trustee or executor in his own name and professedly for his own benefit, although upon the refusal of the lessor to grant a new lease to the *cestui que trust*, shall be held upon trust for the person entitled to the old lease (*v*). And this rule is applicable also to persons having a limited interest in a renewable lease, as a tenant

or by tenant for life;

(*t*) 47 & 48 Vict. c. 54, amended by 48 & 49 Vict. cc. 4, 26.
(*u*) *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*v*) *Keech* v. *Sandford*, 1 L. C. 46; *Pilgrem* v. *Pilgrem*, 18 Ch. Div. 93; and distinguish *Holmes* v. *Williams*, W. N. 1895, p. 116.

for life, who, if he renews the lease in his own name, will be held a trustee for those entitled in remainder (*x*); and the rule is the same, if the tenant for life purchases the fee-simple reversion on a renewable lease (*y*), or purchases adjoining land under a right of pre-emption annexed to the original settled land (*z*); and the reason of the rule is obvious,—for it is but fair, if a tenant for life, acting upon the good-will that accompanies the possession, gets a more durable term or estate, or an adjoining property, that he should hold it for the benefit of those in remainder (*a*). So likewise if a partner renew a lease of the partnership premises on his own account, he will, as a general rule, be held a trustee of it for the firm (*b*); and the like rule applies to a mortgagor renewing a lease of the mortgaged premises (*c*); and generally the rule applies to all persons occupying a fiduciary or quasi-fiduciary relation, and also to all varieties of property, and not merely to leaseholds (*d*); and by the Settled Land Act, 1882 (*e*), sec. 53, a tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is to be deemed in the position of a trustee for those parties, and liable accordingly.

or by a partner.

(3.) Allowance for payments where same are necessary

(3.) A constructive trust may also arise where a person who is only part owner, acting *bonâ fide*, permanently benefits an estate by repairs or improve-

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(*x*) *Mill* v. *Hill*, 3 H. L. Cas. 828; *In re Lord Ranelagh's Will*, 26 Ch. Div. 590.
(*y*) *Phillips* v. *Phillips*, 29 Ch. Div. 673.
(*z*) *Rowley* v. *Ginnever*, 1897, 2 Ch. 503.
(*a*) *James* v. *Dean*, 15 Ves. 236.
(*b*) *Clegg* v. *Fishwick*, 1 Mac. & G. 394; *Bell* v. *Barnett*, 21 W. R. 119.
(*c*) *Leigh* v. *Burnett*, 29 Ch. Div. 231.
(*d*) *Pole* v. *Pole*, 2 De G. & Sm. 420; *Cooper* v. *Phibbs*, L. R. 2 H. L. 149.
(*e*) 45 & 46 Vict. c. 38.

ment (*f*); for although a person expending money by mistake upon the property of another has no equity against the owner who is ignorant of, and does not encourage him in, his expenditure (*g*), yet if it were necessary for the true owner to proceed in equity, he would only be entitled to the assistance of equity upon the terms of his doing equity, *i.e.*, making compensation for the expenditure,—so far, of course, and only so far, as the expenditure was necessary, and had proved permanently beneficial (*h*). Of course, a person will have no equity who lays out money on the property of another with full knowledge of the state of the title (*i*), or who lays out money unnecessarily or improperly. But where a tenant for life under a will has gone on to finish permanently beneficial improvements to an estate which had been begun by the testator, courts of equity have deemed the expenditure a charge (*k*),—in the nature of salvage,—for which the tenant is entitled to a lien (*l*); and an inquiry has been directed for the purpose of ascertaining whether any particular outlay has been for the benefit of the inheritance (*m*); but in modern times, and by reason of the Improvement of Land Act, 1864 (*n*), and other subsequent Acts *in pari materiâ*, that kind of inquiry has now in great measure ceased to be necessary; for the tenant for life, instead of expending his own money in improvement, now expends money borrowed from some

and permanently beneficial.

Improvements by tenant for life,—

Under Improvement of Land Act, 1864;

(*f*) *Lake* v. *Gibson*, 1 L. C. 198; *Rowley* v. *Ginnever*, 1897, 2 Ch. 503.

(*g*) *Nicholson* v. *Hooper*, 4 My. & Cr. 186.

(*h*) *Neesom* v. *Clarkson*, 4 Hare, 97; *In re Cook's Mortgage*, *Lawledge* v. *Tyndall*, 1896, 1 Ch. 923.

(*i*) *Rennie* v. *Young*, 2 De G. & Jo. 136; *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; *Price* v. *Neault*, 12 App. Ca. 110.

(*k*) *Hibbert* v. *Cooke*, 1 Sim. & Stu. 552; *Dent* v. *Dent*, 30 Beav. 363; *In re Leslie's Settlement Trusts*, 2 Ch. Div. 185; *In re Aldred's Estate*, 21 Ch. Div. 228; *Rowley* v. *Ginnever*, 1897, 2 Ch. 503.

(*l*) *In re Montagu*, *Derbishire* v. *Montagu*, 1897, 2 Ch. 8.

(*m*) *Dunne* v. *Dunne*, 3 Sim. & Giff. 22; *In re Leigh's Estate*, L. R. 6 Ch. App. 887; *Conway* v. *Fenton*, 40 Ch. Div. 512.

(*n*) 27 & 28 Vict. c. 114.

Loan Society for the purpose; and the Acts make the repayment of such moneys a charge upon the lands improved, repayable by instalments (usually twenty-five) by the successive tenants for the time being. Also, by the Settled Land Act, 1882 (*o*), sec. 21, capital money arising under the Act may (subject as therein expressed) be laid out or applied in payment of any improvement authorised by the Act; and the classes of improvements thereby authorised are those specified in section 25 of the Act; but if such application of the money is intended to be made by a tenant for life, he is to submit a scheme for the execution of the improvement to the trustees of the settlement or to the court; and the scheme having been first approved, the money becomes thereafter applicable, either upon a certificate of the Land Commissioners (Board of Agriculture), or of a competent engineer, or upon an order of the court authorising the application.

or under Settled Land Act, 1882.

Trustee has a lien on trust fund for expenses of renewal.

A trustee or executor, or other fiduciary person who renews a lease, has a lien upon the estate for the costs and expenses of the renewal with interest (*p*); and he may pay himself such costs and expenses out of any trust moneys in his hands, or he may raise the same by mortgage of the trust estate (*q*); but the lien, of course, is confined to, and does not extend beyond, the trust estate (*r*). Also, where payments have been made in order to prevent the lapse of a policy, the person making such payments (not being a mere volunteer) is entitled to a lien for the amount

Salvage moneys on policy of insurance.

(*o*) 45 & 46 Vict. c. 38; and Board of Agriculture Act, 1889 (52 & 53 Vict. c. 30), s. 2.

(*p*) *Holt* v. *Holt*, 1 Ch. Ca. 190; *Coppin* v. *Fernyhough*, 2 B. C. C. 291; *Maddy* v. *Hale*, 3 Ch. Div. 327.

(*q*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 19, repeating the like provisions contained in Trustee Act, 1888 (51 & 52 Vict. c. 59), ss. 10, 11.

(*r*) *In re Winchelsea's Policy Moneys*, 39 Ch. D. 168.

on the proceeds of the policy (*s*); and this lien has sometimes been said to be as for salvage-moneys; but the doctrine of salvage has latterly been thought to have little or no application to the payment of premiums on policies of life assurance (*t*); and according to *Leslie* v. *French* (*u*), any one (not being the sole beneficial owner) who pays these premiums, if he will entitle himself to a lien therefor on the policy or its proceeds, must show either some contract with the beneficial owner, or some right of indemnity out of the trust property; or else he must show, that either by right of subrogation, or by virtue of some mortgage or charge, he is entitled to this lien (*v*); and in *Leslie* v. *French*, the court held, that a husband (who, if he had survived his wife, would have become the sole beneficial owner) was not entitled to a lien for the premiums paid by him in keeping up a policy of the wife's on her life,—a crooked decision and which offends against natural equity.

Leslie v. *French*,—its rules as to when lien exists or not.

(4.) When a person has a mortgage in fee which he has not foreclosed, the legal estate in the mortgaged premises used to descend, in case of his intestacy, to his heir; but in equity the mortgaged estate being only a security for the mortgage money, the heir was held a trustee of the legal estate in the lands for the personal representatives of the deceased mortgagee,—for the purpose of securing them the mortgage moneys, to hand over or distribute to or among the persons entitled to the personal estate of the mortgagee (*w*); and now, under the Conveyancing

(4.) Heir of mortgagee trustee for personal representatives,—still so as to copyholds.

(*s*) *Gill* v. *Downing*, L. R. 17 Eq. 316; *In re Leslie*, *Leslie* v. *French*, 23 Ch. Div. 552.
(*t*) *Falcke* v. *Scottish Imperial Insurance*, 34 Ch. Div. 234.
(*u*) 23 Ch. Div. 552.
(*v*) *Falcke* v. *Scottish Imperial Insurance*, supra.
(*w*) *Thornbrough* v. *Baker*, 2 L. C. 1046.

Act, 1881 (*x*), the executor or administrator may himself reconvey the legal estate, on payment of the mortgage money; and in fact, the legal estate now descends under that Act, whether the deceased mortgagee dies testate or intestate, to his legal personal representatives, who are for this purpose his statutory heirs and the devisees of his mortgage estates; but the old law still holds good as to copyholds (*y*).

(4*a*.) Legal representatives (since 31st December 1897),—now trustees for beneficial devisees.

Under the Land Transfer Act, 1897 (*z*), all real estate (other than copyhold hereditaments) now becomes vested upon the death (whether testate or intestate), of the beneficial fee-simple owner in the legal personal representatives of such owner, exactly as if it were a chattel real (sect. 1); and such representatives thereupon become trustees for the persons who by law are beneficially entitled thereto (sect. 2); and exactly like executors may do as regards the bequest of leaseholds, so these representatives may assent to any devise of the real estate (sect. 3), and such devisee may also enforce a conveyance thereof to himself (sects. 2, 3).

Equity's manner of *constructing* trusts explained and illustrated.

Before concluding this chapter, it may be usefully pointed out, that the constructive trusts exemplified above are constructed by the the court of equity in the following manner:—First of all, equity asks, Who has got the *legal* estate?—*i.e.*, to whom does the property belong at law, apart from all equitable considerations? That matter being once ascertained, the court of equity acknowledges the legal ownership, and makes a foundation of it upon which to build up, that is, to *construct*, the trust for which

(*x*) 44 & 45 Vict. c. 45, s. 30.

(*y*) Copyhold Act, 1887 (50 & 51 Vict. c. 73), s. 44; *In re Mill's Trusts*, 40 Ch. Div. 14; Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88.

(*z*) 60 & 61 Vict. c. 65.

it perceives an equity. Thus, in the case of the vendor's lien, the court of equity finds the legal estate in the vendee, inasmuch as the vendor has already conveyed it to him; and then the court founds upon the vendee, *as having the legal estate*, the equitable lien or charge for the unpaid purchase-money; and, on the other hand, in the case of the vendee's lien, the court of equity finds the legal estate in the vendor, inasmuch as he has not yet conveyed same to the vendee; and then the court founds upon the vendor, *as still having the legal estate*, the equitable lien or charge for the prematurely paid purchase-money; and in fact, in all cases it is the rule of the court of equity to found upon the legal estate only,—a rule which, if the student will remember it, will make many things in equity plain to him which would otherwise occasion him much difficulty.

CHAPTER VI.

TRUSTEES AND OTHERS STANDING IN A FIDUCIARY RELATION.

Who may be trustees.

A TRUSTEE should be a person capable of taking and of holding the legal estate, and possessed of natural capacity and legal ability to execute the trust, and should (for reasons of convenience) be domiciled within the jurisdiction of the English courts of equity. A corporation as to lands (*a*), and an infant (*b*) as to both lands and goods, are, on account of their several disabilities, unsuited to hold, but none of them are incapable of holding, the office of trustee. As regards married women, they used to be equally unsuitable for the office of trustee (*c*), and this not only because of the inconvenience resulting from the legal unity of husband and wife, but also because of the reputed variability or instability of the feminine temperament; and although the former of these two objections has, to some extent, ceased to exist (*d*), the latter of them still remains in its integrity (*e*). As regards aliens, being and remaining aliens, they are, since the Naturalisation Act, 1870 (*f*), as capable as native-born persons of acting as trustees, even as regards real estate; but,

(*a*) *Att.-Gen.* v. *St. John's Hospital*, 2 De G. J. & Sm. 621.
(*b*) *Hearle* v. *Greenbank*, 3 Atk. 712.
(*c*) *Lake* v. *De Lambert*, 4 Ves. 595.
(*d*) 44 & 45 Vict. c. 75, s. 18; *In re Harkness and Allsopp*, 1896, 2 Ch. 358.
(*e*) *Re Peake*, 1894, 3 Ch. 520.
(*f*) 33 & 34 Vict. c. 14, s. 2.

of course, formerly they could not have held real estate, even as trustees (*g*); and even still they are objectionable as trustees, unless they are permanently domiciled within the jurisdiction.

Equity never wants a trustee.

It is a general rule in courts of equity, that whenever a trust exists, and there is no trustee to execute it, equity will decree that person a trustee in whom the legal estate is vested (*h*); for a court of equity never wants a trustee, and the beneficial interest therefore is never affected by the want of a trustee. And accordingly, where property has been bequeathed in trust without the appointment of a trustee, if it is personal estate, the personal representative is deemed the trustee, and if it is real estate, the heir or devisee is deemed the trustee; and in either case, the trustee, whoever he is, is bound to the due execution of the trust; also, if there is no executor, or the executor refuses or becomes incapable to act, the court will appoint a trustee to discharge the duties of the executor (*i*), *being duties which the executor would as a trustee execute* (*k*); for generally, if the trust cannot be executed through the medium which was in the primary view of the testator, it shall be executed through the medium appointed by the Court of Chancery. Also, now, under the provisions of the Judicial Trustees Act, 1896 (*l*), and the Rules of August 1897 made under that Act, the court will in a proper case appoint the official solicitor of the court (or some other person) to be a judicial trustee, and that either alone or jointly with any existing trustee (including an executor or administrator).

(*g*) Gilb. on Uses, 43; *Fish* v. *Klein*, 2 Mer. 431.
(*h*) *Salisbury* v. *Bagott*, 2 Swanst. 608.
(*i*) *In re Moore, M'Alpine* v. *Moore*, 21 Ch. Div. 778.
(*k*) *In re Willey*, W. N. 1890, p. 1; *Eaton* v. *Daines*, W. N. 1894, p. 32.
(*l*) 59 & 60 Vict. c. 35.

In what sense the trustee is the *servant*, and in what sense the *controller*, of his *cestui que trust*.

A trustee must act according to the rules of equity, and he departs therefrom at his own particular peril; and yet, at the same time, he is a mere machine and the servant of his *cestui que trust* for the time being; but by "*cestui que trust*" is here meant, not one person having a partial beneficial interest in the trust fund,—for the trustee is not the servant but the controller of such partial beneficiary,—but the aggregate body of persons (born and unborn) that make up the entirety of the persons entitled, or who may be or become entitled to any beneficial interest in the trust property as such (*m*); also, the person for whom the trustee shall be a trustee depends entirely upon the will of such *cestui que trust*, whether entitled under the original creation of the trust, or by subsequent devolution or transfer,—for such *cestui que trust* may assign his beneficial interest without the consent of the trustee (*n*); also, a majority of the *cestuis que trustent* may, *e.g.*, upon the *total* failure of the objects for which the trust money was subscribed, demand back the trust money (*o*); and a minority even may, upon proper terms, do the like (*p*). And the *cestuis que trustent*, or any one or more of them, are entitled to sue the trustee to compel him to the execution of any particular act of duty; also, if any *cestui que trust* has reason to suppose, and can satisfy the court, that the trustee is about to proceed to an act not authorised by the true scope of the trust, he may have an injunction to restrain the trustee from such wrongful exercise of his legal power (*q*); and as regards a judicial trustee, the court may direct an inquiry into his conduct (*r*).

Trustee may be compelled to any act of duty;

or restrained from abuse of his legal title.

(*m*) *Morgan* v. *Swansea U. S. Authority*, 9 Ch. Div. 582.
(*n*) *Att.-Gen.* v. *Downing*, Wilm. 23; *Donaldson* v. *Donaldson*, Kay, 711.
(*o*) *Wilson* v. *Church*, 13 Ch. Div. 1.
(*p*) *Collingham* v. *Sloper*, 1893, 2 Ch. 96.
(*q*) *Balls* v. *Strutt*, 1 Hare, 146.
(*r*) Judicial Trustee Rules, 1897, Rule 22.

A trustee who has accepted the trust cannot afterwards *renounce* it; also, upon the death of one trustee, the entire responsibilities survive to the other trustees or trustee (*s*); and the only mode in which a trustee could obtain a *release* from his responsibilities used to be, either under the sanction of a court of equity, or by virtue of a special power in the instrument creating the trust, or with the consent of all parties interested in the estate, being *sui juris* (*t*). Of these three modes of *release*, the second was usually the only one unattended with serious expense; for as regards the first mode of release, the court would not sanction the release merely because the trustee wished it; and as regards the third mode of release, it was rarely, if ever, the certain fact that *all* the *cestuis que trustent* were *sui juris*, or even yet in existence. But now, under the Trustee Act, 1893, s. 11, repeating the like provision contained in the Conveyancing Act, 1881 (*u*), a trustee may by deed retire from the trust, provided two trustees remain, and provided these two trustees and the person, if any, entitled to appoint others express by the deed their consent to his retirement; and under the Judicial Trustees Act, 1896, and Rule 23 of the rules made under that Act, a judicial trustee may retire, on giving notice to the court of his desire in that behalf, the notice stating the arrangements which have been made for the appointment of his successor; and in such a case, the court will appoint an official judicial trustee, when there is no other proper trustee available, or when the court otherwise thinks fit; also, a judicial trusteeship may (under Rule 24) be discontinued, and an ordinary trusteeship be substituted for it.

Trustee cannot renounce after acceptance.

Release of trustee,—modes of, in general;

and in the case of judicial trustee.

(*s*) *Att.-Gen.* v. *Gleg*, 1 Atk. 356; *Cooke* v. *Crawford*, 13 Sim. 91; *Osborne to Rowlett*, 13 Ch. Div. 774.
(*t*) *Manson* v. *Baillie*, 2 Macq. H. L. Cas. 80.
(*u*) 44 & 45 Vict. c. 41, s. 32.

Trustee cannot delegate his office.

The office of trustee, being one of personal confidence, cannot, in general, be delegated; for trustees who take on themselves the management of property for the benefit of others have no right to shift their duty in that particular on other persons (*v*). A limited power of delegation has, however, now been conferred on trustees (including executors and administrators) by the Trustee Act, 1893 (*x*), repeating a similar provision contained in the Trustee Act, 1888 (*y*); for a trustee may now depute his solicitor to receive the purchase-money of an estate sold, or may depute his solicitor or any banker to receive moneys payable under a policy of (life) assurance; but there is nothing in the Act which excuses the trustee from seeing to the security or safety of the moneys so received, or which authorises a double delegation (*z*). And here note, that a lawful delegate would be accountable to his principal; but he might, and no doubt would, be accountable also to the *cestuis que trustent* if he were guilty of any misapplication of the moneys received; and a trustee *de son tort* would certainly be so accountable (*a*). The incapacity of the trustee, in general, to delegate his office is to be understood of a trustee being and remaining one; because, of course, under a special power in that behalf or otherwise he may (as we have just seen) retire altogether from the trust, with or without appointing a new trustee in his place, and in that way delegate (in one sense) the entire trust. But the trustee who does not resign altogether cannot, save in the cases above referred to, delegate in part, for the reasons stated, and upon

(*v*) *Turner* v. *Corney*, 5 Beav. 517; *Eaves* v. *Hickson*, 30 Beav. 136.
(*x*) 56 & 57 Vict. c. 53, s. 17.
(*y*) 51 & 52 Vict. c. 59, s. 2.
(*z*) *Re Hetling and Merton*, 1893, 3 Ch. 269.
(*a*) *Barnes* v. *Addy*, L. R. 9 Ch. App. 244; *Blyth* v. *Fladgate*, 1891, 1 Ch. 337; *Barney* v. *Barney*, 1892, 2 Ch. 265; and disting. *Mara* v. *Browne*, 1896, 1 Ch. 199.

the maxim "*delegatus non potest delegare*," which, although ridiculed by Bentham as a "fallacy of rhythm," is based and maintained in English law upon sound and enduring reasons.

Delegation permitted where there is a moral necessity for it.

Even apart from the Trustee Act, 1893, trustees and executors may and always might justify their administration of the trust fund by the instrumentality of others, where there is or was a moral necessity for it; and necessity includes the *regular course of business;* for example, "an executor living "in London, who has to pay debts in Newcastle, "may remit money to his co-executor there, or to "any other agent there, to pay those debts; for he "would, in the ordinary course of his own business, "remit money in the same way" (*b*). Also, under exceptional circumstances, *e.g.*, when portion of the trust money has been invested on mortgage of a building estate, and in the course of the development of that estate a frequent reference to the title-deeds is a necessity, the trustee may legitimately leave such title-deeds with his solicitors (*c*),—although he ought, in the general case, to hold the title-deeds himself; but there can hardly be any reason justifying the trustee for leaving indefinitely with his solicitors convertible securities (such as bonds) payable to bearer. And in the case of judicial trustees, the title-deeds and all certificates and other documents evidencing the title of the trustee to the trust property must be deposited either with the bank at which the trust account is kept, or else with such other custodian as the court may direct (*d*).

Also, the rule that trustees are not liable where,

(*b*) *Joy* v. *Campbell*, 1 Sch. & Lef. 351; *Clough* v. *Bond*, 3 My. & Cr. 497; *Brier* v. *Evison*, 26 Ch. Div. 238.
(*c*) *Field* v. *Field*, 1894, 1 Ch. 425.
(*d*) Judicial Trustee Rules, 1897, Rule 10.

acting according to the ordinary course of business, they employ agents, when as prudent men of business they would do so if acting on their own behalf,—this rule is no protection to them if they fail to exercise common prudence in their selection of the agent, or in their instructions to him, or in their acceptance of his report. For example, if they employ a solicitor to act as valuer, or if they accept their solicitor's recommendation of a valuer, without satisfying themselves by independent inquiry that the suggested valuer is a proper agent in that behalf (*e*); or if they do not supply the agent (being a valuer selected by themselves) with sufficient particulars (verified particulars) of the property he is appointed to value (*f*), or if they accept from the valuer a vague general report, not showing the necessary details to enable them to judge for themselves (*g*); or if they fail to exercise their own judgment on the valuer's report,—all these precautions being such as prudent men of business would observe in lending their own moneys on mortgage, they would be liable, unless where and so far as the provisions of the Trustee Act, 1893 (*h*), s. 8, or the like provision contained in the Trustee Act, 1888 (*i*), s. 4, may have altered the rules of equity in these respects; but these last-mentioned provisions amount in fact only to this, that the trustee shall not be liable as for a breach of trust in respect of an investment of the trust estate on an inadequate security, when *the court is satisfied* that the trustee in making the loan "was acting upon a report as to "the value of the property made by a person whom

Trustee Act, 1893,—provisions of, as to delegation of duties.

(*e*) *Fry* v. *Tapson*, 28 Ch. Div. 268; *Olive* v. *Westerman*, 34 Ch. Div. 70; *In re Weall*, *Andrews* v. *Weall*, 42 Ch. Div. 674.

(*f*) *Smith* v. *Stoneham*, 3 Times Law Rep. 77; *Re Partington*, 57 L. T., N. S., 654.

(*g*) *Whiteley* v. *Learoyd*, 35 Ch Div 347; 12 App. Ca. 727.

(*h*) 56 & 57 Vict. c. 53.

(*i*) 51 & 52 Vict. c. 59.

"the trustee *reasonably* believed to be an able prac-"tical surveyor or valuer, instructed and employed "independently of any owner of the property," and that the amount of the loan does not exceed two equal third parts of "the value of the property *as* "*stated* in such report," and that the loan was made "under the advice of such surveyor or valuer *expressed* "*in such report*,"—the principle underlying these provisions being this, that if an independent valuer of reputation, sufficiently instructed to make a just valuation, will *state* (*i.e.*, represent) the value as sufficient, and will *expressly advise* the acceptance of the security,—*knowing the consequent liability which he* (*the valuer*) *will thereby personally incur if his representation and advice are erroneous*,—the trustee may, having so beforehand sufficiently instructed the valuer, reasonably be taken to have done all that his duty in this particular required (*k*).

The care and diligence required of trustees as regards,—

It is commonly stated that trustees are bound to take in all cases the same care of the trust property as a man of ordinary caution would take of his own; and that if they do so, they will not be liable for any *accidental* loss; as, for instance, by a robbery of the property while in their own possession (*l*), or by a robbery or loss whilst in the possession of others with whom it has necessarily, *i.e.*, in the ordinary course of business, been intrusted (*m*), or by a depreciation in the value of the securities upon which the trust funds are rightfully invested (*n*). But the court, in determining the liability or non-liability of a trustee

N.B.

(*k*) *Walker* v. *Walker*, 62 L. T., N. S., 449; *Somerset* v. *Earl Powlet*, 1894, 1 Ch. 231.

(*l*) *Morley* v. *Morley*, 2 Ch. Ca. 2.

(*m*) *Jones* v. *Lewis*, 2 Ves. 240; *Swinfen* v. *Swinfen*, 29 Beav. 211; *In re Speight*, *Speight* v. *Gaunt*, 22 Ch. Div. 727; 9 App. Ca. 1.

(*n*) *In re Godfrey*, *Godfrey* v. *Faulkner*, 23 Ch. Div. 483; *In re Brogden*, *Billing* v. *Brogden*, 38 Ch. Div. 546; *In re Chapman*, *Cocks* v. *Chapman*, 1896, 2 Ch. 763.

for any loss sustained by the trust estate, distinguishes in fact between the *duties* imposed upon and the *discretions* vested in him as such. And as regards his *duties*, the utmost diligence in observing same (*i.e.*, *exacta diligentia*) is his only protection against liability for any loss; and it is only as regards his *discretions* or discretionary powers, that an amount of diligence equal to what he bestows on his own property will protect him from liability. Thus, firstly, as regards *duties*, if a trustee or executor permit the trust fund to remain unnecessarily in the hands of third parties, —as, for instance, if money be left in the hands of a banker (not being, in the case of a judicial trustee, the banker of the trust) more than a year after the testator's death, and after the debts, &c., have been paid (*o*); or if a trustee mix trust property with his own (*p*), or parts with his exclusive control over the fund by associating with himself the authority of another person (*q*); or if the fund be left to the entire control of a co-trustee (*r*); or if it be lent to such co-trustee (*s*),—it will be at his risk (*t*). But, secondly, as regards *discretions*, the trustee will be protected from liability if he properly exercises his discretion, *e.g.*, if he chooses a duly qualified solicitor, against whom there is no suggestion either of incapacity or of dishonesty,—the trustee will not be liable for a loss resulting from the incapacity or from the dishonesty of the solicitor whom he has so employed,—provided the employment is limited to work proper for a solicitor to do; but the trustee would be liable, if he had not exercised his discretion justly in the

(*a.*) Duties.

(*b.*) Discretions.

(*o*) *Darke* v. *Martyn*, 1 Beav. 525.
(*p*) *Lupton* v. *White*, 15 Ves. 432.
(*q*) *Salway* v. *Salway*, 2 Russ. & My. 215; *Webb* v. *Jonas*, 39 Ch. Div. 660.
(*r*) *Scotney* v. *Lomer*, 29 Ch. Div. 535.
(*s*) *Stickney* v. *Sewell*, 1 My. & Cr. 8.
(*t*) *Castle* v. *Warland*, 32 Beav. 660.

choice of such solicitor, or if he had deputed to him work not proper for a solicitor as such to do (*u*), *e.g.*, to collect rents and pay himself thereout a commission and his charges; also, if a trustee is authorised to invest the trust property in such stocks, shares, and securities as he shall "*think fit*," that is an absolute discretion in appearance only, and will not justify a *dishonest* exercise of the discretion (*v*); and if a trustee, *e.g.*, under the investment clause in the will or settlement, has the power of investing in any one or more at his discretion of certain specified funds, comprising good, bad, and indifferent securities, and he invests (say, at the request of an importunate *cestui que trust*) part of the trust funds in Greek or Argentine securities, as being one of the authorised investments, then he will be liable, if he would not have invested his own money in that class of investment (*x*); but otherwise he will not be liable, even in the case of a loss to the trust estate (*y*). And even as regards investments in *real securities*, when these are authorised, the trustee must exercise a just discretion; and if he should, *e.g.*, invest the trust funds in a freehold "*brickfield*," he will be liable for any resultant loss (*z*). And if a trustee has, under the trust instrument, express power to continue a loan made, *e.g.*, to a partnership firm, it is not a matter of course for him to continue such loan after a change in the members of the firm (*a*); and the court will in a proper case control the exercise of the trustee's

(*u*) *In re Weall, Andrews* v. *Weall*, 42 Ch. Div. 674.
(*v*) *In re Smith, Smith* v. *Thompson*, 1896, 1 Ch. 71.
(*x*) *Knox* v. *Mackinnon*, 13 App. Ca. 753.
(*y*) *Tabor* v. *Brooks*, 10 Ch. Div. 273; *Smethurst* v. *Hastings*, 30 Ch. Div. 490.
(*z*) *Whiteley* v. *Learoyd*, 12 App. Ca. 727; *Blyth* v. *Fladgate*, supra; and *Mara* v. *Browne*, supra.
(*a*) *Tucker* v. *Tucker*, 1894, 1 Ch. 724; 3 Ch. 429; 57 & 58 Vict. c. 10, s. 4.

Limit of value for trust investments.

discretion (*b*). The court had also established a firm (and comparatively inflexible) rule as regards the limit of value for the investment of trust moneys on real estate, that is to say: The amount to be lent on the security of freehold houses should never have exceeded one-half the value of such houses, and the amount to be lent on the security of freehold lands should never have exceeded two-thirds the value of such lands (*c*); but this rule has been to some extent modified by the Trustee Act, 1893, ss. 8 and 9, continuing the like provisions contained in the Trustee Act, 1888, ss. 4 and 5, by which the limit of two-thirds has been substituted as the proper limit of value in the case of all kinds of property (whether lands, houses, or other property), proposed as a security for the investment of trust money (*d*); and when the amount invested exceeds such limit, the investment is to be deemed an authorised one up to the limit, and the trustee will accordingly be (in such a case) liable only for the excess (*e*). And a simple executor or administrator is a trustee within the meaning of all these distinctions and provisions; and the Judicial Trustees Act, 1896 (*f*), s. 1 (subsect. 2), expressly so declares, as regards all the provisions contained in that Act. And an executor or administrator will accordingly (subject to the protections aforesaid now afforded him by the Trustee Act, 1893, or by the provisions to be presently referred to contained in the Judicial Trustees Act, 1896), be liable, *e.g.*, for any breach of what the court considers his *duty*, notwithstanding that he has

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(*b*) *Tempest* v. *Lord Camoys*, 21 Ch. Div. 571; *Brown* v. *Brown*, 29 Ch. Div. 889; *Coles* v. *Courtier*, 34 Ch. Div. 136; *In re Baring*, 1893, 1 Ch. 61.

(*c*) *Olive* v. *Westerman*, 34 Ch. Div. 70.

(*d*) *Walker* v. *Walker*, 62 L. T., N. S., 449; *Somerset* v. *Earl Poulett*, 1894, 1 Ch. 231.

(*e*) *Priest* v. *Uppleby*, 42 Ch. Div. 351.

(*f*) 59 & 60 Vict. c. 35.

used all care (*g*), and also for the want of ordinary care in the exercise of his *discretions;* and it is esteemed a breach of trust to invest the trust funds on a contributory mortgage (*h*), in the absence of express authority in that behalf. But under the Judicial Trustees Act, 1896, s. 3, the court may now relieve a trustee of all liability for a breach of trust (past, present, or future), where (and so far as) the court thinks that he has acted honestly *and* reasonably in the matter (*i*),—that is to say, *semble*, in a way which the court would itself have authorised, having regard to the provisions of the Trustee Act, 1893, s. 8, if application had been made to the court for its directions (*k*). And it is also to be remembered, that in the case of a will which authorises mortgages on real estate, there is no positive rule of the court that executors or trustees must, *without exercising any judgment in the matter*, call in the testator's mortgages (even risky ones) within twelve calendar months from the death (*k*); nor is there any rule of the court, that trustees retaining a security authorised by their trust are liable to make good a loss sustained through any fall in the value of the security (*e.g.*, through agricultural depression), where the trustees have acted honestly *and* prudently, and in the belief that they have been doing what was best for all parties (*l*).

Relief of trustee, under Judicial Trustees Act, 1896.

It is an established rule, that trustees, executors, or administrators, or others standing in a similar situation, shall have, in the general case, no allowance for their care and trouble,—for a trustee shall not profit

No remuneration allowed to trustee.

(*g*) *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. Div. 236.
(*h*) *Webb* v. *Jonas*, 39 Ch. Div. 660.
(*i*) *Morley* v. *Kay*, 1897, 2 Ch. 518.
(*k*) *Barker* v. *Ivimey*, 1897, 1 Ch. 536; *Wynne* v. *Tempest*, W. N. 1897, p. 43; *Smith* v. *Stuart*, 1897, 2 Ch. 583.
(*l*) *In re Chapman, Cocks* v. *Chapman*, 1896, 2 Ch. 763.

by his trust (*m*), directly or indirectly (*n*); and so strict is this rule, that although a trustee or executor may, by the direction of the author of the trust, have carried on a trade or business at a great sacrifice of time, he will be allowed nothing as compensation for his personal trouble or loss of time (*o*),—*scil.* in the absence of any provision in the trust deed or will entitling him to such compensation (*p*). And even a solicitor, who is a trustee, is not entitled to charge for non-contentious business done by him in relation to the trust, except for his costs out of pocket only, unless there is in the deed or will a provision enabling him to receive remuneration for the transaction of such business (*q*); but as regards contentious business, it used to be considered that he was entitled to his reasonable profit costs of the action, in addition to his costs out of pocket (*r*), and he would probably still be considered to be so entitled in the general case (*s*). Where, however, the trustee was a mortgagee, and as such was made a defendant to a redemption action which he defended by himself or his firm, he used to be entitled only to his costs out of pocket, and not to any profit costs of such action (*t*); but now, under the Mortgagees' Legal Costs Act, 1895 (*u*), s. 3, he is entitled to his profit costs in such a case. Also, where a solicitor, being executor or trustee, is by an express clause in the will to be "*at liberty to charge for professional services*," he can only charge for services strictly professional, and not for

Solicitor-trustee allowed only for costs out of pocket.

(*m*) *Robinson* v. *Pett*, 2 L. C. 207; *Hamilton* v. *Wright*, 9 Cl. & F. 111.
(*n*) *In re Thorpe*, *Vipont* v. *Radcliffe*, 1891, 2 Ch. 360.
(*o*) *Brocksopp* v. *Barnes*, 5 Mad. 90.
(*p*) *Bignell* v. *Chapman*, 1892, 1 Ch. 59.
(*q*) *Broughton* v. *Broughton*, 5 De G. M. & G. 160; *Burgess* v. *Vinnicombe*, 34 Ch. Div. 77.
(*r*) *Cradock* v. *Piper*, 1 Mac. & G. 464; *Burgess* v. *Vinnicombe*, supra.
(*s*) *London Scottish Benefit Society* v. *Chorley*, 13 Q. B. D. 872.
(*t*) *Stone* v. *Lickorish*, 1891, 2 Ch. 363; *In re Wallis*, 25 Q. B. D. 176; *Fisher* v. *Doody*, 1893, 1 Ch. 129; *Wellby* v. *Still*, 1894, 1 Ch. 218; *Eyre* v. *Wynn-Mackenzie*, 1896, 1 Ch. 135.
(*u*) 58 & 59 Vict. c. 25.

matters which an executor or trustee ought to have done without the intervention of a solicitor, *e.g.*, for attendances to pay premiums on policies, or at the bank to make transfers, &c. (*v*),—wherefore the will or settlement should give to the solicitor-trustee a wide liberty in this respect, extending as well to professional business as also to business in and about the trust, although not strictly professional; and it is convenient also, that such liberty should extend to authorising the co-trustees to settle (without taxation), and to allow out of the trust estate, the amount of such charges (*x*), the co-trustees exercising in such a case the discretion of ordinary prudent men. Occasionally (*e.g.*, in Bankruptcy, and in the case of judicial trustees) the remuneration of a trustee may be fixed or regulated by particular statute, or by rules having the force of statute; and in such a case, the amount and mode of the remuneration thereby prescribed must, of course, be observed (*y*). But in general there is nothing to prevent trustees contracting with the *cestuis que trustent* to receive some compensation for the performance of the duties of the trust; only such a contract will be very jealously scrutinised by a court of equity, and if there be any appearance of unfairness in it, or any unconscionable advantage on the part of the trustee, the agreement will not be enforced (*z*); and the court will (on a proper application being made to it) sanction a commission being paid or allowed to the trustee for his trouble, where the execution of the trust is more than ordinarily burdensome (*a*),—and that whether the trustee is an

Trustees may stipulate to receive compensation.

(*v*) *Harbin* v. *Darby*, 28 Beav. 325; *Ames* v. *Taylor*, 25 Ch. Div. 72; *Newton* v. *Chapel*, 27 Ch. Div. 584.
(*x*) *Bennett* v. *Bennett*, 1893, 2 Ch. 413.
(*y*) *Peed's Case*, 24 Q. B. D. 68 (Bankruptcy); and Judicial Trustees' Rules, 1897, rr. 17, 19.
(*z*) *Ayliffe* v. *Murray*, 2 Atk. 58.
(*a*) *Re Freeman's Settlement Trust*, 37 Ch. Div. 148.

ordinary trustee or is a judicial trustee (*b*). And note, that whether a trustee is paid or not for his trouble, his liability remains unaltered (*c*).

Trustee must not make any advantage out of his trust.

In further illustration of the rule that a trustee shall not make a profit out of his trust may be mentioned those cases where one in a fiduciary position uses that position as a means of obtaining any profit or advantage which he would not otherwise obtain (*d*). For example, if trustees or executors buy up any debt or encumbrance to which the trust estate is liable for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves; but the creditors and legatees, or other *cestuis que trustent*, shall have the advantage of it (*e*). Also, if a trustee or executor uses the fund committed to his care in buying and selling land, or in stock speculations, or lays out the trust money in a commercial adventure, or if he employs it in business, in all these cases, while the executor or trustee is liable for all losses, the *cestui que trust* may insist either on having the trust fund replaced with interest, or on having the profits made by the trust funds so employed (*f*). So likewise a person standing in a fiduciary relation towards another will not be allowed to benefit by his trust by obtaining a renewal of the lease in his own name, but will be deemed in equity to be a trustee for those interested in the original term (*g*); nor will a trustee, as a general rule, be permitted to purchase the trust estate from his *cestui que trust* (*h*). And all the foregoing

(*a*.) Not charge more than he gave for the purchase of debts.

(*b*.) Not take trade profits, paying interest instead.

(*c*.) Trustee cannot renew lease in his own name, or purchase trust estate.

(*b*) Judicial Trustees' Rules, 1897, rr. 17, 26 (2).
(*c*) *Jobson* v. *Palmer*, 1893, 1 Ch. 71.
(*d*) *Webb* v. *Earl of Shaftesbury*, 7 Ves. 480–488.
(*e*) *Pooley* v. *Quilter*, 2 De G. & Jo. 327; *Fosbrook* v. *Balguy*, 1 My. & K. 226.
(*f*) *Docker* v. *Somes*, 2 My. & K. 655; *Willet* v. *Blandford*, 1 Hare, 253.
(*g*) *Keech* v. *Sandford*, 1 L. C. 46.
(*h*) *Fox* v. *Mackreth*, 1 L. C. 123.

principles apply also to constructive trustees, as agents (*i*), guardians (*k*), partners (*l*), directors of companies (*m*), and even promoters of companies (*n*), and managing owners (*o*), committees of inspection in bankruptcy (*p*), auditors (*q*), and generally to all persons clothed with a fiduciary character; and such persons must refund all profit improperly made at the expense of the trust estate, and will not be allowed, as a general rule, any remuneration for their trouble (*r*); and a summary remedy under the Companies (Winding-up) Act, 1890 (*s*), s. 10, formerly under the Companies Act, 1862 (*t*), s. 165, is provided against directors and others in the event of the winding up of the company, and they are thereby made liable for their misfeasances, *i.e.*, breaches of trust (*u*); but directors (and such like persons) are not (like trustees) under any primary or permanent duty to preserve the corpus or capital of the trust estate, but are free to deal therewith as "commercial men," in the exercise of a just discretion (*v*).

Same principles apply to agents, &c.

However, under exceptional circumstances, trustees and other persons standing in the like fiduciary

Exceptional cases in which trustee's pur-

(*i*) *Morrett* v. *Paske*, 2 Atk. 54; *Macpherson* v. *Watt*, 3 App. Ca. 254.
(*k*) *Powell* v. *Glover*, 3 P. W. 252 *n.*
(*l*) *Wedderburn* v. *Wedderburn*, 4 My. & Cr. 41; *Aas* v. *Benham*, 1891, 2 Ch. 244.
(*m*) *Great Luxembourg Railway Co.* v. *Magney*, 25 Beav. 586.
(*n*) *Bagnall* v. *Carlton*, 6 Ch. Div. 371; *New Sombrero Co.* v. *Erlanger*, 3 App. Ca. 1218; *In re Cape Breton Co.*, 29 Ch. Div. 795; *Ladywell Mining Co.* v. *Brooks & Huggins*, 35 Ch. Div. 400.
(*o*) *Williamson* v. *Hine*, 1891, 1 Ch. 390.
(*p*) *In re Galland*, *ex parte Galland*, 1896, 1 Q. B. 68; 1897, 2 Q. B. 8.
(*q*) *Leeds Estate Co.* v. *Shepherd*, 36 Ch. Div. 787.
(*r*) *Imperial Mercantile Credit Association* v. *Colman*, L. R. 6 H. L. 189.
(*s*) 53 & 54 Vict. c. 63; *In re Kingston Cotton Mill*, 1896, 2 Ch. 279; and *Leeds Estate Co.* v. *Shepherd*, supra.
(*t*) 25 & 26 Vict. c. 89.
(*u*) *Pearson's Case*, 5 Ch. Div. 336; *Metcalfe's Case*, 13 Ch. Div. 170; *In re London* v. *General Bank*, 1895, 2 Ch. 673.
(*v*) *Sheffield, &c. Building Society* v. *Aizlewood*, 44 Ch. Div. 112.

chase from *cestui que trust* holds good.

relation may effectively and securely purchase from their *cestuis que trustent*, *e.g.*, (1.) If the trustee will give more for the trust estate than any other purchaser, in other words, if he will give a "fancy price" for it; or (2.) If the offer to sell proceeds from the *cestuis que trustent*, and the trustee pays the ordinary value in the market, keeping (as it is said) his *cestui que trust* at arm's length; or (3.) If the sale is by public auction, and the trustee has the leave of the court to bid; or (4.) If the trustee is only a bare trustee,—then, and in any of these cases, the purchase by the trustee will in general hold good (*x*). And even where the purchase was originally one which would not have stood the test of equity, it may by lapse of time and subsequent events have become impossible of rescission, and therefore may become and continue good (*y*); but in general the Statute of Limitations is no bar to such a suit (*z*) (unless, possibly, under the Trustee Act, 1888, s. 8) (*a*); and the defence of laches or acquiescence is most difficult to establish (*b*); but damages may be given where rescission would be inequitable (*c*). An executor-trustee who has not proved the will, nor otherwise acted in the matter of the will or in the trusts thereof, may, in general, lawfully purchase the trust estate; for he is like a bare trustee in such a case; and to invalidate such a purchase, it must be shown that the purchaser used his power of becoming executor or other his peculiar position in such a way as to render it inequitable that the sale should stand (*d*).

(*x*) *Hickley* v. *Hickley*, 2 Ch. Div. 190.
(*y*) *In re Alexandra Palace Co.*, 21 Ch. Div. 149.
(*z*) *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233; *Lake* v. *Bell*, 34 Ch. Div. 462; *Dooby* v. *Watson*, 39 Ch. Div. 178; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.
(*a*) *In re Lands Allotment Co.*, 1894, 1 Ch. 646.
(*b*) *Beningfield* v. *Baxter*, 12 App. Ca. 167.
(*c*) *In re Galland, ex parte Galland*, 1897, 2 Q. B. 8.
(*d*) *Clark* v. *Clark*, 9 App. Ca. 733.

N. B.

Constructive, not liable to same extent as express, trustee.

But when a person is merely a constructive trustee, his liabilities are in some respects different from those of an express trustee; for the duties and responsibilities of a constructive trustee are in general matters of quasi-contract, and he is therefore not bound by many of the rules which equity has annexed to the express fiduciary relation. Thus, in *Knox* v. *Gye* (*e*), where it was attempted to be argued, that a surviving partner was a trustee of the share of his deceased partner, Lord Westbury, after adverting to the case of vendor and purchaser, and stating that there, though the vendor might (by a metaphor) be called a trustee, *he was a trustee only to the extent of his obligation to perform the agreement* between himself and the purchaser, proceeded as follows: "In like "manner, here the surviving partner may be called "a trustee for the dead man, but the trust is *limited* "*to the discharge of an obligation, which is liable to be* "*barred by lapse of time*" (*f*); but his Lordship was not in that case dealing with a case of concealed fraud, which of course would make a difference (*g*). And so also, where a person is a constructive trustee, merely as having employed the money of another in a trade or business, although he must account for the profits of the money he has employed, he will in general have an allowance made to him for his loss of time and for his skill and trouble (*h*). Also, an executor is not, as a general rule, an express trustee of the legacies given by the will,—although he may, of course, be an express trustee thereof, either as having been constituted such by the will itself, or as having constituted himself an express trustee

Remarks of Lord Westbury in *Knox* v. *Gye*.

Time runs in favour of constructive trustee, although not in favour of express trustee.

Constructive trustee may have remuneration for time and skill.

(*e*) L. R. 5 H. L. 656, 675; *Noyes* v. *Crawley*, 10 Ch. Div. 31; *Moore* v. *Knight*, 1891, 1 Ch. 547; *Friend* v. *Young*, 1897, 2 Ch. 421.

(*f*) *Taylor* v. *Taylor*, 28 L. T., N. S., 189; *Edwards* v. *Warden*, 22 W. R. 669.

(*g*) *Betjemann* v. *Betjemann*, 1895, 2 Ch. 474.

(*h*) *Brown* v. *Lytton*, 1 P. W. 140; *Brown* v. *De Tastet*, Jac. 284; *Docker* v. *Somes*, 2 M. & K. 655.

thereof; but when he is liable in respect of such legacies as an executor simply, he is only constructively a trustee thereof, and may accordingly plead the Statutes of Limitation in his defence to a suit to recover such legacies (*i*),—*scil.* in the absence of fraud or wilful concealment.

Trustee Act, 1888, s. 8,—when and when not the Statutes of Limitation are now a protection even to express trustees.

And here it is to be observed, that under the Trustee Act, 1888 (*k*), s. 8, a statute applicable to trustees generally, but not to a trustee in bankruptcy (*l*), unless when the claim is founded on any fraud or fraudulent breach of trust to which the defendant trustee was party or privy (*m*), or unless where the claim is to recover trust property (or the proceeds thereof) still retained by such trustee (*n*), or previously received by him and converted to his his own use, it is now provided, that in any action commenced after 1st January 1889, trustees (and the persons claiming through them) shall have the full benefit of all (if any) Statutes of Limitation which would be applicable to the action if the defendant were not a trustee (or persons claiming through a trustee) (*o*); and in any action commenced after the 1st January 1889 against trustees (or persons claiming through them) or against directors (*p*), being an action in which the claim is to recover money or other property, and to which action no Statute of Limitations would be available for these defendants as a defence to the claim, the trustees (and the persons claiming through them) or the

(*i*) *In re Davis, Evans* v. *Moore*, 1891, 3 Ch. 119; 37 & 38 Vict. c. 57, s. 8.

(*k*) 51 & 52 Vict. c. 59.

(*l*) *In re Cornish*, 1895. 2 Q. B. 634; W. N. 1895, p. 152.

(*m*) *Jones* v. *Morgan*, 1893, 1 Ch. 304; *Mason* v. *Mercer*, ib. 590; *Thorne* v. *Heard*, 1894, 1 Ch. 599.

(*n*) *How* v. *Earl Winterton*, 1896, 2 Ch. 626; and *Thorne* v. *Heard*, supra.

(*o*) *In re Bowden, Andrew* v. *Cooper*, 45 Ch. Div. 444; *How* v. *Earl Winterton*, supra.

(*p*) *In re Lands Allotment Co.*, 1894. 1 Ch. 646.

directors may by force of the Act alone plead the lapse of time in bar of the action, in like manner as in an action of debt for money had and received (*q*), that is to say, six years or twelve years or twenty years, as the case may be; but in this latter case, the statutes are to run, *as against the beneficiaries*, only as from the time at which their interests (being originally reversionary) fall into possession (*r*), the Act stating nothing expressly as to the disability of infancy or (except where the woman is entitled for her separate use) as to the disability of coverture, which several disabilities will, therefore, *semble*, continue to operate as before, to prevent the statute from beginning to run.

One trustee is liable for his co-trustee, —practically.

In *Townley* v. *Sherborne* (*s*), the extent of the responsibility of one trustee for the acts or defaults of his co-trustee was discussed. In that case, A., B., C., and D. were the trustees of some *leasehold* premises; A. and B. collected the rents during the first year and a half, and *signed acquittances;* but from that period, the rents were uniformly received by an assign of C.; and the question was,—whether A. and B. were chargeable with the rents accrued subsequently to the first year and a half, which had never come to their hands? After much consideration, the judges resolved: That where lands are conveyed to two or more upon trust, and one of them receives all or the most part of the profits, and after dieth or decayeth in his estate, his co-trustees shall not be charged, or be compelled in the Court of Chancery to answer, for the receipts of him so dying or decayed, *unless some practice, fraud, or evil-dealing appears to have been in them, to prejudice the trust*,—for they being

(*q*) *In re Swaine, Swaine* v. *Bringeman*, 1891, 3 Ch. 233; *Masonic and General* v. *Sharpe*, 1892, 1 Ch. 154; *Mason* v. *Mercer*, supra; *Soar* v. *Ashwell*, 1893, 2 Q. B. 390; *How* v. *Earl Winterton*, supra.

(*r*) *Somerset* v. *Earl Poulett*, 1894, 1 Ch. 231.

(*s*) 2 L. C. 870; *Lewis* v. *Nobbs*, 8 Ch. Div. 591.

by law joint-tenants or tenants in common, every one by law may receive either all or as much of the profits as he can come by. But it was also resolved: That if, upon the proof of circumstances, the court should be satisfied that there had been any *dolus malus*, or *any evil practice, fraud, or ill intent in him that permitted his companion to receive the whole profits*, he should be charged, though he received nothing (*t*). And it was, in fact, decided in *Townley* v. *Sherborne*, that if a trustee joined with his co-trustees in *signing receipts*, he was liable, even though he had received nothing—the liability arising not from his mere signing of the receipts (because, of course, it was his duty to do that), but *from his subsequently leaving in the hands of his co-trustees the money that had been received*,—such neglect of *duty* amounting to an "evil practice" within the meaning of this case, although there was no moral culpability on the trustee's part.

"Signing for conformity," —effect of: (1.) By itself alone.

And in later times the rule has been established, that a trustee who joins in a receipt for conformity, but without receiving, shall not *by that circumstance alone* be rendered liable for a misapplication by the trustee who receives (*u*); and the Trustee Act, 1893, s. 24, has recognised this principle; for where the administration of the trust is vested in co-trustees, a receipt for money paid to the account of the trust must (according to the present state of the law) be authenticated by the signature of all the trustees in this their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline,—*scil. where that act is not coupled with any breach of duty arising subsequently*. Where trustees join in a receipt, *primâ facie* all are to be considered at law as having received the money; and a trustee, therefore, if he means to exonerate himself from that inference, must show

(2.) When coupled with subsequent neglect of duty.

(*t*) *Mucklow* v. *Fuller*, Jac. 198; *Booth* v. *Booth*, 1 Beav. 125.
(*u*) *Fellows* v. *Mitchell*, 1 P. W. 81; *In re Fryer*, 3 K. & J. 317.

that the money acknowledged to have been received by all was in fact received by one, and that he himself joined only for conformity (*v*). But for a subsequent neglect of *duty* by the non-receiving trustee he will be liable; and he will not be justified in allowing the money to *remain* in the hands of the receiving co-trustee for a longer period than the circumstances of the case may reasonably require (*x*); and this principle also is recognised by the Trustee Act, 1893, s. 24.

One executor not liable for his co-executor,—practically.

Co-executors, on the other hand, are generally answerable each for his own acts only, and not for the acts of their co-executors (*y*); for in respect of receipts the case of co-executors is materially different from that of co-trustees, an executor having independently of his co-executor a full and absolute control over the personal assets of the testator, and being competent to give valid discharges by his own separate act. If, therefore, an executor join with a co-executor in a receipt, he does an *unnecessary* act, and will therefore be *primâ facie* answerable for any misapplication of the fund (*z*),—unless, of course, he never was in a position, even subsequently to the receipt, to control the receiving executor (*a*); for, as observed by Lord Redesdale in *Joy* v. *Campbell* (*b*), —"If the receipt be given for the purpose of mere "form, then the signing will not charge the person "not receiving; *but if it be given under circumstances* "*purporting that the money, though not actually received* "*by both executors, was* UNDER THE CONTROL OF BOTH, "such a receipt shall charge; and the true question "is *whether the money was* UNDER THE CONTROL OF

Onus on executor joining in receipt to prove that he did not receive.

True rule as to receipts by executors.

(*v*) *Brice* v. *Stokes*, 11 Ves. 319.
(*x*) *Thompson* v. *Finch*, 8 De G. M. & G. 560; *Walker* v. *Symmonds*, 3 Swanst. 1; *Hanbury* v. *Kirkland*, 3 Sim. 265.
(*y*) *Williams* v. *Nixon*, 2 Beav. 472.
(*z*) *Brice* v. *Stokes*, 11 Ves. 319; *Gasguoine* v. *Gasguoine*, 1894, 1 Ch. 470.
(*a*) *Wesley* v. *Clarke*, 1 Eden, 357.
(*b*) 1 Sch. & Lef. 341.

But executors would be liable as for wilful default,—even for what they have not received, where (but for their neglect) they might have received.

BOTH *executors?* (*c*). And it is highly necessary to warn the student, that the non-liability of an executor for the receipts of his co-executor above expounded, holds good only in the absence of WILFUL DEFAULT on the part of the non-receiving executor; for if wilful default by the non-receiving executor is (having regard to the powers of one executor) proved against him, he will be liable even for what he has not himself received. Thus, in *Styles* v. *Guy* (*d*), where two of three executors, with the knowledge that there were unsettled accounts subsisting at the testator's death between the testator and their co-executor, in respect of which they had reason to believe that the latter was considerably indebted to the estate, took no effectual steps to compel him to account for, or to pay or secure, the balance due for several years after the testator's death, and the co-executor went bankrupt, and they were unable to show that an attempt to recover the money at an earlier period would have been fruitless,—The court held, that the solvent non-receiving executors were liable to make good the loss, as having been occasioned by their own wilful neglect and default, the Lord Chancellor in giving judgment, saying (in effect) as follows: "An executor proving a will, but not further acting, "may incur liability to make good losses arising "from his negligence; for if he proves, he thereby "accepts the office, and becomes bound to perform "the duties of it; and one of his principal duties is "to call in and collect such parts of the estate as "are not in a proper state of investment. If, there-"fore, he knows, or has the means of knowing, that "part of the estate is not in a proper state of invest-"ment, *but is held upon personal security only*, is it "not part of the duty he has undertaken to take

Thus, in *Styles* v. *Guy*,—executor held liable for not receiving a debt due to the estate from his co-executor.

Passiveness in a co-executor not usually any protection to him.

Not even when assets are in the possession of his co-executor, *scil.* if not properly in the possession of the latter.

(*c*) *Walker* v. *Symmonds*, 3 Swanst. 1; *Hovey* v. *Blakeman*, 4 Ves. 608.

(*d*) 1 Mac. & Gord. 422.

"measures for putting such property in a proper "state of investment; and does it cease to be his "duty to do so, *because the property is in the hands of "a co-executor, and not of any stranger to the estate?* "It is impossible to say that the duty ceases for "any such reason; and in *Booth* v. *Booth* (*e*), the "passive co-executor was held liable for assets im- "properly left in the hands of the acting executor . . . "and, in fact, I am unable to discover any principle "for distinguishing between debts due from third "parties and *balances due from executors.*"

Recoupment or contribution,—as between co-trustees on a breach of trust,—

Where trustees are held liable for a breach of trust, the judgment is against both or all of them jointly; but, like other joint judgments, it may of course be executed against any one of the trustees singly; and the court will occasionally provide (in its judgment against the trustees, when one alone is morally guilty and the other is only technically liable), that the innocent trustee shall be entitled to be recouped out of the estate of the guilty trustee the amount which he shall have paid to the plaintiff in satisfaction of the breach of trust (*f*); but when both trustees are equally guilty and there is judgment against both, the court will not so provide (*g*). The right of the trustee who has made good the whole breach is a right to contribution, and not to recoupment; and the trustee must commence an independent action against his co-trustee, to enforce his right to contribution (*h*); but when two trustees are equally involved in a breach of trust, and one of them is also a beneficiary, then if the judgment against both is satisfied out of the beneficial interest of the one, the beneficiary trustee has no right to

(1.) As regards the trust-funds made good;

(*e*) 1 Beav. 125.
(*f*) *Bahin* v. *Hughes*, 31 Ch. Div. 390.
(*g*) *Priestman* v. *Tindall*, 24 Beav. 244; *Bahin* v. *Hughes*, supra.
(*h*) *Lingard* v. *Burnley*, 1 V. & B. 114.

(2.) As regards the costs of suit.

contribution against his co-trustee (*i*). Also, apparently, there is not, as regards the costs of the action for the breach of trust, either recoupment or contribution available by independent action in favour of the trustee (whether guilty or innocent) who has paid the whole of such costs (*k*); and such recoupment or contribution must therefore be provided for (if it is to be provided for at all) in the very judgment itself which goes jointly against the trustees (*l*). And here note, that the right of one trustee against his co-trustee for contribution (and possibly also for recoupment) is like the right of a surety, and accordingly the Statute of Limitations will not begin to run against such right *until judgment has been obtained against the two trustees for the breach of trust* (*m*).

Indemnity and reimbursement clauses,—utility of, in general.

An express clause is usually inserted in trust deeds, that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustees, but for his own acts and defaults only; and that the trustees may reimburse themselves out of the trust estate their costs, charges, and expenses properly incurred. But equity infuses such a provision into every trust deed (*n*), and a person can have no better right from the expression of that which, if not expressed, would be implied (*o*); and the Trustee Act, 1893, s. 24, continuing the like provision contained in Lord St. Leonards' Act (22 & 23 Vict. c. 35), s. 31, has adopted this principle of equity; but trustees are not thereby further indemnified than they were before; and a wider indemnity clause (*p*)

(*i*) *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.
(*k*) *Dearsley* v. *Middleweek*, 18 Ch. Div. 236.
(*l*) *Wilson* v. *Thomas*, L. R. 20 Eq. 459; *Lockhart* v. *Reilly*, 1 De G. & Jo. 464; *Barker* v. *Ivimey*, 1897, 1 Ch. 536.
(*m*) *Robinson* v. *Harkin*, 1896, 2 Ch. 415.
(*n*) *Dawson* v. *Clarke*, 18 Ves. 254.
(*o*) *Worrall* v. *Harford*, 8 Ves. 8; *Rehden* v. *Wesley*, 29 Beav. 213.
(*p*) *Wilkins* v. *Hogg*, 3 Giff. 116.

and a more liberal reimbursement clause is therefore often expedient, and is not unusually inserted in trust instruments (whether deeds or wills). And here note, that the reimbursement of the trustee is in general out of residue; but it may be out of any specific portion of the estate, or even out of income (*q*); and the income may for this purpose (in a proper case) be impounded (*r*),—the trustee's right in this respect being paramount to the rights of all the *cestuis que trustent*.

Special indemnity clause,—necessity for.

The two primary duties of a trustee are, first, to carry out the directions of the person creating the trust; and, secondly, to place the trust property in a state of security. Therefore, if a trust fund be an equitable interest, of which the legal estate cannot for the moment be got in, it is the trustee's duty to lose no time in giving notice of his title to the person in whom the legal interest is vested; for, otherwise, he who created the trust might subsequently encumber adversely the settled interest in favour of a purchaser without notice, who, by first giving notice to the legal holder, might gain a priority (*s*). Also, if the trust fund be a chose in action, as a debt which may be reduced into possession, it is the trustee's duty to be active in getting it in, and any unnecessary delay in this respect will be at his own personal risk (*t*). Further, an executor or trustee is not to allow the assets of the testator to remain outstanding upon *personal* security, though the debt was a loan by the testator himself on what he deemed an eligible investment (*u*); and a trustee is not justified in lending on personal

Duties of trustees towards securing the trust property.

(1.) Reduction into possession or quasi-possession.

(2.) Realisation of moneys outstanding on personal security.

(*q*) *Scott* v. *Milne*, 25 Ch. Div. 710.
(*r*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595.
(*s*) *Jacob* v. *Lucas*, 1 Beav. 436; and see pp. 89 92, supra.
(*t*) *Grove* v. *Price*, 26 Beav. 103.
(*u*) *Paddon* v. *Richardson*, 7 De G. M. & G. 56.

security, however good (*v*), although he may continue such loans, and also make new loans on personal security, if expressly empowered to do so by the instrument creating the trust (*x*), exercising his discretion in an honest and reasonable way (*y*).

(3.) The investment of trust-funds.

As regards the range of investments for trust funds, "The Trustee Act, 1893" (56 & 57 Vict. c. 53), repealing but re-enacting "The Trustee Investment Act, 1889" (52 & 53 Vict. c. 32), now authorises (by sect. 1) trustees to invest trust funds in or upon (among the other securities to be presently mentioned) any of the securities in or upon which "cash under the control of the court" may be invested (*z*); and the Act applies to trusts whether created before or after the 22nd September 1893.

(*a.*) Investments authorised before Trust Investment Act, 1889.

Prior to the Trust Investment Act, 1889, and independently of any power given by statute, trustees, executors, or administrators might lawfully invest on mortgages of real estate in England, or in Government securities, or in Consolidated Bank annuities

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(*v*) *Geaves* v. *Strahan*, 8 De G. M. & G. 291.

(*x*) *Paddon* v. *Richardson*, supra.

(*y*) *Tucker* v. *Tucker*, 1894, 1 Ch. 724; 3 Ch. 429; *Smith* v. *Thompson*, 1896, 1 Ch. 71; and *Barker* v. *Ivimey*, 1897, 1 Ch. 536.

(*z*) By Order xxii. Rule 17 (1888), cash under the control of, or subject to the order of, the court may be invested in the following stocks, funds, or securities, viz.: 2¾ per cent. consols (to be called after the 5th April 1903, 2½ per cent. consols); 3 per cent. consols; reduced 3 per cents; £2, 15*s.* per cent. annuities; £2, 10*s.* per cent. annuities; local loans stock under the Local Loans Act, 1887; Exchequer Bills; Bank stock; India 3½ per cent. stock; India 3 per cent. stock; Indian guaranteed railway stocks or shares, not being redeemable within fifteen years from the date of investment; stocks of Colonial Governments guaranteed by the Imperial Government; mortgages of freehold and copyhold estates respectively in England and Wales; Metropolitan consolidated stock, £3, 10*s.* per cent.; 3 per cent. Metropolitan consolidated stock; debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland, having for ten years next before the date of investment paid a dividend on ordinary stock or shares; and nominal debentures, or nominal debenture stock under the Local Loans Act, 1875, not being redeemable within fifteen years from the date of investment.

(*a*); and by Lord St. Leonard's Act, 22 & 23 Vict. c. 35, s. 32, repealed by the Act of 1889, they were authorised to invest on real securities in any part of the United Kingdom, or in the stock of the Bank of England or Ireland, or in East India stock (*b*); and by Lord Cranworth's Act (23 & 24 Vict. c. 145), repealed by the Conveyancing Act, 1881, and Settled Land Act, 1882, they were enabled to invest in any of the parliamentary stocks or public funds, or in Government securities; and by the 30 & 31 Vict. c. 132, repealed by the Act of 1889, they were enabled to invest in any securities the interest of which was guaranteed by Parliament. Also, by the Debenture Stock Act, 1871 (*c*), trustees, having power to invest in the mortgages or bonds of any company, were able to invest in the debenture stock of any such company; and by the Metropolitan Board of Works (Loans) Act, 1871 (*d*), repealed by the Act of 1889, they were enabled to invest in the Consolidated stock of the Metropolitan Board (now the London County Council); and by the Local Loans Act, 1875 (*e*), s. 27, if authorised to invest in the debentures or debenture stock of any railway company or of any other company, they were enabled to invest in the nominal debentures or nominal debenture stock (*f*) issued under that Act by any local authority; and under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, capital trust money not required for the specific purposes prescribed by the Act might be invested in all the like securities. Also under the National Debt (Conversion of Stock) Act, 1884 (*g*), Three per cent. Consolidated

(*a*) *Baud* v. *Fardell*, 7 De G. M. & G. 628.
(*b*) *In re Wedderburn's Trusts*, 9 Ch. Div. 112.
(*c*) 34 & 35 Vict. c. 27.
(*d*) 34 & 35 Vict. c. 47.
(*e*) 38 & 39 Vict. c. 83.
(*f*) Ibid., s. 5.
(*g*) 47 & 48 Vict. c. 23.

Bank annuities might be converted into or exchanged for two and three-quarter per cent. like annuities, or two and a half per cent. like annuities; and under the National Debt (Conversion) Acts, 1888 (*h*), any power in trustees to invest in Consolidated or Reduced or New three per cent. stock was made to extend to authorising them to invest in the New Stock created by that Act (sect. 19); and trustees holding any of the stocks thereby converted were also enabled to sell such stocks, and to invest the sale proceeds in any of the securities which for the time being were authorised for the investment of cash under the control of the court, and that notwithstanding anything to the contrary contained in the deed or will creating the trust (sect. 27).

(*b.*) Investments under Trustee Act, 1893.

And now under the express provisions of the Trustee Act, 1893, which is in large measure a consolidating Act, trustees,—unless expressly forbidden by the instrument (if any) creating the trust, or (*semble*) unless their investments are controlled by some special Act, as the investments of building societies are (*i*),—may, if they have power to invest at all (*k*), invest the trust funds in any of the following investments (besides those already specified for "cash under the control of the court"), that is to say: Parliamentary stocks or public funds, or Government securities of the United Kingdom; real securities in Great Britain or Ireland; stock of the Bank of England or of the Bank of Ireland; India three and a half per cent. stock, and India three per cent. stock, or any future issues of such stock; securities the interest of which is guaranteed by Parliament; Consolidated stock of the Metropolitan Board of

(*h*) 51 Vict. c. 2; 52 Vict. cc. 4, 6.

(*i*) *In re National Permanent Mutual Benefit Building Society*, 43 Ch. Div. 431; 57 & 58 Vict. c. 47, s. 17.

(*k*) *In re Manchester Royal Infirmary*, 43 Ch. Div. 420.

Works, or of the London County Council; debenture stock of the Receiver for the Metropolitan Police District; debenture or rent-charge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament (*l*), and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock; stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity, or for a term of not less than two hundred years, at a fixed rental to any such railway company as is lastly before mentioned; debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India; debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per annum on its ordinary stock; and nominal or inscribed stock lawfully issued by any municipal borough, having according to the returns of the last census prior to the date of investment a population exceeding fifty thousand, or lawfully issued by any County Council, or lawfully issued by any Commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand,—besides certain other stocks of railway companies in India guaranteed by the Secretary of State in Council of India, and besides certain

(*l*) *Elve* v. *Boyton*, 1891, 1 Ch. 501.

"B." annuities referred to in the Act, but as regards these latter, subject to numerous conditions and restrictions. Also as regards any investments of the kind specified in the Act,—whether made under the Act or before the Act,—the trustees may "*vary*" the same for other like investments (*m*); and by the Trustee Act, 1894 (*n*), s. 4, a trustee may "*continue*" any of these authorised investments, notwithstanding that, since the investment of the trust funds therein, they may have ceased to be an authorised investment (*o*).

Variation of investments.

Trustee Act, 1894,—continuance of investments.

"Real securities,"—meaning of this phrase.

It need scarcely be pointed out, that a power to invest in "*real securities*," whether the power arises under the settlement or by virtue of the provisions of any of the Acts above mentioned, does not by itself authorise the trustees to invest the trust fund in the "*purchase*" of lands,—*scil.* because that is not in fact an investment properly so called, but is an alienation out and out of the trust property, and for such an alienation express power is required. And it may further be observed, that "real securities" comprise leaseholds for a long term of years at a peppercorn rent, and which are not subject to onerous covenants, but not any other leaseholds or terms of years (*p*),—the leaseholds prescribed by the Trustee Act, 1893, s. 5, being leaseholds having not less than two hundred years unexpired, and which are not subject to any rent greater than a shilling a year. It was also generally supposed, until recently, that real securities comprised in general (besides other securities of a more manifest real character) local rates, harbour duties, tolls, and the like, levied *directly* by local or other public authorities (*q*); but very

(*m*) *Lopes* v. *Hume Dick*, 1892, A. C. 112; *Owthwaite* v. *Taylor*, 1891, 3 Ch. 494.
(*n*) 57 & 58 Vict. c. 10.
(*o*) *In re Chapman, Cocks* v. *Chapman*, 1896, 1 Ch. 323; 2 Ch. 763.
(*p*) *In re Chennell, Jones* v. *Chennell*, 8 Ch. Div. 492.
(*q*) *Finch* v. *Squire*, 10 Ves. 41.

considerable doubt was latterly thrown on this opinion (*r*); the opinion has, however, been in great measure now restored (*s*), notwithstanding the strong tendency of the court, in the case of gifts to *charities*, to hold that such securities are not interests in land (*t*); and the Trustee Act, 1893, s. 5, now expressly authorises improvement charges made under the Improvement of Land Act, 1864 (or mortgages of such charges) as legitimate investments for trust funds.

(4.) Conversion of terminable and reversionary property comprised in residuary devise or bequest.

As a general rule, where a testator subjects the *residue* of his personal estate to a series of limitations directly or by way of trust, without any particular directions as to the investment or mode of enjoyment, then, in the absence of indications of a contrary intention, such part of the residue as may be wearing out (such as leaseholds) must be converted, and put in such a state of investment as to be securely available for all persons interested in the residue; and if the residue comprises property of a reversionary nature, that also must be converted,—the former of these two rules protecting the remainderman, the latter of them protecting the tenant for life (*u*). But this duty to convert does not arise where, *e.g.*, there is a discretionary power in the trustees to convert a reversionary interest when and as they shall deem expedient, and the whole income is given to one for life, with remainder to another (*v*); nor where the leaseholds are bequeathed specifically and

(*r*) *Martin* v. *Lacon*, 33 Ch. Div. 332.
(*s*) *Buckley* v. *Royal Lifeboat Institution*, 43 Ch. Div. 27; *Driver* v. *Broad*, 1893, 1 Q. B. 539; and *In re Crossley, Birrell* v. *Greenough*, 1897, 1 Ch. 928, re-establishing *Attree* v. *Hawe*, 9 Ch. Div. 337.
(*t*) *Bedford* v. *Teal*, 45 Ch. Div. 161; *Wignall* v. *Park*, 1891, 1 Ch. 682; *Elmsley* v. *Mitchell*, 1894, 2 Ch. 88.
(*u*) *Howe* v. *Lord Dartmouth*, 7 Ves. 137; *Porter* v. *Baddeley*, 5 Ch. Div. 542; *Wright* v. *Lambert*, 6 Ch. Div. 649; *Macdonald* v. *Irvine*, 8 Ch. Div. 101; *In re Hubbuck, Hart* v. *Stone*, 1896, 1 Ch. 754.
(*v*) *In re Pitcairn, Brandreth* v. *Colvin*, 1896, 2 Ch. 199.

Enjoyment *in specie*,—excludes the duty to convert.

not by way of residue (*x*); nor where the testator expressly gives the income *in specie*, or authorises the retention of unauthorised investments (*y*); and an enjoyment *in specie* may even be impliedly directed (*z*), *e.g.*, from an enumeration of particulars (*a*), not being a mere expansion of what is comprised in the *residue* (*b*); but the right to enjoy *in specie* will not be readily implied (*c*). Where the duty to convert exists, it is a duty which must in general be fulfilled within a year from the testator's death (*d*).

(5.) Distinguishing between capital and income.

Where the testator has, either in express terms or by necessary implication, excluded the duty of immediate conversion of the residue, in such a case he may either give the whole actual income until conversion to the tenant for life (*e*), or he may not do so; and where the conversion is postponed, and the testator has not in express terms given the whole actual income to the tenant for life, then it appears in questions between the tenant for life and the remainderman,—(1.) That the tenant for life is entitled to the actual income of so much of the residue as is at the testator's death invested on authorised securities (*f*); and (2.) That with regard to the unauthorised securities, he is entitled to the income which would be produced by the authorised investments of these moneys (the authorised investments

(*x*) *In re Beaufoy's Estate*, 1 Sm. & G. 20; *Gamlen* v. *Lyon*, 33 Ch. Div. 523.

(*y*) *Brown* v. *Gellatly*, L. R. 2 Ch. App. 751; *Nixon* v. *Sheldon*, 39 Ch. Div. 50; *Brandreth* v. *Colvin*, supra.

(*z*) *Ward* v. *Thomas*, 1891, 3 Ch. 482.

(*a*) *Vaughan* v. *Buck*, 1 Phil. 75.

(*b*) *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; *Re Tootal's Estate*, 2 Ch. Div. 628.

(*c*) *In re Game, Game* v. *Young*, 1897, 1 Ch. 881.

(*d*) *Grayburn* v. *Clarkson*, L. R. 3 Ch. App. 605; *Sculthorpe* v. *Tipper*, L. R. 13 Eq. 232; *Hiddeigh* v. *Denyssen*, 12 App. Ca. 624; and see *In re Chapman, Cocks* v. *Chapman*, 1896, 2 Ch. 763.

(*e*) *Chancellor* v. *Brown*, 26 Ch. Div. 42.

(*f*) *Brown* v. *Gellatly*, L. R. 2 Ch. App. 751.

being taken to have been made at the end of one year from the testator's death), assuming that the unauthorised securities can be realised within the year (*g*); but if they cannot, then he is entitled to four pounds per cent. (*h*),—or now three pounds per cent. (*i*),—on what is subsequently ascertained to have been the then value of the property. Also, where there are outstanding inconvertible securities, and they eventually fall in,—that is to say, by a process of natural realisation,—the apportionment between capital and income is to be as follows: Ascertain the sum which, put out at interest at 3 per cent. per annum on the day of the testator's death, would, with the accumulations of clear interest at 3 per cent., and with yearly rests, have produced on the day of the securities falling in the amount actually received; treat the sum so ascertained as capital, and treat the residue as income (*k*).

The limit or measure of trustees' liability for non-investment.

When trustees or executors were directed by the will to convert the testator's property, and to invest it in Government *or* real securities, and they neglected to do either, it was for a long time a question, whether (1.) They should be answerable (at the option of the *cestui que trust*) for the principal money with interest, or for the amount of the stock which might have been purchased at the period when the conversion should have been made, with subsequent dividends; or whether (2.) They should be charged with the amount of principal and interest only (without an option to the *cestui que trust* of taking

(*g*) *Kirkman* v. *Booth*, 11 Beav. 279.
(*h*) *Meyer* v. *Simonson*, 5 De G. & Sm. 723.
(*i*) *In re Goodenough*, *Morland* v. *Williams*, 1895, 2 Ch. 537; *Hay* v. *Woolmer*, 1895, 2 Ch. 542.
(*k*) *Beavan* v. *Beavan*, 24 Ch. Div. 649 *n.*; *In re Chesterfield's Trusts*, 24 Ch. Div. 643; *Teague* v. *Fox*, 1893, 1 Ch. 292; *Prowde* v. *Hengler*, ib. 586; *Hope* v. *D'Hedonville*, 1893, 2 Ch. 361; *Morley* v. *Haig*, 1895, 2 Ch. 738; *In re Hubbuck*, *Hart* v. *Stone*, 1896, 1 Ch. 754.

the stock and dividends); and it has now been settled, that the trustee is answerable, in such a case, only for the *principal money and interest*, and that the *cestui que trust* has no option of taking the stock and dividends (*l*).

Mortgages by trustees and executors.

In general, a power in trustees to mortgage the trust property carries with it a power to insert in the mortgage a power of sale (*m*),—although this has been doubted (*n*), and it is better on the whole, in giving trustees power to mortgage, to say that they may mortgage with or without a power of sale to be inserted in the mortgage deed. When the mortgage is settled by the court, a power of sale is sometimes inserted, and sometimes not (*o*); but in general, if inserted, it will be qualified so as not to be exercisable without the leave of the court. As

(*a.*) Personal assets.

regards executors, they may of course sell whatever portion of the assets vests in them *virtute officii*,—for it will be intended (in the absence of fraud), that the sale is for the purpose of paying the testator's debts; and it seems to follow, that in general the executor may also mortgage such assets, with or without a power of sale in the mortgage deed (*p*); but he would not, *semble*, be justified in making any mortgage at all, if the language of the will was such, or the circumstances of the estate were such, as to require an *immediate* absolute sale in the first instance.

(*b.*) Realassets.

And as regards assets which do not vest in the executor *virtute officii*, viz., real estate devised to the executor as such, it appears that the executor may

(*l*) *Robinson* v. *Robinson*, 1 De G. M. & G. 247.

(*m*) *Bridges* v. *Longman*, 24 Beav. 27; *Cook* v. *Dawson*, 29 Beav. 128; *Re Chawner's Will*, L. R. 8 Eq. 569.

(*n*) *Sanders* v. *Richards*, 2 Coll. 568, now considered to have been overruled in *Russell* v. *Plaice*, 18 Beav. 21.

(*o*) *Selby* v. *Cooling*, 23 Beav. 418; *Drake* v. *Whitmore*, 19 L. T. 243.

(*p*) *M'Leod* v. *Drummond*, 17 Ves. 154.

validly create a mortgage thereof (*q*); but when the will contains a trust for sale (denoting an intention that the estate shall be converted out and out), the executor may not make an *interim* mortgage of that estate (*r*); and the cases which appear to have decided to the contrary (*s*), were all cases in which such trust for sale and intention of absolute conversion were absent.

Executors carrying on trade under direction in will,—their right of indemnity, and subrogated right of their creditors.

Executors have no authority in law to carry on the trade of their testator, using his estate therein; but they may do so, if the will contains a direction that they shall do so (*t*); the direction must, however, be a very clear one (*u*), but may be either express or implied (*v*). When a testator gives such a direction, he may limit the direction to a specific part of his estate, which for this purpose he severs from his general assets; and when the direction is implied, the measure of the assets would, *semble*, be the whole estate, if and so far as available (*x*). And where a trader has by his will expressly or impliedly directed his executor or trustee to carry on his trade, and to employ a specific or limited portion of the trust estate for the purpose, the general rule is,—that, though the executor or trustee is personally liable (*scil.* on contract) for debts incurred by him in carrying on the trade pursuant to the will, yet such executor or trustee has the right to resort for his indemnity to the specific or limited assets so directed to be employed,—and consequently the

(*q*) *Cosser* v. *Cartwright*. L. R. 7 H. L. 731.
(*r*) *Haldenby* v. *Spofforth*, 1 Beav. 390; *Stroughill* v. *Anstey*, 1 De M. & G. 635; *Thorne* v. *Thorne*, 1893, 3 Ch. 196.
(*s*) *Ball* v. *Harris*, 4 My. & Cr. 264; *Mills* v. *Banks*, 3 P. Wms. 1.
(*t*) Williams on Executors, p. 1798.
(*u*) *Kirkman* v. *Booth*, 11 Beav. 273; *Mills* v. *Mills*, 7 Sim. 501; *Arnold* v. *Smith*, 1896, 1 Ch. 171.
(*v*) *In re Cameron, Nixon* v. *Cameron*, 26 Ch. Div. 19; *In re Crowther, Midgeley* v. *Crowther*, 1895, 2 Ch. 56.
(*x*) *In re Crowther, Midgeley* v. *Crowther*, supra.

creditors of the trade are entitled, as a general rule, to stand in the place of the executor or trustee, and by means of this right of *subrogation* to obtain payment of their debts out of such limited assets (*y*), subject of course to the prior indemnity of the executors against all trade liabilities (*z*). But the general rule does not apply when the executor or trustee is in default to the specific trust estate devoted to the trade; and in such case, the defaulting executor or trustee, not being himself entitled to an indemnity, *except upon the terms of making good his default*, the creditors are in no better position,—and are therefore not entitled to have their debts paid out of the specific assets unless they first make good the default (*a*). Jessell, M.R., has stated this right of the creditors to be a mere corollary to the right of following trust funds, and to have been admitted by the courts of equity to prevent the injustice of the *cestuis que trustent* "walking off with the assets" which have been earned by the use of the creditor's property (*b*). But where the executor or trustee has no right to carry on the business, of course he has no such right of indemnity, nor have the creditors any such right of subrogation (*c*),—no specific part of the assets having been either expressly or impliedly appropriated by the testator for the purposes of the business. It appears also, that, a receiver and manager appointed by the court in the winding up of a company and in a debenture holder's action, seeing that he contracts a like personal liability, is

Limit to the right.

(*y*) *Ex parte Garland*, 10 Ves. 120; *Ex parte Edwards*, 4 D. F. & J. 488.

(*z*) *Dowse* v. *Gorton*, 1891, App. Ca. 190; *Kidd* v. *Kidd*, W. N. 1894, p. 73; *Brooke* v. *Brooke*, 1894, 2 Ch. 600.

(*a*) *Shearman* v. *Robinson*, 15 Ch. Div. 548; *Evans* v. *Evans*, 34 Ch. Div. 597.

(*b*) *Shearman* v. *Robinson*, supra.

(*c*) *Strickland* v. *Symonds*, 26 Ch. Div. 245.

entitled to the like indemnity out of the estate (*d*); *secus*, a receiver and manager not so appointed, for he incurs no personal liability, being merely an agent for the principal who appoints him (*e*).

How varying profits and losses are to be dealt with,—in such a case.

When the executors carry on a trade under a direction in that behalf contained in the will, for the benefit of the successive tenants for life and remaindermen entitled under the will, if there is an alternation of profit and loss during the successive tenancies, the loss may or may not, according to the circumstances, have to be made good out of the subsequent profits, or recouped even out of the antecedent profits, in protection or restoration of the capital. The will ought, of course, to provide expressly how such losses are to be borne; and in the absence of such a provision, losses, so far as they are ordinary losses (*e.g.*, bad debts), would, as a general rule, be made good out of the subsequent profits (*f*); but so far as they are not of that character, they would probably be written off against and in reduction of capital (*g*).

Remedies of *cestui que trust* in event of a breach of trust.

It remains to consider the remedies of a *cestui que trust* for a breach of trust. Now, there is, of course, the *personal* liability of the trustees, which is a joint and several liability; and (in certain cases) even the solicitors for the trustees are implicated in this liability, and may be substantively liable to the *cestuis que trustent*, and even (collaterally) to the trustees themselves (*h*). But we propose, for the present, to

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(*d*) *Burt & Co.* v. *Bull*, 1895, 1 Q. B. 276; *Strapp* v. *Bull & Co.*, 1895, 2 Ch. 1.
(*e*) *Owen* v. *Cronk*, 1895, 1 Q. B. 265.
(*f*) *Upton* v. *Brown*, 26 Ch. Div. 588.
(*g*) *Gow* v. *Foster*, 26 Ch. Div. 672; *Frowde* v. *Hengler*, 1893, 1 Ch. 586.
(*h*) *Blyth* v. *Fladgate*, 1891, 1 Ch. 337; *Mara* v. *Brown*, 1896, 1 Ch. 199.

consider rather what may be called the *real* remedies as distinguished from the *personal* remedies of the *cestuis que trustent*, and in the first place to inquire into whose hands the trust estate may be followed. And *firstly*, if the alienee of the trust estate is a volunteer, then the estate may be followed into his hands whether he had notice of the trust or not (*i*); and if the alienee is a purchaser of the estate, even for valuable consideration, but with notice, the same rule applies (*k*). But this remedy is not available unless the funds are trust funds; *e.g.*, it is not available in the case of mere *debts* (*l*); and the remedy is not usually available against bankers, in respect of trust funds transferred from the trust account of a customer to the private account of the customer (*m*). Also, even in the case of trust funds, if the alienee is a purchaser for valuable consideration, having the legal estate, and without notice, his title, even in equity, cannot be impeached, and he takes the land freed from the trust (*n*); and if a trustee who has been guilty of a breach of trust makes good the breach out of his own property, although it should be immediately prior to his own becoming a bankrupt, the trust estate in general is entitled to retain the benefit so acquired, and the general creditors of the trustee cannot set aside the transaction as a fraudulent preference (*o*). Also, if the purchaser or mortgagee has in the first instance taken only an equitable conveyance, and *afterwards*

(1.) Right of following the trust estate.

Purchaser cannot protect himself by getting in the

(*i*) *Spurgeon* v. *Collier*, 1 Eden, 55.

(*k*) *Wigg* v. *Wigg*, 1 Atk. 382; *Daniels* v. *Davidson*, 16 Ves. 249; *Coburn* v. *Collins*, 35 Ch. Div. 373.

(*l*) *Lister* v. *Stubbs*, 45 Ch. Div. 1.

(*m*) *Gray* v. *Johnston*, L. R. 3 H. L. 1; *Coleman* v. *Bucks Bank*, 1897, 2 Ch. 243.

(*n*) *Pilcher* v. *Rawlins*, L. R. 7 Ch. App. 259; *Fraser* v. *Murdoch*, 6 App. Ca. 855.

(*o*) *Ex parte Stubbins, in re Wilkinson*, 17 Ch. Div. 58; *Ex parte Doyle, in re Goldsmid*, 18 Q. B. D. 295; *Ex parte Ball*, 35 W. R. 264; *New's Trustee* v. *Hunting*, 1897, 1 Q. B. 607; 2 Q. B. 19.

discovers the trust, and *then* obtains a conveyance of the legal estate, although he cannot protect himself by taking shelter under such legal estate if the subsequent conveyance thereof to him is merely voluntary (*p*), still he may do so if the subsequent conveyance of the legal estate is not purely voluntary (*q*),—as he may also do if he can get such legal estate into himself merely by his own lawful acts (*r*). And here it may be convenient to observe, that the debt created by a breach of trust is only a simple contract debt; and that the trustee's acceptance by deed of the trust will not make it a specialty debt,—unless there be (which there never is) a covenant, express or implied, for payment of the trust fund (*s*); consequently, the remedy for such breach will now, in general, be barred under sect. 8 of the Trustee Act, 1888, after six years from the date of the breach (*t*); but (as we have seen) when the breach of trust is a fraudulent one, the remedy for it will not be barred under that Act; nor will the fraudulent trustee be released therefrom even by obtaining his discharge under the Bankruptcy Act, 1883, s. 30 (*u*).

legal estate by *voluntary* conveyance from a trustee.

Breach of trust creates a simple contract debt.

Secondly, If the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may also follow the property that has been substituted in its place, so long as the substituted property can be traced (*v*). Now, money, notes, and bills may be followed by the rightful owner, unless where they

(2.) Right of following the property into which the trust fund has been converted.

When money, notes, &c., may be followed.

(*p*) *Bates* v. *Johnson*, Johns. 304; *Carter* v. *Carter*, 3 K. & J. 617; *Sharples* v. *Adams*, 32 Beav. 213; *Shropshire Union Railway* v. *Reg.*, L. R. 7 H. L. 496; *Union Bank* v. *Kent*, 39 Ch. Div. 238.

(*q*) *Taylor* v. *Russell*, 1891, 1 Ch. 8; 1892, A. C. 244.

(*r*) *Dodds* v. *Hills*, 2 H. & M. 424; *Powell* v. *London and Provincial Bank*, 1893, 1 Ch. 610.

(*s*) *Isaacson* v. *Harwood*, L. R. 3 Ch. App. 225; *Holland* v. *Holland*, L. R. 4 Ch. App. 449; *Butler* v. *Butler*, 7 Ch. Div. 116.

(*t*) *Somerset* v. *Earl Poulett*, 1894, 1 Ch. 231.

(*u*) *Munns* v. *Burn*, 35 Ch. Div. 266.

(*v*) *Frith* v. *Cartland*, 2 Hem. & M. 417; *Earnest* v. *Croysdill*, 2 De G. F. & J. 175; *Hopper* v. *Conyers*, L. R. 2 Eq. 549.

have passed or been negotiated without notice of the trust (*x*); and the only difference between money on the one hand and notes and bills on the other is, that money is not ear-marked, and therefore cannot (except under peculiar circumstances) be traced; but notes and bills, from carrying a number or a date, can in general be identified by the owner without difficulty (*y*). The difficulty of identification does not of course arise where the trust property is still in the hands of the trustee; because if the trustee mix the trust money with his own money, the *cestui que trust* will be entitled to every portion of the blended property which the trustee cannot prove to be his own (*z*). Also, if the trust estate has been invested (under an express power in that behalf) in the purchase of land, and the trustee adds money of his own in order to make up the full purchase-moneys, or raises such extra money by an "attempted mortgage" of the purchased lands, he and also his mortgagee have a right to be indemnified out of the purchased property the extra money so paid or raised, but this right is subject to the prior right of securing the full amount of the trust money; and subject to such prior right and to the right of indemnity, the purchase enures wholly for the benefit of the trust (*a*).

(3.) The beneficial estate (if equitable) of the trustee, and the interest of the *cestuiquetrust*, guilty of or

And *thirdly*, if a trustee who has been guilty of a breach of trust has any beneficial interest under the trust instrument, and such interest is equitable, the court will not allow him to receive any part of the trust fund in which he is equitably interested until

(*x*) *Thompson* v. *Clydesdale Bank*, 1893, A. C. 282; *In re Hallett & Co.*, 1894, 2 Q. B. 237.

(*y*) *Birt* v. *Burt*, 11 Ch. Div. 773 *n.*; *Harris* v. *Truman*, 7 Q. B. D. 340; *The New Zealand and Australian Land Co.* v. *Watson*, ib. 374.

(*z*) *Lupton* v. *White*, 15 Ves. 432; *In re Hallett*, 13 Ch. Div. 696; *Hancock* v. *Smith*, 41 Ch. Div. 456.

(*a*) *Worcester Bank* v. *Blick*, 22 Ch. Div. 255.

participating in a breach of trust, may be "impounded."

he has made good his default as a trustee; and this is called "impounding his beneficial interest" (*b*); but the court cannot in general apply this remedy, if or so far as the trustee's beneficial interest under the deed or will is legal and not equitable (*c*),—for "the court" (it has been said) "has no power to lay "hold of that legal interest or to assert anything in "the nature of a lien or charge upon it in order to "recoup the breach of trust." The beneficial interest of any *cestui que trust* who has participated in the breach of trust may in like manner be impounded to make good the breach,—that is to say, if such interest is equitable, as it usually is, and not legal; and this is now so, even in the case of a married woman restrained from anticipation (*d*); and upon the like principle, legatees of residue who are indebted to the estate must pay up these debts before they are permitted to share in the residue (*e*),—and that is so, even where the debts in question are statute-barred (*f*); and even a specific legatee is subject to this rule (*g*). Moreover, the equitable right of the trustee to impound the beneficial interest has priority over the right of a mortgagee of the equitable interest of the beneficiary (*h*); and also, *semble*, over the right of the trustee in bankruptcy of the beneficiary (*i*),—*scil.* as regards a *debt*, and not a mere *liability*, of the beneficiary (*k*).

If a trustee is guilty of any undue delay in

(*b*) *Woodyat* v. *Gresley*, 8 Sim. 180; *Waring* v. *Coventry*, 2 My. & K. 406; *Dixon* v. *Brown*, 32 Ch. Div. 597; *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.

(*c*) *Eybert* v. *Rutter*, 21 Beav. 560; *Fox* v. *Buckley*, 3 Ch. Div. 508.

(*d*) 56 & 57 Vict. c. 53, s. 45; 56 & 57 Vict. c. 63, s. 2; *Griffiths* v. *Hughes*, 1892, 3 Ch. 105; *Holt* v. *Holt*, 1897, 2 Ch. 525.

(*e*) *Cherry* v. *Boultbee*, 4 My. & Cr. 442; *Courtenay* v. *Williams*, 3 Ha. 539.

(*f*) *Akerman* v. *Akerman*, 1891, 3 Ch. 212.

(*g*) *Taylor* v. *Wade*, 1894, 1 Ch. 671.

(*h*) *Bolton* v. *Curre*, 1895, 1 Ch. 544.

(*i*) *In re Watson*, *Turner* v. *Watson*, 1896, 1 Ch. 925.

(*k*) *In re Binns*, *Lee* v. *Binns*, 1896, 2 Ch. 584.

Interest payable by trustees on a breach of trust.

When interest at more than four per cent. charged.

investing or in transferring the fund, he will be answerable to the *cestui que trust* for interest during the period of his laches (*l*), the rate being usually four (and not three) (*m*) per cent.; but the court will charge more than four per cent. upon balances in the hands of a trustee in the following cases (*n*), that is to say: (1.) Where he ought to have received more, as where he has improperly called in a mortgage carrying five per cent.; (2.) Where he has actually received more than four per cent. (*o*); (3.) Where he must be presumed to have received more,—as if he has traded with the money, in which case the *cestui que trust* has it at his option to take the profits actually obtained (*p*); and (4.) Where the trustee is guilty of direct breaches of trust or gross misconduct (*q*).

Bar of remedy: (1.) Acquiescence in breach of trust.

(2.) Concurrence in breach of trust.

The remedy of a *cestui que trust* against his trustee may of course be barred by the *cestui que trust's* acquiescence, or by his executing a release (*r*); but there can be no acquiescence without knowledge (*s*); nor would a release executed without full knowledge be binding (*t*). The concurrence of the *cestui que trust* in the breach of trust is also a full discharge to the trustee from all liability therefor to such concurring *cestui que trust*, and to persons subsequently claiming under him (*u*); nevertheless, persons under

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(*l*) *Stafford* v. *Fiddon*, 23 Beav. 386.
(*m*) *Owen* v. *Richmond*, W. N. 1895, p. 29.
(*n*) *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 851; *Powell* v. *Hulkes*, 33 Ch. Div. 552.
(*o*) *Emmet* v. *Emmet*, 17 Ch. Div. 142.
(*p*) *Jones* v. *Foxall*, 15 Beav. 392.
(*q*) *Townend* v. *Townend*, 1 Giff. 212.
(*r*) *Burrows* v. *Walls*, 5 De G. M. & G. 233; *London Financial Association* v. *Kelk*, 26 Ch. Div. 107.
(*s*) *Life Association of Scotland* v. *Siddal*, 3 D. F. & J. 73; *Jacques Cartier* v. *Montreal City Bank*, 13 App. Ca. 111.
(*t*) *Walker* v. *Symmonds*, 3 Swanst. 1.
(*u*) *Evans* v. *Benyon*, 37 Ch. Div. 329; *Bridger* v. *Deane*, 42 Ch. Div. 9.

disability, as married women (*v*), or infants (*x*), who have concurred in a breach of trust, may successfully proceed against the trustee, except where they have by their own active fraud induced the trustee to deviate from the proper performance of his duties (*y*); and even in that excepted case, married women have at times proceeded successfully against the trustee whom they have induced to deviate from his duties, —*e.g.*, where the trust was for the separate use of the married woman without power of anticipation (*z*); and although latterly some of the judges endeavoured to hold that the restraint on anticipation was intended for the protection of a married woman outside the court, and was not intended to enable her to do a wrong in the court (*a*),—so that the court might, *e.g.*, have given the trustees liberty to retain their costs against a married woman out of her income notwithstanding the restraint on anticipation,—these endeavours were not successful (*b*); but by the Married Women's Property Act, 1893 (*c*), s. 2, a married woman's separate estate, although restrained, may now be made liable for such costs,—*scil.* for the costs of litigation *instituted* by her, and therefore not for her costs of defence (*d*), nor for her costs of appealing in a matter not instituted by her (*e*); but her counter-claim is deemed a proceeding instituted

Married women,— effect of their concurrence.

(*v*) *Parkes* v. *White*, 11 Ves. 221.
(*x*) *Wilkinson* v. *Parry*, 4 Russ. 276.
(*y*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595; *Garnes* v. *Applin*, 31 Ch. Div. 147.
(*z*) *In re Lush's Trusts*, L. R. 4 Ch. App. 591; *Stanley* v. *Stanley*, 7 Ch. Div. 589; *Bateman* v. *Faber*, 1897, 2 Ch. 243; W. N. 1897, p. 167.
(*a*) *In re Andrews*, 30 Ch. Div. 159; *Ellis* v. *Johnston*, 31 Ch. Div. 532.
(*b*) *Hood-Barrs* v. *Cathcart*, 1894, 2 Q. B. 559.
(*c*) 56 & 57 Vict. c. 63; *Dixon* v. *Smith*, 35 Ch. Div. 4; *In re Lumley*, 1894, 3 Ch. 135.
(*d*) *Hood-Barrs* v. *Cathcart*, 1894, 3 Ch. 376; *Moran* v. *Place*, 1896, P. 214.
(*e*) *Hood-Barrs* v. *Cathcart*, 1894, 3 Ch. 376; *Hood-Barrs* v. *Heriot*, 1897, A. C. 177.

by her (*f*). Moreover, the Trustee Act, 1893 (*g*), s. 45, has also now provided that when the breach of trust has been committed at the "instigation or request," or with the written consent of the married woman, the court may order her beneficial estate or interest to be impounded by way of indemnity to the trustee,—this provision being a continuance of the like provision contained in the Trustee Act, 1888, s. 6. A *cestui que trust* may also, by subsequent confirmation, prevent himself from taking proceedings against trustees for a breach of trust (*h*); but the purported confirmation will not be binding on him unless he had a full knowledge of the facts of the case (*i*); and the mere connivance of the *cestui que trust* at a breach of trust is not necessarily a confirmation of the breach (*k*).

(3.) Confirmation.

Settlement of accounts.

A trustee is entitled to have his accounts examined and to have a settlement of them; and if the *cestui que trust* (being *sui juris*) is satisfied that nothing more is due to him, he ought to close the account, and give an acknowledgment equivalent to a release; and if, on the other hand, he is dissatisfied with the accounts, he ought to have the accounts taken,—for he is not at liberty to keep a Chancery suit hanging for an indefinite time over the head of the trustee; and as a rule, settled accounts are not opened (*i.e.*, taken over again throughout or *in toto*); but in an action for an account, or which involves an account, when the plea of settled accounts is put forward in defence (*l*), the practice of the court is, upon proof

Surcharging and falsifying.

(*f*) *Hood-Barrs* v. *Cathcart*, 1895, 1 Q. B. 873.
(*g*) 56 & 57 Vict. c. 53; *Griffith* v. *Hughes*, 1892, 3 Ch. 106.
(*h*) *French* v. *Hobson*, 9 Ves. 103; *Flitcroft's Case*, 21 Ch. Div. 519; *Kelk's Case*, 26 Ch. Div. 107.
(*i*) *Lloyd* v. *Attwood*, 3 De G. & Jo. 650; *Burrows* v. *Walls*, 5 De G. M. & G. 254.
(*k*) *Walker* v. *Symmonds*, 3 Swanst. 463.
(*l*) *Holgate* v. *Shutt*, 28 Ch. Div. 111; *Hunter* v. *Dowling*, 1893, 1 Ch. 391.

of one clear omission or insertion that is erroneous, to give liberty to the plaintiff to *surcharge* the omission and to falsify the *insertion*, together with all other erroneous omissions and insertions; and this liberty is commonly called "liberty to surcharge and falsify" (*m*). And, apparently, the error or errors need not be of a fraudulent character (*n*); but it is sufficient, in the general case, that they are errors of a substantial amount (*o*); but if it is the agent himself who rendered the account that seeks to open it, or to surcharge and falsify it, then he must show fraud therein (*p*).

Trustee Act, 1893,—trustee's release under,—on appointment of new trustees.

Under the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 25–41, continuing the like provisions contained in the Trustee Act, 1850 (*q*), and the Trustee Extension Act, 1852 (*r*), the Court of Chancery or Chancery Division may appoint a new trustee or new trustees, either in substitution for, or in addition to, any existing trustee or trustees, whenever it is expedient to make such appointment, and it is inexpedient, difficult, or impracticable to do so without the aid of the court; but no such appointment by the court is to operate further or otherwise as a discharge to any former or continuing trustee than the like appointment under an express power in the instrument of trust would have done (*s*). The occasions for having recourse to the Trustee Acts, 1850 and 1852, were, however, latterly very much diminished by and in consequence of the Conveyancing and Law of Property Act, 1881 (*t*),

(*m*) *Heighington* v. *Grant*, 1 Phil. 601 ; *Blagrave* v. *Routh*, 2 K. & J. 509, 522.
(*n*) *Williamson* v. *Barbour*, 9 Ch. Div. 529.
(*o*) *Gandy* v. *Macaulay*, 31 Ch. Div. 1.
(*p*) *Davies* v. *Davies*, 2 Keen, 534; *Lambert* v. *Still*, 1894, 1 Ch. 73; *Eyre* v. *Wynn-Mackenzie*, ib. 218.
(*q*) 13 & 14 Vict. c. 60.
(*r*) 15 & 16 Vict. c. 55.
(*s*) *Barton* v. *Irwin*, W. N. 1895, p. 23.
(*t*) 44 & 45 Vict. c. 41.

ss. 31–34, which provided (in effect) for the appointment of new trustees by the person in that behalf referred to in the Act, and for the vesting of the trust property in them jointly with any of the old (and continuing) trustees, the appointor merely making a declaration that the property should so vest and the new appointment operating in general to release the retiring trustee or trustees; and these provisions of the Act of 1881 were retrospective; and under the Conveyancing and Law of Property Act, 1882 (*u*), s. 5, as amended by the Conveyancing Act, 1892 (*v*), s. 6, on the appointment of new trustees, separate sets of trustees might be appointed for separate properties held upon separate or distinct trusts (*x*); and all these provisions as well of the Conveyancing Act, 1881, as also of the Conveyancing Acts, 1882 and 1892, have been nominally repealed, but are in substance continued, by the Trustee Act, 1893, ss. 10–12 (*y*). And apart altogether from legislation, the Court of Chancery always had (and the Chancery Division still has) an inherent jurisdiction to remove old trustees, and to appoint new ones in their places; and it assumes and exercises this jurisdiction where the interests of the beneficiaries appear to require it, and even in cases where no personal fault is attributable to the old trustees (*z*),—the interests of the trust being the matter of supreme regard with the court, in the case of the removal (or suspension) of trustees, whether ordinary trustees or judicial trustees (*a*); and if a trustee becomes bankrupt, that is a ground

Provisions of the Conveyancing Acts, 1881, 1882, and 1892.

Removal of trustees generally.

(*u*) 45 & 46 Vict. c. 39.
(*v*) 55 & 56 Vict. c. 13.
(*x*) *Saville* v. *Couper*, 36 Ch. Div. 520; *In re Parker's Trusts*, 1894, 1 Ch. 707.
(*y*) *Wheeler* v. *De Rochow*, 1896, 1 Ch. 315.
(*z*) *Letterstedt* v. *Broers*, 9 App. Ca. 371; *In re Moss's Trusts*, 37 Ch. Div. 518.
(*a*) Judicial Trustees' Rules, 1897, rr. 20, 21.

for his removal by the court (*b*),—but it does not follow that the court will, in fact, remove a trustee on that ground, unless where the security of the estate may appear to require his removal (*c*); and the like rule applies, *semble*, to an executor (*d*).

Trustee Act, 1893,—trustee's release under,—on payment or transfer into court.

Under the Trustee Act, 1893, s. 42, continuing the like provision contained in the Trustee Relief Acts, 1847, 1849 (*e*), trustees and executors, or the major part of them, may, on affidavit, and without either action or other legal proceeding, pay trust moneys into the Bank of England to the account of the Paymaster-General, Chancery Division, in the matter of the particular trust; and may also transfer or deposit trust stocks and securities into or in the name of such Paymaster-General in such matter; and the court will, when necessary, make an order for such payment or transfer; but the relief afforded by the Act should not be resorted to, unless there is a difficulty in administering or in further administering the trust fund (*f*). The trustees and executors, after such payment or transfer into court, and to the extent thereof, are discharged of all control over the trust, and of all duties as trustees or executors (*g*); and they ought to give the *cestuis que trustent* notice of their having made the payment or transfer (*h*); and thereafter the court takes charge of the trust fund and invests it; and upon petition (or, as the case may be, on summons) by the person

(*b*) 56 & 57 Vict. c. 53, s. 25.
(*c*) *Re Adams' Trusts*, 12 Ch. Div. 634.
(*d*) *Bowen* v. *Phillips*, 1897, 1 Ch. 174.
(*e*) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74; S. C. Funds Rules, 1894, r. 41. The Act 36 Geo. III. c. 52, s. 32 (as to payment into court of a legacy to which an *infant* is entitled) is also now superseded by the Trustee Act, 1893; *Re Hood*, 1896, 1 Ch. 270.
(*f*) Life assurance companies may also, in the like case of difficulty, pay policy moneys into court (59 & 60 Vict. c. 8).
(*g*) *Re Coe*, 4 K. & J. 199.
(*h*) Order liv. *b*, made 5th December 1893; and (for Life Assurance Companies) Order liv. *c*, made 31st October 1896.

or persons claiming to be entitled thereto, the court will, upon notice to the trustees or executors, make an order for the payment out of the fund, and will also on such petition or summons decide any questions of law or of fact incidental to such payment out (*i*),—unless (which rarely happens) the court finds that the difficulties are such as to justify the institution of an action for the determination of the questions involved (*k*).

(*i*) *In re Spurrier's Settlement*, 1897, 1 Ch. 453.
(*k*) *Re Bloye*, 1 Mac. & G. 488; *Lewis* v. *Hillman*, 3 H. L. 607.

CHAPTER VII.

DONATIONES MORTIS CAUSA.

Essentials of—(1.) Must be made in expectation of death.

(2.) On condition to become absolute on donor's death.

(3.) Delivery essential.

It is essential to the validity of a *donatio mortis causâ* that it should be made "in the expectation of death" (*a*); and such a gift being always made on the condition that the gift shall be absolute only in case of the donor's death, it is revocable during his life,—so that, if he recovers from the illness, or resume possession of the gift, it will be defeated (*b*). Also, to the validity of a *donatio mortis causâ* there is *the further and all-essential requisite of delivery;* for, if the intention be expressed in writing, but no delivery takes place, the document, even though signed by the donor, will be ineffectual as a *donatio mortis causâ* (*c*); and although it might possibly be good as a declaration of the trust (*d*), still that is not at all likely, at least in the general case; for what is clearly intended to operate in one way and fails to do so, is not, as a rule, construed by the court to operate in another way—*in favour of a volunteer;* but if there is an effectual delivery (*e*), the gift will be good, although the writing should not be attested at all (*f*), and even although the gift should be unaccompanied with any writing whatever (*g*); and an *ante-*

(*a*) *Duffield* v. *Elwes*, 1 Bligh, N. S. 530.
(*b*) *Ward* v. *Turner*, 1 L. C. 983; *Bunn* v. *Markham*, 7 Taunt. 231; *Edwards* v. *Jones*, 1 My. & Cr. 233.
(*c*) *Rigden* v. *Vallier*, 2 Ves. Sr. 258; *Tapley* v. *Kent*, 1 Rob. 400.
(*d*) *Morgan* v. *Malleson*, L. R. 10 Eq. 475; *Pethybridge* v. *Burrow*, W. N. 1885, p. 83.
(*e*) *Kilpin* v. *Ratley*, 1892, 1 Q. B. 582.
(*f*) *Moore* v. *Darton*, 4 De G. & Sm. 519.
(*g*) *Tate* v. *Gilbert*, 2 Ves. Jr. 120.

cedent delivery to the donee, although in the character of bailee and not of donee, will apparently suffice, *if the quality of the possession is changed before the death* (*h*).

Imperfect testamentary gift,—not supported as a *donatio mortis causâ*.

Ineffectual gift *inter vivos* not supported as a *donatio mortis causâ*.

What is a sufficient delivery.

(*a.*) To donee or donee's agent.

It is well settled, that if a donor intends to make a testamentary gift which turns out to be ineffectual as such, that gift will not be supported as a *donatio mortis causâ* (*i*); and it is equally well settled, that if the donor intends to make a gift *inter vivos* which is ineffectual as such, it cannot be supported as a *donatio mortis causâ* (*k*). On the other hand, if there has been a delivery, the gift is perfect; and if a personal chattel be actually given by the donor himself to the donee, or by some other person at the donor's request into the hands of the donee, or to some other person as a trustee or agent for the donee, a good delivery is constituted; but a mere delivery to an agent, in the character of an agent, for the donor, would amount to nothing (*l*),—for an effective delivery must be a delivery to the donee, or to the donee's agent (*m*). Where the chattel itself is not delivered, the delivery of some effective means of obtaining it is sufficient; but not the delivery of a mere ineffective symbol (*n*); for example, if the thing given as a *donatio mortis causâ* be a chose in action, the delivery of some document essential to the recovery of the chose in action is sufficient (*o*); and in *Jones* v. *Selby* (*p*), the delivery of the key of a box was held to be a sufficient *donatio mortis causâ* of the contents of the box. But where, as in *Trimmer*

(*b.*) Delivery of effective means of obtaining the property.

(*h*) *Cain* v. *Moon*, 1896, 2 Q. B. 283, following *Winter* v. *Winter*, 4 L. T., N. S., 639.
(*i*) *Mitchell* v. *Smith*, 12 W. R. 941.
(*k*) *Edwards* v. *Jones*, 1 My. & Cr. 226.
(*l*) *Farquharson* v. *Cave*, 2 Coll. Ch. Ca. 367.
(*m*) *In re Richards*, *Shenstone* v. *Brock*, 36 Ch. Div. 541.
(*n*) *Ward* v. *Turner*, 1 L. C. 98; *Snellgrove* v. *Baily*, 3 Atk. 214.
(*o*) *Moore* v. *Darton*, 4 De G. & Sm. 519.
(*p*) Prec. in Ch. 300.

v. *Danby* (*q*), the key of a box containing some bonds labelled "The first five of these bonds belong to and are H. D.'s property," was given into the custody of H. D., who was the testator's housekeeper, the court was of opinion that the testator gave the key to H. D. *in her character of housekeeper, and for the purpose of taking care of it for his benefit;* and that whether or not the testator meant to give the bonds to H. D., there had been no actual transfer thereof,—and consequently H. D. did not get the bonds. Similarly, in *Hawkins* v. *Blewitt* (*r*), where A., being in his last illness, ordered a box containing wearing apparel to be carried to the defendant's house to be delivered to the defendant, giving no further directions respecting it; and on the next day the defendant brought the key of the box to A., who desired it to be taken back, saying he should want a pair of breeches out of the box,—the court held this not to be a good *donatio mortis causâ*,—for the box "seemed rather to have been "left in the defendant's care for safe custody, and "was so considered by herself."

Examples of imperfect delivery.

(*a.*) Delivery to donor's agent.

(*b.*) Delivery to donor's agent coupled with retention of ownership.

There cannot, it seems, be a good *donatio mortis causâ* of South Sea annuities (*s*); nor of railway stock (*t*); nor of the donor's own cheque upon a banker (*u*), unless cashed in his lifetime or otherwise negotiated (*v*). But there may be a good *donatio mortis causâ* of a bond (*x*); also, of a mortgage debt on real estate by delivery of the mortgage deeds (*y*);

What may be given as a *donatio mortis causâ*.

In re Beaumont Beaumont v. Fretwell 1901 WN 50

(*q*) 25 L. J. Ch. 424; *Powell* v. *Hellicar*, 26 Beav. 261.
(*r*) 2 Esp. 663.
(*s*) *Ward* v. *Turner*, 2 Ves. Sr. 431.
(*t*) *Moore* v. *Moore*, L. R. 18 Eq. 474.
(*u*) *Tate* v. *Hilbert*, 4 Bro. C. C. 286; *Boutts* v. *Ellis*, 4 De G. M. & G. 249; *Hewit* v. *Kaye*, L. R. 6 Eq. 198; *In re Mead, Austin* v. *Mead*, 15 Ch. Div. 651.
(*v*) *Rolls* v. *Pearce*, L. R. 5 Ch. Div. 730.
(*x*) *Snellgrove* v. *Baily*, 3 Atk. 214; *Gardner* v. *Parker*, 3 Mad. 184.
(*y*) *Duffield* v. *Elwes*, 1 Bligh, N. S. 497.

and the delivery of a promissory-note, payable to order though not endorsed (*z*), or of a third party's cheque, payable to order though not endorsed (*a*), or of a deposit note (*b*), although with form of cheque endorsed thereon (*c*), will constitute a good *donatio mortis causâ*. But the delivery of the title-deeds to an estate will not, of course, operate to convey the estate; and where a promissory-note has been lost, a mere direction to destroy it when found will not amount to a gift thereof (*d*).

How it differs from a legacy and agrees with a gift *inter vivos*.

A *donatio mortis causâ* differs from a legacy, and resembles a gift *inter vivos* in these respects: (1.) It takes effect *sub modo* from the delivery in the lifetime of the donor, and therefore cannot and need not be proved as a testamentary act; and (2.) It requires no assent or other act on the part of the executor or administrator to perfect the title of the donee. On the other hand, it differs from a gift *inter vivos* and resembles a legacy in these respects:— (1.) It is revocable during the donor's lifetime (*e*); (2.) It may be, and always might be, made even at law to the donor's wife (*f*); (3.) It is liable to the debts of the donor on a deficiency of assets (*g*); (4.) It is subject to legacy duty in all cases when, if it was a legacy, it would be subject thereto; and (5.) It used to be subject to probate duty or (speaking more properly) to "account stamp duty" (*h*); and

How it resembles a legacy and differs from a gift *inter vivos*.

(*z*) *Veal* v. *Veal*, 27 Beav. 303; *In re Mead*, *Austin* v. *Mead*, 15 Ch. Div. 651.
(*a*) *Clement* v. *Cheeseman*, 27 Ch. Div. 631.
(*b*) *Amis* v. *Witt*, 33 Beav. 619; *Moore* v. *Moore*, L. R. 18 Eq. 474.
(*c*) *Duffin* v. *Duffin*, 44 Ch. Div. 76.
(*d*) *Francis* v. *Bruce*, 44 Ch. Div. 627.
(*e*) *Smith* v. *Casen*, 1 P. W. 406; *Jones* v. *Selby*, Prec. Ch. 300.
(*f*) *Tate* v. *Leithead*, Kay, 658.
(*g*) *Smith* v. *Casen*, supra.
(*h*) 44 & 45 Vict. c. 12, s. 38; *In re Foster*, *Thomas* v. *Foster*, 1897, 1 Ch. 484.

it is now subject (or in effect subject) to estate duty (*i*),—the last-mentioned duty falling, however, upon the general residuary personal estate (*k*).

(*i*) 57 & 58 Vict. c. 30, s. 2.
(*k*) *In re Webber, Gribble* v. *Webber*, 1896, 1 Ch. 914; *In re Culverhouse, Cook* v. *Culverhouse*, 1896, 2 Ch. 251.

CHAPTER VIII.

LEGACIES.

Suits for legacies only in equity.

No suit will lie at the common law to recover legacies,—unless the executor has assented thereto (*a*), or unless the action should be by the legatee of a debt against the executors and the debtors as co-defendants, where the executors refuse to sue the debtor (*b*). But in cases of specific legacies of goods, after the executor has assented thereto, the property vests immediately in the legatee; and the legatee may maintain an action at law for the recovery thereof (*c*); and no assignment is necessary even in the case of leaseholds, the mere assent of the executor (coupled with the bequest contained in the will) operating as an assignment (*d*); and even as regards general pecuniary legacies, if the executor, with consent of the legatee, appropriates (and he may in general, with such consent, appropriate) any specific asset in payment or in discharge of any legacy, such specific asset thereupon becomes the property of the legatee, and ceases to form part of the general estate of the testator (*e*); and there may even be an effective assent to (*f*),—or an

Assent to, or appropriation for, legacy (or share of residue),—effect of.

(*a*) *Deeks* v. *Strutt*, 5 T. R. 690.
(*b*) *Travis* v. *Milne*, 9 Hare, 141; *Yeatman* v. *Yeatman*, 7 Ch. Div. 210.
(*c*) *Doe* v. *Gay*, 3 East. 120.
(*d*) *Thorne* v. *Thorne*, 1893, 3 Ch. 196; *Cook* v. *Culverhouse*, 1896, 2 Ch. 251.
(*e*) *Dowsett* v. *Culver*, 1892, 1 Ch. 210.
(*f*) *Austin* v. *Biddoe*, W. N. 1893, p. 78.

effective appropriation of securities to answer (*g*),—a residuary bequest, or part of such bequest.

The proper court in which questions regarding legacies should be determined is the Chancery Division of the High Court; but actions for the recovery of legacies may in a clear case be brought either in the Chancery Division or in the Queen's Bench Division of the High Court,—but not in the Probate Division of the High Court (*h*). And prior to the fusion of the Chancery with the Queen's Bench, wherever the bequest of a legacy involved the execution of a trust, express or implied, or the legacy was charged on land, or the other courts could not take due care of the interests of all parties, courts of equity exercised an exclusive jurisdiction; but where the executor had assented to the legacy, courts of equity exercised only a concurrent jurisdiction with the other courts (*i*); and the aid of equity (*i.e.*, the auxiliary jurisdiction) was often required to obtain discovery, or some other relief which the common law courts were at one time incompetent to afford.

Equity jurisdiction,—when exclusive;

when concurrent.

Legacies are either general, specific, or demonstrative. A legacy is *general* where it does not amount to a bequest of any particular thing, as distinguished from all others of the same kind; and the term "pecuniary legacy," as commonly used, is synonymous with "general legacy," although "pecuniary legacy," strictly speaking, means only "a legacy of money" (*k*); and an annuity is a pecuniary legacy,—so much so, that if the annuity is perpetual the legatee thereof may insist upon being paid its

Division of legacies.

1. General.

(*g*) *Morgan* v. *Richardson*, 1896, 1 Ch. 512.
(*h*) 20 & 21 Vict. c. 77; 38 & 39 Vict. c. 77, sect. 11, sub-sect. 3.
(*i*) *Hurst* v. *Beach*, 5 Madd. 360.
(*k*) *Hawthorn* v. *Shedden*, 3 Sm. & G. 293; *Fielding* v. *Preston*, 1 De G. & Jo. 438.

capitalised value (*l*). On the other hand, a legacy
2. Specific. is *specific* when it is a bequest of a particular thing, or particular sum of money, or particular debt, as distinguished from all others of the same kind (*m*);
3. Demonstrative. and a legacy is *demonstrative* when "it is in its nature "a general legacy, but there is a particular fund "pointed out to satisfy it" (*n*), *e.g.* a bequest of £1000 out of some specific fund (*o*).

Distinctions among the three kinds of legacies. It is of great importance to distinguish these three different species of legacies one from the other, the chief points of difference between them being,—(1.) If, after the payment of debts, there is a deficiency of assets for the payment of all the legacies, a general legacy will be liable to abate, but a specific legacy will not; (2). If a specific bequest is made of a chattel or fund which fails by alienation or otherwise during the testator's lifetime, the legatee will not be entitled to any compensation out of the general personal estate of the testator,—because nothing but the specific thing is given to the legatee; and (3.) A demonstrative legacy is so far of the nature of a specific legacy, that it will not abate with the general legacies until the fund out of which it is payable is exhausted; and it is also so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the specific fund designated as the means of paying it (*p*). And with regard to general pecuniary
Special priorities of certain legacies. legacies, the testator may have given some a priority over others,—in which case (if the estate is insufficient) those having priority will be paid first,

(*l*) *Hicks* v. *Ross*, 1891, 3 Ch. 499.
(*m*) *Manning* v. *Purcell*, 7 De G. M. & G. 55.
(*n*) *Robinson* v. *Geldard*, 3 Mac. & G. 735.
(*o*) *Sparrow* v. *Josselyn*, 16 Beav. 135.
(*p*) *Mullins* v. *Smith*, 1 Drew. & Sm. 210; *Vickers* v. *Pound*, 6 H. L. Cas. 885.

and will not abate with the others (*q*); and in general, legacies given in lieu of dower or in satisfaction of debts have priority (*r*),—but as regards legacies given in lieu of dower, the widow as a legatee is entitled to priority only if her husband, the testator, had in fact, at the date of his decease, lands out of which she was and remained dowable notwithstanding the will (*s*); but a mere direction that any particular legacy is to be paid immediately on the death of the testator will not prevent it from abating (even in the case of a wife), if it is otherwise subject to abatement (*t*). And note, that the legatee of an annuity for the life of the legatee, or for any other determinate or determinable period, is in general entitled to have the payment thereof secured by the due appropriation of a sufficient part of the residuary estate, or otherwise (*u*); and when the appropriation is, in fact, the valuation of the annuity,—the estate being insolvent,—the whole appropriation will be payable to the annuitant (*v*),—unless, possibly, where the annuity is liable to be determined sooner than the death (*x*). Also, note, that in a proper case, the arrears of an annuity, where it is charged upon or issues out of land, will be ordered to be raised by a sale or mortgage of the land (*y*).

Appropriations to answer certain legacies.

In deciding on the validity and interpretation of purely personal legacies, courts of equity in general follow the rules of the civil law, as recognised and

Construction of legacies.

(*q*) *Wells* v. *Borwick*, 17 Ch. Div. 798.
(*r*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.
(*s*) *Roper* v. *Roper*, 24 W. R. 1013; *Greenwood* v. *Greenwood*, 1892, 2 Ch. 295; 3 & 4 Will. IV. c. 105, s. 12.
(*t*) *Oppenheimer* v. *Schweider*, 1891, 3 Ch. 44.
(*u*) *Scott* v. *Leech*, 42 Ch. Div. 570; *Harbin* v. *Masterman*, *Wharton* v. *Masterman*, 1895, A. C. 186.
(*v*) *Allen* v. *Sinclair*, 1897, 1 Ch. 921.
(*x*) *Carr* v. *Ingleby*, 1 De G. & Sm, 362.
(*y*) *Tucker* v. *Tucker*, 1893, 2 Ch. 323.

acted on in the old ecclesiastical courts; but as to the validity and interpretation of legacies charged on land, they in general follow the rules of the common law, which in all cases favour the heir; and accordingly the courts favour the vesting of legacies if not charged on land,—whereby they become transmissible to the personal representatives of the legatee should he die before the time of payment (*z*); but the courts have persistently held, that a legacy payable out of land, although it may be vested in one sense, yet sinks for the benefit of the inheritance in case the legatee dies before the period of payment (*a*),—unless where that period is postponed for adventitious reasons (*b*). Again, legacies charged on land carry interest as from the date of the testator's death (*c*), or (when given subject to a life estate in the lands charged) as from the date of the death of the tenant for life (*d*); but general legacies not so charged (including apparently demonstrative legacies properly so called) (*e*), carry interest as from one year after the testator's decease (*f*); and this is so, *semble*, even where the legacy is given on a series of limitations, *e.g.*, to one for life and afterwards to another or others (*g*). But a general legacy given in satisfaction of a debt carries interest as from the death (*h*); as does also a general legacy to an infant child not otherwise provided for (*i*), or the legacy of a fund which is severed from the rest

(1.) As to vesting.

(2.) As to interest.

(*z*) *Harrison* v. *Foreman*, 5 Ves. 207.
(*a*) *Pawlett* v. *Pawlett*, 1 Vern. 321; *Henty* v. *Wrey*, 21 Ch. Div. 332.
(*b*) *King* v. *Withers*, 3 P. Wms. 414.
(*c*) *Maxwell* v. *Wettenhall*, 2 P. Wms. 26.
(*d*) *Waters* v. *Boxer*, 42 Ch. Div. 517.
(*e*) *Mullins* v. *Smith*, 1 Dr. & Sm. 210.
(*f*) *Child* v. *Elsworth*, 2 De G. M. & G. 679.
(*g*) *Whittaker* v. *Whittaker*, 21 Ch. Div. 657.
(*h*) *Clarke* v. *Sewell*, 3 Atk. 99.
(*i*) *Newman* v. *Bateson*, 3 Sw. 689; *In re Moody, Woodroffe* v. *Moody*, 1895, 1 Ch. 101.

of the estate (*k*); also, if the legacy is an annuity, it accrues, *semble*, as from the death (*l*), at least in general; but a legacy to the testator's widow, although expressed to be given in lieu of dower or freebench, carries interest only as from a year from the death (*m*). As regards specific legacies,—including bequests of specific portions of a specific fund, so long as such fund remains,—they carry interest like specific legacies (*n*), which in fact they are (*o*).

Arrears of interest,—what recoverable.

The rate of interest is four (and not three) per cent. in all cases (*p*); and where the property of the testatrix out of which general legacies are payable is reversionary, and the executors instead of selling the reversion wait till the reversion falls in, the legatees will, in general, be entitled not merely to six years' arrears, but to interest from one year after the death of the testatrix (*q*).

Hotchpot clause,—effect of, as regards interest.

When a testator gives his residuary estate equally among his children (either subject or not subject to a life interest in his widow), he directs, in general, that, for the purpose of producing equality in the division of the estate, any sums which he shall have advanced to any child shall be brought into hotchpot and accounted as part of his (the child's) share; and in such a case, interest at the rate of four per cent. (now three per cent.) per annum is payable on the amount of the advances; but the interest is to be computed only as from the period when the estate is to be divided, which is usually the date of the widow's

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(*k*) *Dundas* v. *Wolfe-Murray*, 1 H. & M. 425; *Snaith* v. *Snaith*, W. N. 1894, p. 115.
(*l*) *Gibson* v. *Bott*, 7 Ves. 89.
(*m*) *Bignold* v. *Bignold*, 45 Ch. Div. 496.
(*n*) *Barrington* v. *Tristram*, 6 Ves. 345.
(*o*) *Mullins* v. *Smith*, 1 Dr. & Sm. 210.
(*p*) *Wood* v. *Bryant*, 2 Atk. 523.
(*q*) *Blachford* v. *Worsley*, 27 Ch. Div. 676.

death, although it will occasionally be the date of the testator's own death (*r*).

Accretion on legacy,—whether it goes or not with the legacy.

Where there is a legacy of shares, or of other like property, and there is an accretion thereto,—either by the payment of a bonus or otherwise,—the question whether such accretion belongs as capital to the estate of the testator, or whether it belongs to the legatee of the shares or other like property,—and the further question (where the accretion belongs to the legacy, and the legacy is given to one for life, with remainder to another), whether the accretion belongs wholly to the legatee for life as income, or whether it is to be treated as capital added to the legacy, so that only the interest thereon shall go to the legatee for life,—these questions have been answered as follows: Firstly, the bonus or dividend or other accretion, if it was declared before the testator's death, will form part of the testator's general estate, and will not go to the legatee of the shares (*s*); but if the bonus or dividend or other accretion was declared after the death, it will go to the legatee of the shares (*t*); and where no declaration (of bonus or dividend or other accretion) is necessary, or the accretion accrues *de die in diem*, an apportionment will be made, if part of the time during which the accrual has proceeded is in the life of the testator, and the residue of such time has been after his death (*u*),—excepting possibly in the case of a specific legacy (*v*); but as regards the profits of a private partnership, these appear not to be within the Ap-

(*r*) *In re Rees, Rees* v. *George*, 17 Ch. Div. 701; *In re Dallmeyer, Dallmeyer* v. *Dallmeyer*, 1896, 1 Ch. 372; *Middleton* v. *Moore*, 1897, 2 Ch. 169.

(*s*) *Lock* v. *Venables*, 27 Beav. 598.

(*t*) *Wright* v. *Tuckett*, 1 J. & H. 266; *Mackinley* v. *Bates*, 31 Beav. 280.

(*u*) *Constable* v. *Constable*, 11 Ch. Div. 681.

(*v*) *Pollock* v. *Pollock*, L. R. 18 Eq. 329.

portionment Act, 1870 (*x*), although the profits of a public partnership or company are within the 5th section of that Act (*y*). And, Secondly, when and so far as the bonus or dividend or other accretion goes to the legatee, then as between the tenant for life of the legacy and the remainderman, a bonus declared out of capital will be capital (*z*), and a bonus declared out of profits (even out of accumulated profits) will be income (*a*); but if the company has the power of declaring the bonus to be either capital or income, and of paying or applying it accordingly, the company's decision determines the question as between the tenant for life and the remainderman (*b*). However, a mere dividend is not (for this purpose) an accretion; and although such dividend, if paid in cash, would belong wholly to the tenant for life as income, yet if paid as to part in cash, and (through the intervention of the trustees) as to the other part by an issue of new shares, the tenant for life will not in general get the new shares as part of his or her income, but such new shares (less the portion of dividend not paid in cash) will be capitalised (*c*).

And when it is to be regarded as income or as capital.

Dividends,—when paid partly in cash and partly in shares.

Where stocks or shares are held upon trust for A. for life, with remainder upon trust for (and to transfer the same to) B., and A. dies while a dividend is accruing, and the stocks or shares (instead of being transferred) are sold *cum div.* (*i.e.*, with the accruing dividend included), *and thereby a larger price is obtained for the stocks or shares*,—A.'s estate is not entitled to receive any part of that price in respect of the appor-

Apportionment,—none, where stocks or shares are sold *cum div.*

(*x*) *In re Cox's Trust*, 9 Ch. Div. 159.
(*y*) *Carr* v. *Griffith*, 12 Ch. Div. 655.
(*z*) *Paris* v. *Paris*, 10 Ves. 185; *Sproule* v. *Bouch*, 12 App. Ca. 385; *Sugden* v. *Alsbury*, 45 Ch. Div. 237; *Malam* v. *Hitchens*, 1894, 3 Ch. 578.
(*a*) *Barclay* v. *Wainwright*, 14 Ves. 66; *Armitage* v. *Garnett*, 1893, 3 Ch. 337.
(*b*) *In re Burton's Trust*, L. R. 5 Eq. 238.
(*c*) *In re Malam*, *Malam* v. *Hitchens*, 1894, 3 Ch. 578.

tioned dividend accrued before A.'s death (*d*),—save possibly, now, under the Apportionment Act, 1870 (*e*), and on the ground of special circumstances (*f*).

Infant's maintenance out of interest on legacy.

When a legacy is given to a child contingently on his or her attaining the age of twenty-one years, the income accruing on the investments representing the legacy is, by the Conveyancing Act, 1881, s. 43, available for the interim maintenance of the child during the contingency (*g*).

(*d*) *Freman* v. *Whitbread*, L. R. 1 Eq. 266.
(*e*) 33 & 34 Vict. c. 35.
(*f*) *Bulkeley* v. *Stephens*, 1896, 2 Ch. 241.
(*g*) *Holford* v. *Holford*, 1894, 3 Ch. 30,—following *In re Dickson*, 29 Ch. D. 331, and *In re Adams*, 1893, 1 Ch. 329, and disapproving *In re Jeffery*, 1891, 1 Ch. 671; and see *Woodfin* v. *Glass*, 1895, 2 Ch. 309; and *Arnold* v. *Bush*, 1895, 2 Ch. 577.

CHAPTER IX.

CONVERSION.

"NOTHING is better established than this principle, "that money directed to be employed in the purchase "of land, and land directed to be sold and turned "into money, are to be considered in equity as that "species of property into which they are directed to "be converted" (*a*); and as this notional conversion of land into money, or of money into land, may arise either under wills or under deeds, it is necessary to inquire, in the case of each class of document,— (1.) What words are sufficient to produce conversion; (2.) From what time conversion takes place; (3.) What is the general effect of the conversion; and (4.) What is the result of a total or partial failure of the purposes for which the conversion has been directed.

General rule.

Money into land.

Land into money.

By will or settlement.

1. *The words sufficient to produce conversion.*—The direction to convert must be imperative; for if the conversion be merely optional, the property will be considered as real or personal according to the actual condition in which it is found. Thus, in *Curling* v. *May* (*b*), where A. gave £5000 to B., in trust that B. should lay out the same in the purchase of lands, *or* else put the same out on good securities, for the separate use of his daughter H. (the plaintiff's then wife), her heirs, executors, and administrators, and

What words are sufficient. The direction to convert must be imperative, whether (1.) Express;

(*a*) *Fletcher* v. *Ashburner*, 1 L. C. 898.
(*b*) Atk. 255.

died in 1729; and in 1731, H., the daughter, died without issue, before the money was invested in any purchase of land; and the husband, as her administrator, brought a bill for the money against the heir of H.,—the money was decreed to the husband-administrator, Lord Talbot observing it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention (*c*). But although the conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands of inheritance, *or* at interest," or "in land *or* some other securities," as they shall think most fit and proper, yet if the limitations and trusts of the money directed to be laid out are only adapted to real estates, so as to denote the testator's intention that land *shall* be purchased, this circumstance will outweigh the presumed option, which may be read as referable only to the interim investment, and the money will be considered land (*d*); and the like rule may possibly apply to the converse case,—but the limitations are seldom exclusively applicable to personal estate, and the idea of an interim investment in land is not very sensible. A direction to convert and invest *upon request* may or may not be, but usually is, imperative (*e*); but a mere *power* to convert (as distinguished from a *trust* to convert) is not imperative (*f*).

or (2.) Implied, *e.g.*, where limitations are adapted *only* to land, or *vice versâ*.

Time from which conversion takes place.

2. *The time from which the conversion takes place.*—Subject to the general principle that the terms of each particular instrument must guide in the construction of it (*g*), the rule is, that in regard to wills,

(*c*) *Bourne* v. *Bourne*, 2 Hare, 35.
(*d* *Earlom* v. *Saunders*, Amb. 241.
(*e*) *Thornton* v. *Hawley*, 10 Ves. 129; *Burrell* v. *Baskerfield*, 11 Beav. 525.
(*f*) *Pitman* v. *Pitman*, 1892, 1 Ch. 279.
(*g*) *Ward* v. *Arch*, 15 Sim. 389.

conversion takes place as from the death of the testator (*h*), and as to deeds or other instruments *inter vivos*, from the date of their execution; for, as stated in *Griffith* v. *Ricketts* (*i*),—"A deed differs from a "will, in that the will speaks from the death and the "deed from the delivery. The *principle* is the same, "but the application is different, by reason that the "deed converts the property in the lifetime of the "author of the deed, whereas in the case of a will the "conversion does not take place until the death of "the testator;" and in the case of a deed, the conversion into personal estate will take effect as from the execution of the deed, *notwithstanding the trust for sale contained in the deed is not to arise until after the settlor's death* (*k*). It is, of course, necessary in all cases, and more especially in the case of a deed, to be quite sure that there is an intention to convert; and in the absence of such intention, there will be no conversion at all,—that is to say, no *notional* conversion; and the property will in such a case not alter its character until there has been an *actual* conversion of it. Thus in *Wright* v. *Rose* (*l*), where A., being seised in fee of a freehold estate, borrowed £300 from B., the defendant, and secured the repayment of it with interest by executing a mortgage on the estate, with power of sale; and by the terms of the mortgage deed it was provided, *that the surplus moneys to arise from the sale, in case the same should take place, should be paid to A., his executors or administrators;* and A. died; and afterwards B. sold the estate under the power of sale,—The court held, that the surplus sale proceeds were real estate,—for the estate being *unsold at the death of the mortgagor*, the equity of redemption

In wills, from testator's death.

In deeds, from execution.

Rule as to deeds inapplicable when conversion is not the object.

(1.) In the case of mortgages,—difference according as sale before or after death of mortgagor.

(*h*) *Beauclerk* v. *Mead*, 2 Atk. 107.
(*i*) 7 Hare, 311; *Morris v. Griffiths*, 26 Ch. Div. 601.
(*k*) *Clarke* v. *Franklin*, 4 K. & J. 257; *Hewitt* v. *Wright*, 1 Bro. C. C. 86.
(*l*) 2 Sim. & St. 323.

descended to the heir, and he was entitled to the surplus sale proceeds; but if the sale had been made in the lifetime of the mortgagor, that surplus would have formed part of A.'s personal estate, and would at his death have gone to his next of kin, and not to his heir (*m*).

(2.) In case of land taken compulsorily,—complete contract.

So again where lands are taken compulsorily under the provisions of the Lands Clauses Consolidation Act, 1845 (*n*), the mere notice to treat which is given by the company does not, as from the date thereof, operate as a conversion of the lands into money,—for such notice without more does not amount to a contract (*o*); but if the notice is duly followed up, and the price is afterwards ascertained, whether by agreement of the parties or (failing agreement) by valuation, arbitration, or verdict, as provided in the Act, then, and as from (but only as from) that date, a conversion is effected,—for an enforceable contract has then, and not until then, been arrived at between the company and the landowner (*p*); and this view is entirely consistent with the doctrine of equity in the case of ordinary contracts for the sale of lands,—for if such ordinary contract is not enforceable (*e.g.*, because there is no title to a material part of the tenements comprised in the contract), there is no conversion effected thereby (*q*).

(3.) In case of leases containing option of purchase.

Closely connected with the class of cases just referred to are those cases where the conversion depends on an option to purchase in some third person to be exercised at a future time. Thus, in *Lawes* v. *Bennett*

(*m*) *Bourne* v. *Bourne*, 2 Hare, 35.
(*n*) 8 Vict. c. 18.
(*o*) *Haynes* v. *Haynes*, 1 Dr. & Sm. 426; *Richmond* v. *North London Railway Company*, L. R. 5 Eq. 352, at p. 358.
(*p*) *Harding* v. *Metropolitan Railway Company*, L. R. 7 Ch. App. 154.
(*q*) *Thomas* v. *Howell*, 34 Ch. Div. 166.

(*a.*) Option created previously to will.

1. General devise,—*Lawes* v. *Bennett.*

(*r*), where A. made a lease to B. for seven years, and on the lease was endorsed an agreement that if B. should within a limited time be minded to purchase the inheritance of the premises for £3000, A. would convey them to B. for that sum; and B. assigned to C. the lease and the benefit of this agreement; and A. died, and by his will gave all his *real* estate generally to D., and all his *personal* estate to D. and E.; and within the limited time, but after the death of A., B. on behalf of C. claimed the benefit of the agreement from D., who accordingly conveyed the premises to C. for £3000,—the sum of £3000, when paid, was held to be part of the *personal* estate of A., and E. was entitled to one moiety of it as such,—the election once made being referred back to the original agreement, although the rents and profits went in the meantime to the person entitled to the property as real estate (*s*); and the decision in *Lawes* v. *Bennett* is applicable also when the lessor dies intestate, and although the option to purchase is expressed to be not exercisable until after his death (*t*).

Rents until option is exercised go as realty.

2. Specific devise,—*Drant* v. *Vause.*

On the other hand, where the testator specifically devises the lands which are subject to the option of purchase, the question arises whether the specific devisee is entitled to receive the purchase-money payable when the option is exercised? and this point was so decided in *Drant* v. *Vause* (*u*); for observe, that after the testator had made the lease, he devised the lands *specifically*, intending thereby that the land or (in case the option should be exercised) the purchase-moneys should go to the specific devisee; and but for such specific devise evidencing such intention, the purchase-money would have fallen into the

(*r*) 1 Cox, 167; *In re Adams and Kensington Vestry*, 27 Ch. Div. 394; *Alexander* v. *Cross*, 30 Ch. Div. 203.
(*s*) *Townley* v. *Bedwell*, 14 Ves. 591; *Ex parte Hardy*, 30 Beav. 206.
(*t*) *Isaacs* v. *Reginald*, 1894, 3 Ch. 506.
(*u*) 1 Y. & C. C. C. 580; *Emuss* v. *Smith*, 2 De G. & Sm. 722.

(*b.*) Option created subsequently to will.

(1.) General devise. (2.) Specific devise,—*Weeding* v. *Weeding.*

residuary personalty, and would not have gone to the devisee (*v*). Also, where the testator, *after* making his will devising his real estate specifically to one and bequeathing the residue of his personal estate to another, enters into a contract giving an option of purchase of his real estate, and that option is exercised after his death, the real estate is held to be converted as from the date of the exercise of the option, and goes to the residuary legatee (*x*),—for, a observed by Wood, V.C.—"*The case is as if the testator,* "*after having given the property by will, had made a* "*sale of it; in which case, if the sale was out and out,* "*the devisee's interest would be taken away;* and the "sale was but suspended for a time until through the "exercise of the option it became an actual complete "sale" (*y*); and *à fortiori,* if the devise in such a case was a general (as distinguished from a specific) devise, the result would be the same. And the general principle underlying all these decisions appears to be this, namely, that if the option is created *after* the will, it is a suspensory conversion of the land into money and a suspensory ademption thereof from the devisee (whether general or specific), which subsequently operates or not according as the lessee exercises or does not exercise his option; but if the option is created *before* the will, and the testator afterwards devises the lands by specific descriptions, —or if the option and the specific devise are (in effect) contemporaneous (*z*),—the suspensory conversion exists, but the suspensory ademption does not; and accordingly, when in the latter case the option is afterwards exercised, although the conversion becomes complete and actual, still there is no ademption at all.

The general principle applicable to options.

(*v*) *Collingwood* v. *Row,* 5 W. R. 484.
(*x*) *Weeding* v. *Weeding,* 1 J. & H. 424.
(*y*) *Goold* v. *Teague,* 7 W. R. 84; *Frewen* v. *Frewen,* L. R. 10 Ch. App. 610.
(*z*) *In re Pyle, Pyle* v. *Pyle,* 1895, 1 Ch. 724.

3. *As to the effects of conversion.*—These have been stated to be generally, to make personal estate real, and real estate personal,—and that before any *actual* conversion of the property. Accordingly, money directed to be turned into land descends to the heir (*a*), and land directed to be converted into money goes to the personal representatives (*b*); and when the conversion is by will, the land, although only notionally converted into money, used to be subject to probate duty, and will now be subject to estate duty (*c*), and also to legacy duty (when such latter duty is payable) (*d*); but the money which is notionally converted into land was held (somewhat inconsistently) to remain subject to legacy duty (*e*), and even to probate duty (*f*), and to account duty (*g*), and it will now be subject to estate duty, of course. So also money directed to be turned into land would not formerly have escheated to the crown upon the failure of the heirs of the party entitled (*h*),—because escheat used to be a legal incident; but such money will now escheat, by virtue of section 4 of the Intestates' Estates Act, 1884 (*i*),—for such money is equitable realty within the meaning of that section. Also, land directed to be turned into money would not formerly have escheated to the crown, nor yet would it formerly have gone to the crown as *bona vacantia* (*k*); but, apparently, it will now go to the crown as a result of the Intestates' Estates Act,

The effects of conversion.

(*a*.) As regards devolution on death; and as regards liability to death duties.

(*b*.) As regards escheat to the crown.

(*a*) *Scudamore* v. *Scudamore*, Prec. in Ch. 543.
(*b*) *Elliot* v. *Fisher*, 12 Sm. 505.
(*c*) *Att.-Gen.* v. *Hubbuck*, 13 Q. B. D. 275; *Re Gunn*, 9 P. D. 242; 57 & 58 Vict. c. 30.
(*d*) *Att.-Gen.* v. *Holford*, 1 Pri. 426; see 55 Geo. III. c. 184.
(*e*) *Re De Lancy*, L. R. 5 Ex. 102; *Reg.* v. *De Lancy*, L. R. 6 Ex. 286.
(*f*) *Matson* v. *Swift*, 8 Beav. 368; *Att.-Gen.* v. *Ailesbury* (*Marquis*), 12 App. Ca. 672.
(*g*) *Att.-Gen.* v. *Dodd*, 1894, 2 Q. B. 150.
(*h*) *Walker* v. *Denne*, 2 Ves. 169.
(*i*) 47 & 48 Vict. c. 71.
(*k*) *Taylor* v. *Haygarth*, 14 Sim. 8.

1884, sect. 7, read in combination with section 4,—that is to say, as being an equitable interest of the testator, which, within the meaning of section 7, is in the event undisposed of. So again, money belonging to a married woman, which has been directed to be converted into land, is liable to the husband's curtesy; and though the widow would not formerly have been entitled to her dower out of the money of her husband directed to be laid out in land (*l*), she would now be entitled to her dower out of such money (*m*); and before the Wills Act (*n*), an infant, under the age of twenty-one, might have made a will of his personal estate, but not if such personal estate had been directed to be laid out in land (*o*).

(c.) As regards curtesy and dower.

(d.) As regards disposing of same by will.

(4.) Results of total or partial failure.

4. *The results of a failure of the purposes for which the conversion is directed.*—It is necessary to distinguish between a *total* and a *partial* failure. And *firstly*, as to a *total failure*,—The rule is, that where conversion is directed, whether by *will* or *by deed*, and *whether of money into land or of land into money*, if the purposes for which the conversion is intended totally fail *before or at the time when the will or deed comes into operation*, no conversion will take place, but the property will remain as it was; or, in the words of Wood, V.C., in *Clarke* v. *Franklin* (*p*),—"If at the moment "when the grantor put his hand to this deed, the "purpose for which the conversion was directed had "failed, the property would have been *at home* in "his lifetime, and the court would have regarded it "as if no conversion had been directed" (*q*). But *secondly*, as to a *partial failure*,—The rules are somewhat complex, and it will be necessary to deal

(A.) Total failure,—in deeds and in wills indifferently.

The property results unconverted.

(B.) Partial failure.

(*l*) *Sweetapple* v. *Bindon*, 2 Vern. 536.
(*m*) 3 & 4 Will. IV. c. 105, s. 2.
(*n*) 1 Vict. c. 26.
(*o*) *Earlom* v. *Saunders*, Amb. 241.
(*p*) 4 K. & J. 257.
(*q*) *Ripley* v. *Waterworth*, 7 Ves. 435; *Smith* v. *Claxton*, 4 Mad. 492.

seriatim with the cases, regard being had to the nature of the instrument (whether deed or will) by which the conversion is directed; and in each case, three questions arise, namely,—(1.) To what extent is the trust for conversion still in force? (2.) Who is to benefit by the partial failure? and (3.) In what character will the property descend or devolve?

I. Cases under wills,—(*a.*) Land into money.

Ackroyd v. *Smithson*,—the heir takes the undisposed-of surplus, or surplus lands.

And *firstly*, as was decided in *Ackroyd* v. *Smithson* (*r*), when by a will land is directed to be turned into money, the heir takes the undisposed-of surplus of the land. In that case, a testator gave several legacies, and ordered his real and personal estate to be sold, and his debts and legacies to be paid out of the sale proceeds, and subject thereto he gave the residue to certain legatees, two of whom died in his lifetime, and their shares consequently lapsed. The lapsed shares, so far as they represented or were attributable to personal estate, were decreed to go to the next of kin of the testator; but so far as they represented or were attributable to real estate, they were decreed to go to the heir-at-law, and for the following reasons, namely:—"That the heir-"at-law is entitled to every interest in land not "disposed of by his ancestor; that it is not enough "that the testator did not intend his heir to take,— "for to exclude the heir, he must make an actual "disposition in favour of another (*s*); and although "the testator meant to convert the whole of his real "estate into personalty in case *all* his residuary "legatees should take, still he never meant to deter-"mine anything as between his own heir-at-law and "his own next of kin; and to argue from what he "intended with respect to the residuary legatees, "that he intended the same in favour of his next of

There must be a gift over to exclude the heir.

(*r*) 1 Bro. C. C. 503; 1 L. C. 949.
(*s*) *Fitch* v. *Weber*, 6 Ha. 146.

"kin, is to reason from a case in which intention is "expressed to prove a like intention in a case which "presupposes the absence of intention."

Doctrine does not apply to a sale by the court,—

But the rule which was applied in *Ackroyd* v. *Smithson* is not applicable to the case of a sale under an order of the court,—at any rate where the heir-at-law has consented to such sale (*t*); for (in such a case), the moment a sale is *properly* made, conversion follows, and there is no equity to reconvert the surplus. Also, in cases where the trustees of the will have a power of sale, and they do not exercise it, but the court, in an administration action to which the trustees are defendants, orders a sale, that is a lawful and complete conversion of the land as from the date of the order; and there is not in such a case any reconversion as regards the surplus proceeds (*u*). Nevertheless, even in sales by the court, a reconversion may under special circumstances exist, *e.g.*, under the express provisions in that behalf contained in any statute; and accordingly under the Partition Act, 1868 (*v*), in the case of infants' lands (*x*), and also in the case of married women's lands (*y*), (but not of adults who are *sui juris*), being sold under the decree made under that Act for the sale thereof in lieu of partition, there is a reconversion; and so generally, in all cases of lands sold under the Lands Clauses Consolidation Act, 1845 (*z*), where the land is the property of a corporation, or of a tenant for life, or of any of the other persons under dis-

Except under special circumstances.

(*t*) *Steed* v. *Preece*, 22 W. R. 432; *Foster* v. *Foster*, 1 Ch. Div. 588; *Mildmay* v. *Quicke*, 6 Ch. Div. 553.
(*u*) *Hyett* v. *Mckin*, 25 Ch. Div. 735; *Arnold* v. *Dixon*, L. R. 19 Eq. 113.
(*v*) 31 & 32 Vict. c. 40.
(*x*) *Foster* v. *Foster*, supra.
(*y*) *Wallace* v. *Greenwood*, 16 Ch. Div. 362.
(*z*) 8 Vict. c. 18.

ability to sell who are specified in section 69 of that Act (*a*).

The further question now remains,—In what character does the real estate coming to the heir descend or devolve upon him? And the answer to this question is given in *Smith* v. *Claxton* (*b*), where it was stated, that a devisor may give to his devisee either land or the price of land at his pleasure, and the devisee must receive it in the quality in which it is given; and if a devisor directs his land to be sold, and the produce to be divided between A. and B., A. and B. take their several interests as money, and not as land; and if A. dies in the lifetime of the devisor, and the heir stands in his place, the heir will take the share of A., as A. would have taken it, *i.e.*, as money, and not as land; the obvious purpose of the devisor being to direct a sale for the convenience of division, which purpose (when the failure is partial only) still holds good; and accordingly, where it is *necessary* to sell the land for the purposes of the trust, and there is only a *partial* disposition of the produce of the sale, there the surplus belongs to the heir as money, and not as land, and will therefore go to his personal representative, even though the land may not have been sold during his lifetime, *provided that it be afterwards actually sold* in the course of the due execution of the trust (*c*).

Land into money (*continued*).

Smith v. *Claxton:* The land to be sold results to the heir,—as personal estate, if that is its actual condition.

(*a*.) Where sale is necessary,—it results as money to the heir.

(*b*.) Where sale is unnecessary, and is not made, or so far as not made,—it results as land to the heir.

Secondly, as was decided in *Cogan* v. *Stephens* (*d*), where by a will money is directed to be turned into land, the next of kin take the undisposed-of surplus money. In that case, a testator had directed £30,000

Money into land.

Cogan v. *Stephens:* Undisposed-of

(*a*) *Kelland* v. *Fulford*, 6 Ch. Div. 491; *Ex parte Flamant*, 1 Sim. N. S. 270; *Re Sloper*, 22 Beav. 198.
(*b*) 4 Mad. 492; *Mordaunt* v. *Benwell*, 19 Ch. Div. 302.
(*c*) *Wright* v. *Wright*, 16 Ves. 188; *Curteis* v. *Wormald*, 10 Ch. Div. 172; *Scales* v. *Heyhoe*, 1892, 1 Ch. 379.
(*d*) 1 Beav. 482 *n.*; *Reynolds* v. *Godlee*, 1 Johnson, 536, 582.

money results to personal representatives.

to be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which he gave to his widow during her life, with remainder in tail to A., B., and C., and with the ultimate remainder to a charity. The remainder in tail expired through the deaths of A., B., and C. in the lifetime of the widow and without issue, and the gift to the charity was void. The next of kin were held entitled to the fund,—for just as in the case of land directed to be turned into money, the heir takes the undisposed-of surplus, whether the land be actually sold or not, so (by analogy) in the case of money directed to be turned into land, the next of kin take the undisposed-of surplus.

Undisposed-of personalty results to personal representatives of testator as personalty.

Upon the further question,—In what character does the personal estate coming to the next of kin descend or devolve, it has now been clearly settled, that the property devolves after the expiration of the specified trusts, and in the meantime subject thereto, *according to its actual condition* at the time of the devolution; that is to say, as personal estate if that continues to be its actual condition, but as real estate if (from any special cause) that should have become its actual condition (*e*).

Blending of real and personal estate,—the principle of *Ackroyd* v. *Smithson* is not thereby excluded.

It was decided in *Jessop* v. *Watson* (*f*), that the blending of the proceeds of the real with the personal estate, for an express purpose which fails, will not operate to convert the real into personal estate for a purpose not expressed, viz., to give it to the next of kin; and this rule received a strong application in *Fitch* v. *Weber* (*g*), where a testatrix devised and be-

(*e*) *Reynolds* v. *Godlee*, 1 Johnson, 536, 583; *Curteis* v. *Wormald*, 10 Ch. Div. 172; *Scales* v. *Heyhoe*, 1892, 1 Ch. 379.
(*f*) 1 My. & K. 667.
(*g*) 6 Hare, 146.

queathed her real and personal estate in trust, as to the real estate for sale as soon after her decease as could be; and she declared, that the trustees should stand possessed of the proceeds of the sale, as a fund of personal and not of real estate, *for which purpose such proceeds, or any part thereof, should not in any case lapse or result for the benefit of the heir-at-law;* and after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should by any codicil to her will direct or appoint; but she made no codicil. It was held, that the heir-at-law was entitled to the proceeds of the real estate undisposed of; that the mere intention to exclude the heir was of no avail, *unless there was a gift over* (*on failure of the purposes*) *to some one else;* that the purpose for which the testatrix said she excluded the heir was simply that the realty might be made a fund of personalty, which purpose would not *per se* be sufficient to disinherit the heir *except for the purposes of the will.* And in accordance with that decision no conversion of land into money will arise merely by a testator or testatrix declaring that the land is to be deemed personal estate, and distributable accordingly (*h*); for, unless the testator or testatrix sufficiently declares an intention that the realty shall be converted into personalty, not only for the *purposes of the will,* but *whether such purposes take effect or not,* so much of the real estate or of the produce thereof as is not effectually disposed of by the will at the time of the death will result to the heir,—every conversion, however absolute in its terms, being deemed a conversion for the purposes of the will only, unless an intention is distinctly indicated that on the failure of those purposes the

Conversion for purposes of will, or out and out.

(*h*) *Att.-Gen.* v. *Mangles,* 5 M. & W. 120; *Edwards* v. *Tuck,* 3 De G. M. & G. 40.

conversion is to prevail even as between the heir and the next of kin (*i*).

II. Cases under deeds.

Property results to settlor in converted form.

Passing now from wills to deeds, the rule in all these cases is, that when realty is directed to be converted into personalty (*k*), or personalty into realty (*l*), for certain specified purposes or objects, and a *part* of those purposes or objects fails, the property to that extent results to the settlor; and through him, if it is land directed to be converted into money, it goes to his personal representatives (*m*), and if it is money directed to be converted into land, it goes to his heir (*n*); and its subsequent further devolution (if any) will, *semble*, depend upon its actual character at the time such further devolution arises. And it will be seen, therefore, that there is (at least apparently) a material distinction in the case of a partial failure of conversion, according as the conversion is directed by will or by deed; for that in the case of a conversion directed by will, any partial failure of the purposes for which the conversion has been directed will enure for the benefit of the testator's representatives, real or personal, who would have been entitled had no conversion been directed; whereas in the case of a conversion directed by deed or other instrument *inter vivos*, the rule is just the reverse; and this is because a will comes into operation from the death of the testator, but a deed takes effect from the moment of its execution; "and the "grantor by executing the deed says, in effect, "'*From the time I put my hand to this deed, I limit so* "*much of this real estate to myself as personal estate*'" (or so much of this personal estate to myself as real

Distinction between partial failure under a will and under a settlement.

Explanation of the distinction.

(*i*) *Cruse* v. *Barley*, 3 P. Wms. 22; *Taylor* v. *Taylor*, 3 De G. M. & G. 190; *Robinson* v. *Governors of London Hospital*, 10 Hare, 19.
(*k*) *Clarke* v. *Franklin*, 4 K. & J. 263.
(*l*) *Pulteney* v. *Darlington*, 1 Bro. Ch. Ca. 223.
(*m*) *Griffith* v. *Ricketts*, 7 Hare, 299.
(*n*) *Wheldale* v. *Partridge*, 8 Ves. 236.

estate) (*o*); and the property therefore results into the hands of the settlor himself where the conversion is by deed, and from him it devolves (as by a second devolution) in the same way that it devolves from the heir or next of kin where the conversion is by will.

(*o*) *Clarke* v. *Franklin*, 4 K. & J. 263.

CHAPTER X.

RECONVERSION.

Reconversion.

RECONVERSION is the notional or imaginary process by which a prior notional conversion is annulled, and the notionally converted property is restored in contemplation of law to its original actual unconverted quality; and such reconversion may take place either (1.) by act of the parties, or (2.) by operation of law.

Two varieties of reconversion.

I. By the act of the parties.

I. Firstly, Reconversion by act of the parties,—And hereunder the matters to be considered are (1.) the persons who may or who may not reconvert; and (2.) the mode in which they do so. And

1. By absolute owner.

in the first place, it is clear, that the sole absolute owner in fee-simple in possession of property directed to be converted may elect to take that property in whatever form he chooses,—it would be vain for equity to compel the doing of that which might be undone the next moment; still the onus of proving a reconversion will (even in that case) be on those who allege it (*a*). But as regards co-tenants, the following distinction has been taken, namely, that when the conversion is of money into land, any one undivided owner may reconvert without the concurrence of the others (*b*), but he may not do so in the converse case (*c*); and the reason for this

2. By owner of an undivided share.

(*a*.) Of money to be turned into land,—the

(*a*) *Sisson* v. *Giles*, 11 W. R. 971; *Benson* v. *Benson*, 1 P. Wms. 130.
(*b*) *Seely* v. *Jago*, 1 P. Wms. 389.
(*c*) *Holloway* v. *Radcliffe*, 23 Beav. 163.

diversity is, because the sale of an undivided share in realty would be less marketable, and would probably produce a far less sum than would be attributable to it on a sale of the entirety. As regards a remainderman, he cannot reconvert so as to affect the interests of the prior tenants; but, of course, the remainderman is not prevented from declaring that, *as between his real and personal representatives*, his remainder shall be distributable or shall descend in whichever character he chooses to direct (*d*).

undivided owner may reconvert.

(*b*.) Of land to be converted into money,—the undivided owner may *not* reconvert.

3. By remainderman,—to extent of his own interest only.

As regards infants, lunatics, and married women, some greater detail is required: and firstly, an infant cannot ordinarily reconvert (*e*),—because usually the matter can wait till he comes of age; but if the matter won't wait, then the court may direct an inquiry, whether it is for the benefit of the infant to reconvert or not, and will order and decree according to the result of the inquiry,—but apparently without prejudice to the respective rights of the real and personal representatives of the infant dying under age (*f*). Secondly, a lunatic cannot reconvert (*g*), but his committee, with the sanction of the court, may do so for him,—in which case the like inquiry will be directed as in the case of infants; but the court will not usually in the case of lunatics prejudice the respective rights of the real and personal representatives of the lunatic; on the contrary, the court will in general make express provision for preserving these rights intact (*h*). And finally, as regards married women, they may doubtless recon-

4. By infants.

5. By lunatics.

6. By married women.

(*d*) *Gillies* v. *Longlands*, 4 De G. & Sm. 372, 379; *Cookson* v. *Cookson*, 12 Cl. & F. 121.

(*e*) *Carr* v. *Ellison*, 2 Bro. C. C. 56; *Robinson* v. *Robinson*, 19 Beav. 494.

(*f*) *Foster* v. *Foster*, 1 Ch. Div. 588

(*g*) *Ashby* v. *Palmer*, 1 Mer. 296.

(*h*) *Att.-Gen.* v. *Ailesbury* (*Marquis*), 12 App. Ca. 672.

vert if they are absolute owners; and the only matter to be considered is,—the mode in which they shall do so. Now, as to money to be converted into land,—a *feme covert* could not reconvert by a contract or ordinary deed (*i*); for, as observed by Lord Hardwicke in *Oldham* v. *Hughes* (*k*), "a *feme covert* cannot "alter the nature of *money* to be laid out in land, "*barely* by a contract or deed; yet the money may "be invested in land (and sometimes sham pur-"chases have been made for that purpose), and she "may then levy a fine of the land and give it to her "husband, or any one else; or she may reconvert by "coming into this court, and consenting to take the "money as personal estate, *scil.* being first examined "(as a *feme covert* on a fine is) as to her consent;" and now by the Act 3 & 4 Will. IV. c. 74, s. 77, a married woman may by deed acknowledged reconvert (*l*). And as to land to be converted into money, the husband and wife might, before the Act 3 & 4 Will. IV. c. 74, by levying a fine of the land while remaining unsold, bar all the wife's estate and interest in the money to arise from the sale of the land (*m*); and since the Act a married woman may, with her husband's concurrence, by deed acknowledged reconvert; and she may do so, whether her estate is in possession (*n*) or in reversion (*o*); and whether it be an *estate* or merely an *interest* in the land (*p*), present or future; but not where it is a mere expectancy or *spes successionis* (*q*). Of course, as regards her *separate estate*, a married woman (being the absolute owner) may now reconvert by an ordinary unacknowledged deed.

(*a.*) Money into land.

(*aa.*) Anciently, the married woman was examined in court, and so reconverted.

(*bb.*) At present, the married woman executes a deed acknowledged, and so reconverts, 3 & 4 Will. IV. c. 74, s. 77.

(*b.*) Land into money.

(*aa.*) Anciently the married woman reconverted by levying a fine.

(*bb.*) At present, the married woman reconverts by executing a deed acknowledged.

(*i*) *Frank* v. *Frank*, 3 My. & Cr. 171.
(*k*) 2 Atk. 453.
(*l*) *Forbes* v. *Adams*, 9 Sim. 462.
(*m*) Co. Litt. 121*a*, *n.*
(*n*) *Briggs* v. *Chamberlain*, 11 Hare, 69.
(*o*) *Tuer* v. *Turner*, 20 Beav. 560.
(*p*) *Miller* v. *Collins*, 1896, 1 Ch. 573.
(*q*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.

How election is shown. (*a.*) By express direction.

As regards the mode of reconverting in general,—It is clear, that an absolute owner of property, not under disability, may reconvert by any express declaration of his intention in that behalf (*r*); and in case he should not so express his intention, the acts of such an owner may be sufficient to lead to an inference of reconversion; and as regards real estate directed to be converted into money, slight circumstances have been deemed sufficient to raise the inference of a reconversion on his part,—*e.g.*, his keeping the land unsold for a time (*s*); or his granting a lease thereof, reserving rent to himself, his heir and assigns (*t*); and as regards personal estate to be laid out in land, if he receives the capital money from the trustees, he is held to have reconverted (*u*),—but not if he has received merely the *income* of the money, though for a long time (*v*).

(*b.*) By implied direction, from conduct.

(*aa.*) As to land into money,—slight circumstances suffice to reconvert.

(*bb.*) As to money into land,—slight circumstances not sufficient to reconvert.

II. By operation of law. Concurrence of two requisites to reconversion necessary,—1st, property in person entitled, whether it be real or personal, and, 2nd, no declaration by him concerning it.

II. Secondly, Reconversion by operation of law,—And hereunder it is to be observed, (1) that where money has once been impressed with the quality of land, that impression will, in a contest between the heir and the executor, remain for the benefit of the heir until it is put an end to; and (2) that to put an end to it two things are necessary, neither of which standing alone will suffice to reconvert the property, that is to say, it must be shown, firstly, that the money was in the hands, *i.e.*, in the actual possession, of a person who had in himself both the executors and the heirs (*x*); and, secondly, that such

(*r*) *Bradish* v. *Gee*, Amb. 229; *Wheldale* v. *Partridge*, 8 Ves. 932; *Att.-Gen.* v. *Mangles*, 5 M. & W. 120.

(*s*) *Dixon* v. *Gayfere*, 17 Beav. 433; *Mutlow* v. *Bigg*, 1 Ch. Div. 385; *Roberts* v. *Gordon*, 6 Ch. Div. 531.

(*t*) *Crabtree* v. *Bramble*, 3 Atk. 680; *Farwell* v. *Lewis*, 30 Ch. Div. 654.

(*u*) *Trafford* v. *Boehm*, 3 Atk. 440; *Martin* v. *Trimmer*, 11 Ch. Div. 341.

(*v*) *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*x*) *Wheldale* v. *Partridge*, 8 Ves. 235.

person died without making any declaration of his intention regarding it either way. Accordingly, where in *Chichester* v. *Bickerstaff* (*y*), on the marriage of Sir John Chichester with the daughter of Sir Charles Bickerstaff, Sir Charles by articles covenanted to pay £1500 in part of his daughter's portion, which £1500, together with another £1500 to be advanced by Sir John within three years after the marriage, was to be invested in land and settled on Sir John for life, remainder to his intended wife for life, remainder to their issue, remainder to Sir John's right heirs; and within a year of the marriage the wife died childless, and Sir John died *three days after his wife;* and Sir John by his will made Sir Charles his *executor*, and devised the residue of his personalty, after debts, &c., paid, to Frances Chichester, his sister,—Upon a bill filed by the heir-at-law of Sir John against Sir Charles to compel him to pay the £1500 which Sir John had covenanted to pay, insisting that (by virtue of the marriage articles) the money ought to be looked on and considered in equity as land, and therefore as belonging to him as heir,—Lord Somers said:—"This money, though "once bound by the articles, yet, when the wife died "without issue, became free again, as the land would "have been in case a purchase had been made pur-"suant to the articles;" and he dismissed the bill (*z*). And in the case of *Pulteney* v. *Darlington* (*a*), where money impressed with the qualities of realty had come by operation of law into the hands of the person (Lord Bath) solely entitled to it under the limitation in fee; and he, without taking notice of the particular sum, devised all his manors, &c.

Chichester v. *Bickerstaff*,—the money was "at home" *for three days only*, and Sir John "died and made no sign" about it.

Pulteney v. *Darlington*,—the money was doubly reconverted, having been twice over "at home."

(*y*) 2 Vern. 295.

(*z*) The £1500 payable by Sir Charles, if not already paid by him to Sir John, would, *semble*, cease to be recoverable,—as the law then was,—by reason of Sir Charles being appointed Sir John's executor!

(*a*) 1 Bro. C. C. 223; 7 Bro. P. C. 530.

(except certain *locally* described estates therein mentioned), to his brother H. in fee, and gave him all the residue of his personal estate, and made him his executor; and H. subsequently, by his will, gave all his estates by *local* descriptions to certain uses therein mentioned, and all his moneys, securities for money, goods, chattels, and personal estate not before disposed of, to his executors, upon certain trusts mentioned in his will,—Upon a bill filed by the heir-at-law of Lord Bath claiming to have the money laid out in land, Lord Thurlow refused the claim, saying:—"Where a sum of money is in the hands of "one without any other use but for himself, it will "be money, and the heir cannot claim;" and Lord Eldon, commenting on this decision, says:—"It went "no further than this, that if the property was *at* "*home* in the possession of the person under whom "the heir and the executor both claimed, the heir "could not take it; but if it stood out in a third "person, he possibly might; and the question in such "latter case would be simply whether the money was "*at home*" (*b*). And, in accordance, with that last observation, it has been held, in the recent case of *Walrond* v. *Rosslyn* (*c*), that there is no reconversion by operation of law, when any subsisting legal interest (*e.g.*, a legal jointure) is outstanding, notwithstanding that all the successive limitations in the settlement have (subject only to such one jointure) centred in one and the same person; and accordingly, the money in that case directed to be laid out in land and to be strictly settled was held to remain impressed with the character of land, and therefore went to the real representatives by reason of (and of course subject to) the outstanding jointure.

Money impressed with real uses *at home* in the hands of the absolute owner devolves as money.

But not if any outstanding partial interest stands in the way.

(*b*) *Wheldale* v. *Partridge*, 8 Ves. 235.
(*c*) 11 Ch. Div. 640.

CHAPTER XI.

ELECTION.

Election arises from inconsistent alternative gifts.

THE doctrine of election in equity originates in two inconsistent alternative donations or benefits, the one of which, the purporting donor has no power to make, without at least the assent of the donee of the other benefit (*a*). In this duality of gifts, or purported gifts, there is an intention,—which may be express, but which is more often implied,—that the one gift shall be a substitute for the other, and shall take effect only if the donee thereof permits the other gift to also take effect, substantially in the manner and to the extent intended by the donor. The permitting donee has the right to choose,—whence this head of equity is commonly called Election. The *foundation* of the doctrine is, of course, the intention of the author of the instrument,—an intention which, extending to the whole disposition, is frustrated by the failure of any part; and its *characteristic* is, that, by an equitable arrangement, effect is given to a purported donation of that which is not the property of the donor. And this doctrine of election, in common with many other doctrines of our courts of equity, appears to have been derived from the civil law; for by that law a bequest of property which the testator knew to belong to another was not void, but the like bequest in error was invalid (*b*); but the English law (which dislikes those fruitless and im-

The *foundation* and the *characteristic effect* of the equitable doctrine.

Election,—derived from the civil law.

(*a*) *Harle* v. *Jarman*, 1895, 2 Ch. 419.
(*b*) Just. Insts. ii. 24, 1.

possible inquiries with which the civil law abounded) holds, that whether the donor knew or not that the property he assumed to deal with was his own or not, *if he has advisedly assumed to give it*, then and in either case it is held that the donee is put to his election (*c*). Supposing therefore that A. by *will* or *deed* gives (*i.e.*, purports to give) to B. property belonging to C., and by the *same* instrument gives other property belonging to himself to C., a court of equity will hold C. to be entitled to the gift made to him by A., only upon the implied condition of his (C.'s) conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of B.

Two courses open to elect between,—

(1.) Election under the instrument.

(2.) Election against the instrument.

And in the case supposed, C. has two courses open to him to choose between, that is to say, either (1.) to take under the instrument, and consequently to conform to all its provisions,—in which case no difficulty arises, as B. will take C.'s property, and C. will take the property given to him by A.; or (2.) to go against the instrument,—in which case the question arises, Does C., by refusing to conform to the terms of the instrument, wholly forfeit the gift made to him, or only so much of that gift as is required to be taken from him to compensate B. for the disappointment he has suffered by C.'s election against the instrument?

Illustration,—showing that compensation and not forfeiture is the rule,—upon an election against the instrument.

To illustrate by a simple case: Suppose A., the testator, gives to B. a family estate belonging to C., worth £20,000 in the market, and by the same will gives to C. a legacy of £30,000 of his (A.'s) own property. C. is unwilling to part with his family estate, and therefore elects against the instrument. It has been held that, in such a case, viz., the election against the instrument, the principle of compensation, and not that of forfeiture, is to govern. In the case

(*c*) *Whistler* v. *Webster*, 2 Ves. 370.

put, therefore, C. will retain his family estate and will also receive £10,000, portion of his legacy of £30,000, leaving to B. £20,000, other portion of the legacy of £30,000, to compensate him (B.) for the value of the estate of which he has been disappointed by C.'s election against the instrument: in other words, as is stated in the note to *Gretton* v. *Haward* (*d*), in the event of election to take against the instrument, courts of equity assume jurisdiction to sequester the benefits intended for the refractory donee, in order to secure *compensation* to those whom his election disappoints; and the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right.

Ratification of voidable contract, distinguished from *election*.

Election arising, therefore, only where there are two gifts, the one real and effective of the donor's own property, and the other unreal and ineffective of what is already the donee's own property, it is necessary to distinguish election from the mere *ratification* of a voidable contract, with which it has sometimes been confounded (*e*); and it is also necessary to distinguish cases of election properly so called from another (apparently similar but in reality dissimilar) class of cases, where a testator makes two or more separate gifts of *his own* property in the same instrument,—for in such latter case, the gifts, whether beneficial or onerous, being both of them the property of the donor, the donee may take what is beneficial and reject what is onerous, unless it appear on the will that it was the intention of the testator to make the acceptance of the burden a

No election proper in cases where the testator makes two bequests of his own property in the same instrument.

(*d*) 1 Swanst. 433; *Rogers* v. *Jones*, 3 Ch. Div. 688; *Cavendish* v. *Dacre*, 31 Ch. Div. 466.

(*e*) *Wilder* v. *Pigott*, 22 Ch. Div. 263; *Harle* v. *Jarman*, 1895, 2 Ch. 419.

condition of the benefit (*f*); but this class of cases does not fall properly within the equitable doctrine of election, and the student should accordingly dismiss it wholly from his mind.

There must be a fund from which compensation can be made, *i.e.*, some property of donor's own.

As the doctrine of election depends on the principle of compensation, it follows that that doctrine will not be applicable where there is no fund from which compensation can be made; or, speaking more plainly, the doctrine of election only properly arises where the donor, or purporting donor, really puts into his gifts, or purported gifts, or some or one of them, *some property that actually is his own*, at the same time that he affects to give away the property of others; and this point comes out clearly upon a contrast of the decisions in *Bristow* v. *Warde* and *Whistler* v. *Webster;* for in *Bristow* v. *Warde* (*g*), decided in 1794, it appeared that a father had the power of appointing certain moneys or stock (£6000 South Sea stock) among his children, and that the appointment funds in question were given to the children in default of appointment by the father: it also appeared that the father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); and it also appeared that the father did not in or by his will give any property of his own to the children; and upon these facts the court held, that the children might keep their appointed shares, and also take (as in default of appointment) the shares appointed to X., Y., and Z.,—and that, in fact, the children were not bound to

Bristow v. *Warde*,—case of donor not adding any property of his own.

(*f*) *Warren* v. *Rudall*, 1 J. & H. 13; *Guthrie* v. *Walrond*, 22 Ch. Div. 573; *Syer* v. *Gladstone*, 30 Ch. Div. 614; *Freke* v. *Calmady*, 32 Ch. Div. 408; *Frewen* v. *Law Life Assurance Society*, 1896, 2 Ch. 511.
(*g*) 2 Ves. Jr. 336; *Hamilton* v. *Hamilton*, 1892, 1 Ch. 396.

Whistler v. *Webster*,—case of donor adding some property of his own.

elect. On the other hand, in *Whistler* v. *Webster* (*h*), also decided in 1794, it appeared that a father had the power of appointing certain moneys (£3000) among his children, and that the appointment-funds in question were given to his children in default of appointment by the father; it also appeared that the father by his will appointed portion of the funds to his children (the proper appointees), and the remaining part thereof to X., Y., and Z. (who, as not being children, were improper appointees); but it also appeared that the father in and by his will gave also certain property of his own to the children; and upon these facts the court held, that the children were bound to elect, keeping (if they chose) their appointed shares and the other benefits given to them by the will, and in that case not interfering with the shares improperly appointed to X., Y., and Z.; or else taking (if they chose) the entire appointment-fund to themselves, and out of the other benefits given to them by the will compensating X., Y., and Z. for the value of the shares improperly appointed.

Election under powers.

Considerable difficulty often attaches to cases of election when complicated, as the two lastly before stated cases were, with special powers of appointment, and it becomes necessary therefore to consider these cases a little closely: and firstly, where, under a special power, an express appointment is made to a stranger to the power, which appointment is therefore void, and a benefit is conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election; but, secondly, where, under a special power, the donee of the power appoints to a stranger, and confers benefits out of his own property upon an object

(1.) As to person entitled in default of appointment,—a true case of election.

(2.) As to person entitled under the power,—no

(*h*) 2 Ves. 367; *Beauclerk* v. *James*, 34 Ch. Div. 160.

of the power, the person who is the object of the power (not being also the person entitled in default of appointment) cannot with propriety be said to be put to his election; for, in order to raise a case of election, two circumstances must concur, that is to say, firstly, property which belongs to one person (A.) must be given to another person by the testator; and secondly, the testator must at the same time give to A. property of his (the testator's) own; and it is only where both these circumstances concur that A. is put to his election. Suppose then that A. is the object of the power, B. the person entitled in default of appointment to A., and X. is the person in whose favour the appointment is actually made: The appointment in favour of X. is clearly a bad appointment, and therefore the property would pass to B. as in default of appointment; and if the testator has conferred any benefits on B., he (B.) will be put to his election. But no property which *belongs* to A. has been given to X.,—for A. is but a volunteer as regards the donee of the power, and until the donee of the power has exercised the power in favour of A., the fund is not A.'s property; therefore, no part of A.'s property has been given to another. But if A. had been both the object of the power and the person entitled to the fund in default (*i.e.*, if in the case put A. and B. were the same individual), he would, if he had received any benefits from the donee of the power, be put to his election, not as A., the object of the power, but as B., *the person entitled in default of appointment* (*i*). The student will, however, observe, that in the case supposed of A. and B. being different persons, if A. gets any portion of the appointment-fund by any appointment thereof to him, he will be simply thankful for it and say nothing about what is

case of election properly so called.

But the same thing in effect.

(*i*) *Whistler* v. *Webster*, 2 Ves. 367.

appointed to X.; and if in addition A. gets also some property of the testator's own, he will simply be more thankful (in fact A. will in such a case be doubly thankful), and again will say nothing about what is appointed to X.; and that is all that is meant, when it is sometimes said, that the person entitled under the power, or as an object of the power, is not put to his election.

Blacket v. *Lamb*,—absolute appointment, with directions modifying the appointment,—

(1.) When such directions are invalid.

(2.) When such directions are valid, and raise a case of election;

Where there is an absolute appointment by will in favour of a proper object of the power, and the appointment is followed by words attempting to modify the interest so appointed in a manner *which the law will not allow* (*k*), the words of attempted modification will not be available for raising a case of election (*l*); but if the attempted modifications are in themselves *such as the law will in ordinary cases allow*,—and are also sufficiently clear and imperative, amounting in substance to the creation of a trust or to a direct gift,—then the question of election would arise, and would have to be answered upon the principles already explained. In other words, to cite the words of the Master of the Rolls in *Blacket* v. *Lamb* (*m*)—"The question resolves itself into this, whether these "words" (meaning the precatory words in which it was attempted to modify the interests appointed to the children) "amount to a direct appointment in "favour of the grandchildren; for if they do amount "to such an appointment, there is not, I think, any "doubt but that a case of election is raised; but if "not, then no case of election will arise." Accordingly, where there is a clause of forfeiture of the legacies on non-compliance with any such attempted modification of the appointed interests, a case of

e.g., when they impose a forfeiture for non-compliance;

(*k*) *Wollaston* v. *King*, L. R. 8 Eq. 165.
(*l*) *Woolridge* v. *Woolridge*, Johns. 63.
(*m*) 14 Beav. 482.

election would be raised (*n*),—assuming that the other conditions requisite for raising a case of election were present; and in the case of *White* v. *White* (*o*), where A. had under his marriage settlement power to appoint the settled hereditaments to the children of his first marriage, and such children were entitled thereto in default of appointment; and by his will A. gave the settled property to a son of his by the first marriage, but purported to subject the devise to a certain charge in favour of his children by a second marriage as well as in favour of his other children by the first marriage, and in and by his will he also devised certain property of his (the testator's) own to the son, subject to the like charge,—The court held, that the son was put to his election; in other words, that the charge purporting to be created on the settled property appointed to the son, although not valid *in se* so far as it regarded the children of the second marriage, was good (or the effect thereof could be accomplished) by virtue of the doctrine of election.

or where, as in *White* v. *White*, the direction is clear and imperative.

Questions of election also sometimes arise where the disposing party is without capacity to dispose, or where the instrument of disposition is ineffectual for the purpose; and some few of these cases may be now conveniently referred to. And firstly, as regards infants, no case of election was ever raised where there was a want of capacity to devise real estate by reason of infancy. Thus, under the old law, when the will of an infant was valid as to personalty, but invalid as to realty, if an infant gave a legacy to his heir-at-law and devised real estate to another person, the heir-at-law would not have been obliged

Ineffectual attempts to dispose of property by will, —examples of, raising or not election.

(*a*.) Infancy.

(*n*) *King* v. *King*, 15 Ir. Ch. R. 479; *Boughton* v. *Boughton*, 2 Ves. Sr. 12.

(*o*) 22 Ch. Div. 555; and disting. *Woolridge* v. *Woolridge*, Johns. 63.

to elect between the legacy and the real estate (*p*); that is to say, he might have kept the real estate coming to him by descent in spite of the will, and also have taken the personal estate coming to him under the will. And secondly, as regards married women, a case of election would not arise by reason of incapacity to make a will; therefore where a *feme covert* made a valid appointment by will to her husband under a power, and also bequeathed to another person personal estate (not being her own separate estate) to which the power did not extend, the husband was not put to his election; that is to say, he was held to be entitled to the benefit appointed to him under the power, and also to the property ineffectually bequeathed by his wife, to which latter he was entitled *juri mariti* (*q*); and the rule was the same, where the will was valid at the time of execution, but afterwards became in part inoperative (*r*). And in the recent case of *In re Vardon's Trusts* (*s*), where a female had married during infancy, and by her marriage settlement property was settled upon her for her life to her separate use without power of anticipation, and she thereby covenanted to settle her future property, and having afterwards during the coverture become entitled to certain property under the will of her brother, she elected (or purported to elect) not to be bound by her covenant made during infancy,—the restraint on anticipation created by the settlement was held to be a circumstance on the face of the settlement itself which excluded the application of the doctrine of election; but the court indicated, that, but for that circumstance, the case was one in

(*b*.) Coverture.

(*a* and *b*.) Infancy and coverture combined.

(*p*) *Hearle* v. *Greenbank*, 3 Atk. 695.
(*q*) *Rich* v. *Cockell*, 9 Ves. 369.
(*r*) *Blaiklock* v. *Grindle*, L. R. 7 Eq. 215.
(*s*) 31 Ch. Div. 275; *Carter* v. *Silber*, 1892, 2 Ch. 278; and (sub nom. *Edwards* v. *Carter*), 1893, A. C. 360.

which the usual consequences of an election against the instrument would have followed.

(c.) Wills before 1 Vict. c. 26.

Previous to the Wills Act, 1 Viet. c. 26, where a testator, by a will *not properly attested* for the devise of freeholds, but sufficient to pass personal estate, devised freehold estates away from his heir, and gave him a legacy, the question arose whether the heir-at-law was obliged to elect between the legacy and the freehold estate, which descended to him in consequence of the devise away from him being inoperative; and it was clearly settled that he would not be obliged to elect (*t*),—unless the legacy were given to him with an express condition that if he disputed or did not comply with the whole of the will he should forfeit all benefit under it (*u*). On the other hand, if the will was *properly attested* for the devise of freehold estates, and the testator attempted to thereby dispose of *after-purchased lands*, which previous to the Wills Act, 1 Viet, c. 26, he could not effectually do, then the heir taking any personal estate under the will was bound to elect between that personal estate and such after-purchased lands so ineffectually attempted to be disposed away from him (*v*). And again, in cases where a testator having real estate in both England and Scotland makes an English will devising his lands in both countries (in effect) to his children, and the will not being operative as regards the lands in Scotland, the eldest son becomes (strictly speaking) entitled thereto as the testator's heir-at-law, the courts have held that the eldest son is put to his election between the operative devises and bequests to him contained in the will and the real estate in

(*aa.*) Will not properly attested.

(*bb.*) Will properly attested.

(*d.*) Election, where Scotch lands are devised by English will;

(*t*) *Sheddon* v. *Goodrich*, 8 Ves. 481.
(*u*) *Boughton* v. *Boughton*, 2 Ves. Sr. 12
(*v*) *Schroder* v. *Schroder*, Kay, 578.

or foreign lands, generally.

Scotland coming to him by descent (*x*). So also, when a testator was possessed of real estates in England and of other real estates in the island of St. Kitts, and by a will duly attested for the real estates in England (but which was inoperative by the law of St. Kitts for the real estates in St. Kitts) devised his real estates both in England and in St. Kitts to his heir-at-law for life, the court held that the heir-at-law was put to his election (*y*).

(*e.*) Election with reference to dower,—(*a.*) At law,—express words. (*b.*) In equity,—express words or necessary implication.

Where the Dower Act (3 & 4 Will. IV. c. 105) did not apply, that is, in the case of all widows married on or before the 1st January 1834, a widow might at law be put to her election by express words between her dower and a gift conferred on her (*z*); and in equity she might be put to her election by manifest (*i.e.*, necessary) implication, demonstrating the intention of the donor to exclude her from her legal right to dower; but this intention would not be implied unless the instrument contained provisions essentially *inconsistent* with the right to dower. The question therefore was, whether the gift was inconsistent with her right to dower as well; and it was settled, that a devise (although to herself) of *part* of the lands of which she was dowable, was not inconsistent with her claim to dower out of the remainder (*a*); and that a devise of lands (out of which the widow was dowable) on *trust for sale*, was not inconsistent with her claim to dower out of those lands, even though the interest of a part of the proceeds of the sale was given to her (*b*); and the mere gift of an annuity to the testator's widow, although charged on all the testator's property, was

Necessary implication from concurrence of gift to widow with gift of other lands inconsistent with her right of dower.

(*x*) *Brodie* v. *Barrie*, 2 V. & B. 127; *Orrell* v. *Orrell*, L. R. 6 Ch. App. 302.
(*y*) *Dewar* v. *Maitland*, L. R. 2 Eq. 834.
(*z*) *Nottley* v. *Palmer*, 2 Drew. 93.
(*a*) *Lawrence* v. *Lawrence*, 2 Vern. 365.
(*b*) *Ellis* v. *Lewis*, 3 Hare, 310.

not inconsistent with her right to dower (*c*); and, in fact, the only provisions in a will which were held to be essentially inconsistent with the widow's right to dower were provisions which prescribed to the devisees a certain mode of enjoyment which necessitated their having the entire land, and which, of course, they could not have if the widow was to have assigned to her a third part of the land (*d*). But under the recent Dower Act (where that Act applies), any gift of the character above exemplified, made by a testator to his widow, would defeat the widow's dower altogether (*e*) without giving her any option to elect.

Example of a gift *inconsistent with* widow's right of dower.

Dower,—under the Dower Act, 1833.

Somewhat connected with this group of cases are such cases as the following, namely:—A. B. is entitled to a fee-simple estate, and C. D. by his will gives A. B.'s estate to E. F., and gives to A. B. property of his (C. D.'s) own, and also gives to G. H. other property of the testator's own; then the testator dies, and A. B. elects against the will and afterwards dies, leaving G. H. his heir-at-law or universal devisee. The question in such a case is, whether G. H. becoming *derivatively* entitled under A. B. is bound to elect, A. B. having already elected as aforesaid; and the courts have held, that he is not. In like manner, if a wife elected against the will of a testator to keep her own estate-tail, her husband would not lose his curtesy in such estate merely because he took the benefits given to him by the same will out of the testator's own property (*f*), for the curtesy is a mere incident to the estate-tail of the wife (*g*). But where the derivation or devolution of interest happens before

(*f*) Election in the case of *derivative* interests.

(*c*) *Holdich* v. *Holdich*, 2 Y. & C. C. C. 19.
(*d*) *Butcher* v. *Kemp*, 5 Mad. 61; *Miall* v. *Brain*, 4 Mad. 119; *Birmingham* v. *Kirwan*, 2 Sch. & L. 444.
(*e*) *Thomas* v. *Howell*, 34 Ch. Div. 166.
(*f*) *Cavan* v. *Pultency*, 2 Ves. 544; 3 Ves. 384.
(*g*) *Grisell* v. *Swinhoe*, L. R. 7 Eq. 291.

the original donee (who is called upon to elect) has elected, the person or persons claiming through him are bound to elect; and for this purpose the titles of residuary legatees and of next of kin are to be regarded as one title (*h*).

The intention of the testator is to be sought for.

In order to raise a case of election, there must in all cases appear on the instrument itself a clear intention to dispose of that which is not the donor's own; and if therefore the words used are capable of being otherwise satisfied, no case for election will arise; *e.g.*, if a testator devises an estate in which he has a limited interest, the court will lean to that construction which will make him deal only with his limited interest; for every testator must, *primâ facie*, be taken to "have intended to dispose only of what "he had a right or power to dispose of; and, in order "to raise a case of election, it must be clear that "there was an intention on the part of the testator "to dispose of what he had not the right or power to "dispose" (*i*). Wherefore, in *Shuttleworth* v. *Greaves* (*k*), where the wife of S. F. was the only child of A., and A. was entitled to certain shares in the Nottingham Canal, which shares upon his death were transferred into the names of "F. S. and wife," the wife having become her father's administratrix; and F. S. was afterwards, until his death, treated by the Canal Company as proprietor of the shares, and received the dividends upon them; and by his will, he bequeathed what he called "all my shares in the Nottingham Canal Navigation," and all his personal estate to trustees, in trust for his wife for life, remainder over to his brothers and sisters absolutely; and he had, in fact, no such canal shares at all, unless those so

Where the testator has a limited interest, he is presumed to have given his own, and not to have attempted to give what was not his own.

Shuttleworth v. *Greaves*,—a case of *shares* in a specified company.

(*h*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53.
(*i*) *Wintour* v. *Clifton*, 8 De G. M. & G. 651.
(*k*) 4 My. & Cr. 35; *Noys* v. *Mordaunt*, 2 Vern. 581; *Honywood* v. *Forster*, 30 Beav. 14.

transferred into the names of his wife and himself should be considered his,—The court held, that the words of the will amounted to a bequest of the particular shares before mentioned, and could not be otherwise satisfied, and that the widow was bound to elect. On the other hand, in *Dummer* v. *Pitcher* (*l*), where a testator by his will "bequeathed the rents "of his leasehold houses, and the interest of all his "funded property or estate," upon trust for his wife for life, and after her decease, on trust to pay divers legacies of stock; and he had, in fact, no funded property at the date of his will, but there was at that date funded property standing in the joint names of himself and his wife; and the wife, after his death, claimed, by survivorship, the funded property standing in the names of her husband and herself; and it was contended that, as she took benefits under the will, she ought to be put to her election between those benefits and the funded property,—The court held, that the widow was not put to her election; consequently, she kept the stock which she took by survivorship, and also took the life estate given to her by the will; and this decision proceeded purely on this, that there was no *constat* on the face of the will, that the testator was dealing with his wife's funded property; he might himself at any moment before his own death have acquired funded property (consols being a very different thing from Nottingham Canal shares as regards facility of acquisition). And it must never be forgotten, that parol evidence is not admissible for the purpose of raising a case of election; and in *Clementson* v. *Gandy* (*m*), where parol evidence was tendered for the purpose of showing that the tes-

Dummer v. *Pitcher*,—a case of *funded property* generally.

Evidence *dehors* the instrument,—not admissible to make out a case of election.

(*l*) 2 My. & K. 262; *Usticke* v. *Peters*, 4 K. & J. 437.
(*m*) 1 Keen, 309; *Stratton* v. *Best*, 1 Ves. Jr. 285; *Honywood* v. *Forster*, 30 Beav. 14.

tatrix intended to pass, under a general bequest, certain property in which she had only a life-interest, supposing it to be her own absolutely, so as to put a legatee who had an interest in the property to his election, Lord Langdale refused to admit the evidence, observing, that "*the intention to dispose must, in all "cases, appear by the will alone.*"

Mode of electing.

With regard to the mode of signifying one's election, in cases where a person is required to elect, the same observations (without any material change) are applicable here which were made above when considering the mode of signifying one's reconversion. That is to say, Firstly, married women elect as to real estate by deed acknowledged; but where the court has seisin of the matter, an inquiry will, at least occasionally, be directed as to which of the two interests is the more beneficial for them, and they will then elect within a limited time after the result of the inquiry (*n*); and of course, as regards their *separate estate*, they elect (being of full age) like any male adult,—*scil.* where no restraint on anticipation is annexed to their separate estate; but where such restraint is annexed, if (under the circumstances) the married woman must elect (*o*), she would do so with the aid of the court, and by virtue of the provision contained in the Conveyancing Act, 1881, s. 39, under which the court, with her consent, may for this purpose lift off the restraint. And as regards personal estate (not being separate estate), a married woman would elect by deed acknowledged under Malins's Act (20 & 21 Vict. c. 57), wherever that Act is applicable; and when it is not applicable, then she elects under the direction

Persons under disabilities. (1.) Married women,—they elect as to *land* by deed acknowledged; and as to *money*, by direction of court on inquiry.

(*n*) *Davis* v. *Page*, 9 Ves. 350; *Wilder* v. *Pigott*, 22 Ch. Div. 263.
(*o*) *In re Vardon's Trusts*, 31 Ch. Div. 275; *Gibson* v. *Way*, 32 Ch. Div. 361.

of the court upon an inquiry (*p*). But a married woman may also in all cases elect out of court, that is to say, by her conduct, whereby she will be (in effect) estopped from denying that she has elected (*q*), —unless, *semble*, in cases where she is subject to the restraint in anticipation (*r*). Secondly, as regards infants, the practice is not quite uniform, being of course adapted to the necessities of the case; *e.g.*, in *Streatfield* v. *Streatfield* (*s*), the period of election was deferred until the infant came of age; but in other cases, there has been a reference to inquire what would be most beneficial to the infant (*t*), and the court has elected upon the result of the inquiry being certified. And, Lastly, as regards lunatics, the practice is to refer the matter to a Master in Lunacy, to report what would be most beneficial to the lunatic, and the court has elected upon the result of the inquiry; and the court will not defer the matter until the lunacy is superseded, unless, perhaps, where a supersedeas is in prospect; and this jurisdiction extends even to lunatics not so found (*u*).

(2.) Infants, —they wait till of age; or else elect by direction of court on inquiry.

(3.) Lunatics, —they elect by direction of court on inquiry.

Persons compelled to elect are entitled previously to ascertain the relative values of the two properties between which they are called upon to elect (*v*); and for that purpose they may file a bill to have all necessary accounts taken and inquiries made (*x*);

Privileges of persons compelled to elect.

(*p*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53.

(*q*) *Barrow* v. *Barrow*, 4 K. & J. 409; *Wilder* v. *Pigott*, 22 Ch. Div. 263; *Greenhill* v. *North British Insurance Co.*, 1893, 3 Ch. 474; *Williams* v. *Knight*, 1894, 2 Ch. 421.

(*r*) *Cahill* v. *Cahill*, 8 App. Ca. 420; *Seaton* v. *Seaton*, 13 App. Ca. 61; *Harle* v. *Jarman*, 1895, 2 Ch. 419; *Bateman* v. *Faber*, 1897, 2 Ch. 223.

(*s*) 1 L. C. 369.

(*t*) *Bigland* v. *Huddlestone*, 3 Bro. C. C. 285 *n.*; *Ashburnham* v. *Ashburnham*, 13 Jur. 1111.

(*u*) *Wilder* v. *Pigott*, supra.

(*v*) *Boynton* v. *Boynton*, 1 Bro. C. C. 445.

(*x*) *Buttrecke* v. *Brodhurst*, 3 Bro. C. C. 88; *Leslie* v. *French*, 23 Ch. Div. 552.

and an election made under a mistake of fact will not be binding,—for in all cases of election, the court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts, performed perhaps in ignorance or under a misapprehension of the value of the funds (*y*). Where election is to be inferred from the acts of the party, that is to say, in all cases of election by conduct, considerable difficulty arises in deciding what acts of acceptance or of acquiescence amount to an implied election; and this question must be determined (like any other question of fact) upon the circumstances of each particular case, and not on any general principles of law; and if a party, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and to reject the other; and if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own, as, for instance, by mortgaging it (particularly if this be done with the concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rent of the other property (*z*); and of course, the acts from which an election is to be inferred must have been done with the intention of electing (*a*), and with full (or at least sufficient) knowledge.

What is deemed an election,—by conduct.

A person who does not elect within the time limited, when a time is limited, will be considered as having elected to take against the instrument

Election against instrument,—where no election in fact.

(*y*) *Wake* v. *Wake*, 3 Bro. C. C. 255; *Kidney* v. *Coussmaker*, 12 Ves. 136.
(*z*) *Padbury* v. *Clarke*, 2 Mac. & G. 298.
(*a*) *Dillon* v. *Parker*, 1 Swanst. 380, 387.

putting him to his election (*b*); but where no time is limited, it is difficult to lay down any rule as to what length of time will be binding on the party (*c*),—for although the court will not readily hold him concluded by the mere lapse of time, still if he suffers specific enjoyment by others until it becomes inequitable to disturb their rights, he will be concluded (*d*).

Length of time may exclude right to question election.

(*b*) *Fytche* v. *Fytche*, L. R. 7 Eq. 494.
(*c*) *Sopwith* v. *Maughan*, 30 Beav. 235.
(*d*) *Tibbitts* v. *Tibbitts*, 19 Ves. 663.

CHAPTER XII.

PERFORMANCE.

Equity imputes an intention to fulfil an obligation.

THE doctrine of performance is based upon the maxim of equity which imputes an intention to fulfil an obligation; in other words, when a person covenants to do an act, and he does some other act of a kind applicable to the performance of his covenant, he is presumed to have had, when he did such other act, the intention of performing his covenant; and there are two classes of cases in which questions of performance arise, namely: (1.) Where there is a covenant to purchase and settle lands, and a purchase is in fact made, but no settlement is made; and (2.) Where there is a covenant to *leave* personalty to A., and the covenantor dies intestate, and property comes thereby in fact to A.

I. Covenant to purchase lands, and land is purchased.

I. The first class of cases is exemplified and fully considered in *Lechmere* v. *Earl of Carlisle* (*a*). There Lord Lechmere, upon his marriage with Lady Elizabeth Howard, daughter of the Earl of Carlisle, covenanted to lay out within one year after his marriage £6000, her portion, and £24,000 (amounting in the whole to £30,000) in the purchase of *freehold lands in possession*, in the south part of Great Britain, with the consent of the Earl of Carlisle and Lord Morpeth (the trustees), to be settled on Lord Lechmere for life, with remainder (for so much as would

(*a*) 3 P. Wms. 211; Ca. t. Talb. 80.

amount to £800 a year) to Lady Lechmere for her jointure, with remainder to the first and other sons in tail-male, and with the ultimate remainder to Lord Lechmere, his heirs and assigns for ever. Lord Lechmere was seised of some lands in fee at the time of his marriage; and after his marriage, but without any consent on the part of the trustees, he purchased some *estates in fee* of about £500 per annum, some estates *for lives, and some reversionary estates in fee* expectant on lives; and *contracted* for the purchase of other estates *in fee in possession;* and he then died intestate without issue, and without having made any settlement on any of these estates. Upon a bill being filed by the heir-at-law of Lord Lechmere for specific performance of the covenant, and to have the £30,000 laid out as therein agreed, it was held that the *freehold* lands purchased and contracted to be purchased *in fee-simple in possession after* the covenant, though with but part of the £30,000, should go in part performance of the covenant; but that the estates purchased *previously to the articles, the leaseholds for lives, and the reversions in fee expectant on the estates for lives, should not go in part performance of the covenant,* for these latter could not answer the end of the articles like the fee-simple purchases in possession did; and the want of *the trustees' consent* was of no consequence; and the judgment concluded with these words:—"Where a "man is under an obligation to lay out £30,000 in "land, and he lays out part as he can find purchases, "which are attended with all material circumstances, "it is more natural to suppose those purchases made "with regard to the covenant than without regard "to it; *for when a man lies under an obligation to do a "thing, it is more natural to ascribe the purchase to the "obligation he lies under than to treat the purchase as "a mere voluntary act.*" And besides the principal point established by this case, these further points

Deductions from *Lechmere* v. *Carlisle* (*Earl*).

1. Performance may be good *pro tanto*.

2. Previously purchased lands do not count.

3. Lands purchased, if unsuitable, do not count.

4. Trustee's consent to purchase,—want of, is immaterial.

may be deemed to have been established by it, that is to say:—1. Where the lands purchased are of less value than the lands covenanted to be purchased and settled, they will be considered as purchased in *part* performance of the covenant. 2. Where the covenant points to a *future* purchase of lands, it cannot be presumed that lands of which the covenantor was already seised at the time of the covenant were intended to be taken in part performance of it. 3. It cannot be presumed that property of a different nature from that covenanted to be purchased by the covenantor was intended as a performance (*b*). And 4. Although by the settlement the consent of the trustee is required, still the absence of that consent will not prevent the presumption of performance from arising, if the other circumstances of the purchase are favourable to such presumption; and so immaterial is the absence of the trustee's consent that in one case (*c*) the doctrine of *Lechmere* v. *Earl of Carlisle* was extended to a case even where the covenant was to pay money to the trustees, *to be laid out by them* in the purchase of land, and the covenantor himself purchased the land, and took a conveyance to himself of the fee, and died intestate without having made a settlement.

Covenant to settle does not create a lien on lands purchased.

It is to be observed, that a covenant to settle lands generally is a mere specialty debt, and will not create a specific lien on the lands afterwards purchased; and, consequently, such a covenant will not affect a purchaser or mortgagee of the lands even with notice (*d*). It might be otherwise, however, if the covenant was to acquire and settle certain specified lands, or, *semble*, if the covenant

(*b*) *Pennell* v. *Hallett*, Amb. 106.
(*c*) *Sowden* v. *Sowden*, 1 Bro. C. C. 582.
(*d*) *Deacon* v. *Smith*, 3 Atk. 323.

was to settle specified lands already acquired by the covenantor (*e*). And here we my perhaps usefully observe that, as regards the covenants to settle the after-acquired property of the wife, which are usually inserted in marriage settlements, these covenants bind that property in equity, but not as against a purchaser for value without notice who acquires the legal estate. Moreover, these covenants (unless the words thereof are clear to the contrary) operate only during the coverture when the wife is the survivor, although they may operate beyond the coverture when the husband is the survivor (*f*). And we may here also further observe, that although the case of following trust money into land purchased with portion of the trust funds has some resemblance to the case of performance properly so called, yet the two cases differ materially,—for in the case of performance, the husband is under an OBLIGATION to purchase the land, while in the case of following trust money, the husband is under no such obligation, and therefore all turns on the circumstance that the purchase was in fact made with the trust money (*g*).

Covenants to settle after-acquired property,—construction of.

Right of *cestui que trust* to follow trust fund,—distinguished from performance.

II. The second class of cases in which questions of performance arise is exemplified by the covenant of a husband to leave his wife a gross sum of money, and through his death intestate she becomes entitled to a portion of his personal property under the Statutes of Distribution; and in such cases the question is whether such distributed share is a performance of the covenant, or whether she can claim both the distributive share and the money

II. Covenant to pay or leave by will, and share under the Statute of Distributions.

(*e*) *Mornington* v. *Keane*, 2 De G. & J. 292; *In re Proper's Purchase*, 22 L. J. Ch. 948.

(*f*) *Fisher* v. *Shirley*, 43 Ch. Div. 290; *Broughton* v. *Broughton*, 1894, 3 Ch. 76.

(*g*) *Lench* v. *Lench*, 10 Ves. 511; *French* v. *Harrison*, 17 Sim. 111.

due under the covenant; and the answer to this question depends on the following distinction, that is to say: Firstly, if the death of the husband occurs at the time, or previous to the time, when the obligation ought, by the terms of the covenant, to be performed, her distributive share will be taken as a performance of the covenant *pro tanto* or *in toto*, according as that share is, on the one hand, less than, or, on the other hand, equal to, or greater than, the sum due under the covenant; and this was the decision in *Blandy* v. *Widmore* (*h*); and the reason given was that the covenant was to be taken as *not broken*, being merely a covenant on the husband's part to *leave* to his widow (and he had left to her) the amount specified in the covenant; and therefore, she could not come in first as a creditor under the covenant, and then for a moiety of the surplus under the statute; and in *Goldsmid* v. *Goldsmid* (*i*) it was decided, on the authority of *Blandy* v. *Widmore*, that where the trusts of a testator's *will* failed, and his property became divisible as in case of intestacy, the widow's distributive share under the statute was a performance of the covenant by the husband under the marriage articles, that his executors should, after his death, pay her a certain sum of money; for, as observed by Sir T. Plumer, M.R., citing *Garthshore* v. *Chalie* (*k*), "Where "a husband covenants to leave or to pay at his "death a sum of money to a person who, independ- "ently of that agreement, and by the mere legal "relation between them, will take a provision, the "covenant is to be construed with reference to that; "and if the covenant is that the executors of the "husband shall pay to the widow a given sum, and "in her character of widow, created by the same

(1.) When husband's death occurs at or before time when the obligation accrues, distributive share a performance.

Blandy v. *Widmore*,—a case of an immediate intestacy.

Goldsmid v. *Goldsmid*,—a case of a resulting intestacy.

(*h*) 2 L. C. 291.
(*i*) 1 Swanst. 211.
(*k*) 10 Ves. 1.

"marriage contract, she in fact obtains from the "executor or administrator that sum, the court is "bound to consider that as payment under the "covenant. *These are not cases of an ordinary debt;* "*during the life of the husband, there is no breach of* "*the covenant, that is to say, no debt;* the covenant is "to pay *after* his death, and the inquiry is not "whether the payment of the distributive share is "a satisfaction, but a question perfectly distinct, "whether it is a performance." But, Secondly, when the decease of the husband occurs *after* the obligation under the covenant has arisen, or, in other words, *after a breach of such covenant*, the widow's distributive share is not a performance of the obligation; and this was the decision in *Oliver* v. *Brickland* (*l*), where the husband's covenant was to pay a sum *within two years* after the marriage; and he lived *after the two years*, and died intestate, leaving a larger sum than what he covenanted to pay, to devolve upon his widow as her distributive share; and she was held entitled both to the money under the covenant and to her distributive share under the statute; for *there was a breach of the covenant* before the death, and from the moment of such breach a *debt* accrued; whereas in the first class of cases, the obligation to pay did not accrue until the time at which the distributive share itself devolved.

(2.) Where husband's death occurs after obligation accrues, distributive share not a performance.

(*l*) 3 Atk. 420.

CHAPTER XIII.

SATISFACTION.

Satisfaction supposes intention.

AN important distinction exists between satisfaction and performance; for although satisfaction, like performance, supposes intention, still in satisfaction the thing done is something different from the thing covenanted to be done,—and is, in fact, a *substitute* for the thing covenanted to be done; whereas in performance, the *identical* act which the party contracted to do is considered to have been done (*a*). The cases on satisfaction group themselves under *four* heads, namely, (1.) Satisfaction of debts by legacies; (2.) Satisfaction of legacies by subsequent legacies; (3.) Satisfaction of legacies by portions; and (4.) Satisfaction of portions by legacies.

I. Of debts by legacies.

I. *Satisfaction of debts by legacies.*—In this group of cases, the general rule is, "that if one, being in-"debted to another in a sum of money, does by his "will give him a sum of money as great as, or greater "than, the debt, without taking any notice at all of "the debt, this shall be in satisfaction of the debt, "so that he shall not have both the debt and the "legacy" (*b*); and this presumption is founded upon the maxim, *Debitor non presumitur donare.* But the presumption is not favoured by the court, and the court's leaning against the presumption has led it to lay hold of trifling circumstances in order to exclude

Presumption not favoured.

(*a*) *Goldsmid* v. *Goldsmid*, 1 Swanst. 211.
(*b*) *Talbot* v. *Shrewsbury*, Prec. Ch. 394.

the presumption altogether. Thus—1. Words ordinarily employed to grant a legacy show an intention of favour rather than an intention to fulfil an obligation, *i.e.*, "a legacy imports a bounty." Therefore —2. If the legacy be less than the debt, it has never been held to go in satisfaction, even *pro tanto* (*c*). However—3. If the legacy be given *simpliciter*, and be *equal* to the debt (*d*); also, if the legacy be given *simpliciter*, and be *greater* than the debt (*e*),— in either of these cases, the legacy will be taken as a satisfaction of the debt; and in either of these cases, if the debt is afterwards discharged by payment before the testator's death, the legacy may be held to have ceased to be payable (*f*). But—4. No presumption of satisfaction will be raised where the debt of the testator was contracted subsequently to the making of the will,—for the testator could have had no intention of making any satisfaction for what was not at the time in existence (*g*); and the rule appears to be the same if the debt be created contemporaneously with the gift of the legacy (*h*). Also—5. Equity will lay hold of slight circumstances to indicate an intention that the legacy is not to go in satisfaction, *e.g.* (1.) Where there is an express direction in the will for payment of *debts* AND *legacies*, the court will infer that it was the intention of the testator that both the debt and the legacy should be paid to the creditor; and this is called the rule in *Chancey's case* (*i*),—a rule which it was generally supposed would not apply in the

1. Legacy imports bounty.

2. Legacy less than debt.

3. Legacy equal to, or greater than, debt.

4. Debt contracted after will.

5. Circumstances rebutting the presumption. (1.) Direction in will for payment of debts *and* legacies.

(*c*) *Eastwoode* v. *Vinke*, 2 P. Wms. 617.
(*d*) *Haynes* v. *Mico*, 2 Bro. C. C. 130.
(*e*) *Talbot* v. *Shrewsbury*, 2 L. C. 352.
(*f*) *Pankhurst* v. *Howell*, L. R. 6 Ch. App. 136; *Gillings* v. *Fletcher*, 38 Ch. Div. 373.
(*g*) *Cranmer's Case*, 2 Salk. 508.
(*h*) *Wiggins* v. *Horlock*, 39 Ch. Div. 142.
(*i*) 1 P. Wms. 408.

Direction to pay debts alone.

case of a direction to pay debts *alone* (*k*),—unless, *semble*, the gift of the legacy followed on the direction to pay the debts (*l*); it has been recently held, however, in *Bradshaw* v. *Huish* (*m*), that a direction to pay the debts is of itself sufficient. And again,—

(2.) Time for payment of legacy differing from that of debt.

(2.) Where the time fixed for the payment of the legacy is different from the time when payment of the debt is demandable, both debt and legacy will (as a rule) be payable (*n*),—unless where (*o*) the legacy is payable at an earlier date than the debt; and where no time is fixed for payment of the legacy (*p*), the legacy (although equal to or greater than the debt), will not be deemed a satisfaction of the debt. Also—3. Where the legacy is of residue,

(3.) Contingent legacy.

or is otherwise contingent or uncertain, it will not be held a satisfaction of the debt (*q*), even of a debt due to a child (*r*),—and this is because a gift of residue is necessarily uncertain; and a bequest of residue to a wife even will not be a satisfaction of a debt due to her (*s*), being in a manner *less* than the debt (*t*).

II. Satisfaction of legacies by subsequent legacies.

II. *Satisfaction of legacies by subsequent legacies.*—In this group of cases the legacies may be either

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(*k*) *Rowe* v. *Rowe*, 2 De G. & Sm. 297, 298; *Cole* v. *Willard*, 25 Beav. 568; *Pinchin* v. *Simms*, 30 Beav. 119; *Glover* v. *Hartcup*, 34 Beav. 74.

(*l*) *Wiggins* v. *Horlock*, 39 Ch. Div. 142.

(*m*) 43 Ch. Div. 260.

(*n*) *Clarke* v. *Sewell*, 3 Atk. 96; *Haynes* v. *Mico*, 1 Bro. Ch. Ca. 129.

(*o*) *Wather* v. *Smith*, 4 Mad. 325.

(*p*) *In re Dowse*, 50 L. J. Ch. 285; *Calham* v. *Smith*, 1895, 1 Ch. 516.

(*q*) *Barrett* v. *Beckford*, 1 Ves. Sr. 519.

(*r*) *Crichton* v. *Crichton*, 1895, 2 Ch. 853.

(*s*) *Devese* v. *Pontet*, 1 Cox, 188; *Bartlett* v. *Gillard*, 3 Russ. 149.

(*t*) The Roman law used to hold, and English common-sense agrees, that a payment may be *less* in any one of *four* ways, viz., *re*,—*i.e.*, in amount; *loco*,—*i.e.*, in convenience of place; *tempore*,—*i.e.*, in time; and *causâ*,—*i.e.*, in quality; and if the like distinctions were familiar in English law, all the foregoing cases of the court's leaning against satisfaction would be resolvable into one case, namely, a legacy of *less* than the debt.

(1.) by the same instrument, or (2.) by different instruments. And, Firstly, when legacies of quantity in the *same* instrument, whether a will or codicil, are given to the same person *simpliciter*, and are of *equal* amount, one only will be good; nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended they should be cumulative (*u*); but if the legacies given by the *same* instrument are of *unequal* amount, they will be considered cumulative (*v*). Secondly, where a testator by *different* testamentary instruments has given legacies of quantity *simpliciter* to the same person, the court, considering that he who has given more than once must *primâ facie* mean more than one gift, awards to the legatee both the legacies; and in such a case it is immaterial whether the subsequent legacy differs or not in amount from the prior one (*x*). But though the legacies are in different instruments, if they are not given *simpliciter*, but the motive of the gift is expressed in each, and the *same motive* is expressed in each, and the *same sum* is given, the court considers these coincidences as raising a presumption that the testator did not by the subsequent instrument mean another gift, but only a repetition of the former gift (*y*). But the court raises this presumption *only* where the double coincidence occurs of the *same motive* and the *same sum* in both instruments; for if in either instrument there be, on the one hand, *no motive*, or a *different* or *additional* motive expressed, and the *sum* be the *same* in both instruments (*z*); or if the *same motive* be expressed in the

(1.) Under the same instrument:
(*a.*) Equal legacies are substitutive.

(*b.*) Unequal legacies are cumulative.

(2.) Under different instruments,—legacies, whether equal or unequal, are cumulative,—

Unless same motive expressed and same sum.

(*u*) *Greenwood* v. *Greenwood*, 1 Bro. C. C. 31 *n.*
(*v*) *Hooley* v. *Hatton*, 1 Bro. C. C. 390 *n.*; *Yockney* v. *Hansard*, 3 Hare, 620.
(*x*) *Roch* v. *Callen*, 6 Hare, 531; *Russell* v. *Dickson*, 4 H. L. Cas. 293.
(*y*) *Benyon* v. *Benyon*, 17 Ves. 34.
(*z*) *Ridges* v. *Morrison*, 1 Bro. C. C. 388.

different instruments, but the *sums* are not the same (*a*), the presumption will, in either case, be in favour of cumulation; but where the second instrument expressly refers to the first, or where by intrinsic evidence (*b*), or even by extrinsic evidence (*c*), it is shown to be a mere copy or duplicate of the first, it will so far be held substitutional. And on the question of the admissibility of extrinsic evidence to show that legacies are or are not cumulative, the two following rules appear to hold good, namely:—(1.) That where the court itself raises the presumption against double legacies, such evidence is admissible to show that the testator intended, in fact, the legatee to take both,—for that is in support of the apparent intention of the will, and is in fact in restoration of the plain effect of the instrument; but (2.) Where the court does not raise any contrary presumption, no such evidence is admissible to show that the testator intended the legatee to take in fact one only,—for that is in opposition to the will, and is in destruction of the plain effect of the instrument (*d*).

Secus,—where the two instruments are merely duplicates.

Extrinsic evidence,—when admissible and when not:

Where the court raises the presumption,—evidence to confirm instrument admissible.

Where the court does not raise the presumption,—no evidence to contradict instrument admissible.

III. and IV. Satisfaction of legacy by portion, and *vice versâ*.

III. *The satisfaction* (*otherwise the ademption*) (*e*) *of a legacy by a subsequent* PORTION; and, IV. *The satisfaction of a* PORTION *by a subsequent legacy.*—In both these groups of cases, the general rule may be expressed in words taken from the leading case of

(*a*) *Hurst* v. *Beach*, 5 Mad. 352; *Baby* v. *Miller*, 1 E. & A. 218.

(*b*) *Fraser* v. *Byng*, 1 Russ. & My. 90; *Coote* v. *Boyd*, 2 Bro. C. C. 521; *Currie* v. *Pye*, 17 Ves. 462.

(*c*) *Hubbard* v. *Alexander*, 3 Ch. Div. 738; *Whyte* v. *Whyte*, L. R. 17 Eq. 50.

(*d*) *Hurst* v. *Beach*, 5 Mad. 351; *Hall* v. *Hill*, 1 Dr. & War. 94; *Lee* v. *Pain*, 4 Hare, 216.

(*e*) "With reference to cases . . . of a previous settlement and a subsequent will . . . it is now quite settled, that there is no difference between the two cases, beyond the verbal difference that the term satisfaction is used where the settlement has preceded the will, and the term ademption where the will has preceded the settlement. In substance, there is no distinction between the principles applied to the two classes of cases."—*Coventry* v. *Chichester*, 2 H. & M. 159.

Pym v. *Lockyer* (*f*), as follows: "Where a parent "gives a legacy to a child, not stating the purpose "with reference to which he gives it, the court "understands him as giving a PORTION, and by a "sort of artificial rule—in the application of which "legitimate children have been very harshly treated, "upon an artificial notion and a sort of feeling called "a leaning against double portions—if the father "advances a portion on the marriage of that child, "the portion is presumed to be an ademption of the "legacy *pro tanto* or *in toto*, as the money advanced "is respectively less than, or equal to, or greater "than, the sum expressed to be given as a legacy." And in both groups of cases the following particular applications of the general rule hold good, that is to say:—Firstly, in the case of double provisions, the doctrine of satisfaction does not in general apply to legacies and portions to strangers, but only where the parental relation or its equivalent exists. If, therefore, a person gives a legacy to a mere stranger, and then makes a settlement on that stranger,—or first agrees to make a settlement on that stranger, and then bequeaths a legacy to him,—the stranger is entitled in either case to claim under both instruments; and for the purpose of this doctrine, it is settled that an illegitimate child is in the eye of the law a stranger; and unless other circumstances are found than the bare relation of parentage "by nature," the illegitimate child is at liberty to claim a double provision (*g*). But if a legacy (say, of residue) is given to be divided equally between or among children and strangers, and the children's legacies are afterwards satisfied by portions, and the strangers (including the illegitimate children) also receive advances, these last-mentioned advances would

General rule, —one only payable.

Rule does not apply as to legacies and portions to a stranger, including (for this purpose) an illegitimat child.

Legacy to mixed class of children and strangers,—satisfaction of children's shares,—effect of.

(*f*) 5 My. & Cr. 29; *Pollock* v. *Worrall*, 28 Ch. Div. 552.
(*g*) *Ex parte Pye*, 18 Ves. 140.

not operate (it is true) as a satisfaction of the strangers' shares of the residue; but neither would these latter shares be increased by the satisfaction of the children's shares (*h*),—for satisfaction has for its object equality between the children, and that object does not in such a case extend to augmenting the strangers' shares. And again, even in the case of strangers (including illegitimate children), if the legacy be given for a particular express purpose, and the testator advances money for the same purpose, that will be an ademption of the legacy (*i*),—but not if the purpose of the legacy is not specified, although the purpose of the advancement is (*k*).

Legacy for a purpose,—effect, where advancement for same purpose.

The presumption against double portions is founded on good sense.

And, in passing, it may be observed that the presumption against double portions, although it has been sometimes characterised as a hard and artificial rule, is really founded on good sense and justice; and in *Suisse* v. *Lowther* (*l*), Wigram, V.C., says of it:—"The reason for the presumption against double "portions as between parent and child is this—a "parent makes a certain provision for his children "by will, if they attain twenty-one or marry; he "afterwards makes an advancement to a particular "child; the court concludes that by such advance- "ment the parent intends that he has satisfied, or "in part satisfied, in his lifetime the obligation which "he would otherwise have discharged at his death; "on the other hand, where there is no relation, either "natural or artificial, of parent and child, the gift "proceeds from the mere bounty of the testator; and "there is no reason *within the knowledge of the court* "for cutting down or for cutting out the gift, or why

(*h*) *Montefiore* v. *Guedalla*, 1 D. F. & G. 93; and *Kirk* v. *Eddowes*, 3 Hare, 509; *Meinertzhagen* v. *Walters*, L. R. 7 Ch. App. 670.
(*i*) *Monck* v. *Monck*, 1 Ball. & B. 303.
(*k*) *Pankhurst* v. *Howell*, L. R. 6 Ch. App. 136.
(*l*) 2 Hare, 435.

"the court should assign any limit to a bounty which "is wholly arbitrary. The consequence is, as Lord "Eldon observed, that a natural child sometimes "stands in a better situation than a legitimate child; "but that is an accidental anomaly, and one which "very rarely operates" (*m*).

The presumption applies where the donor has placed himself *in loco parentis* to the donee. What is putting one's self *in loco parentis?*

For the general rule applies, even in the case of illegitimate children and of other strangers, if they be persons towards whom the donor has placed himself "*in loco parentis;*" and the only question is, What is signified by the words "putting one's self *in loco parentis?*" and to this question *Powys* v. *Mansfield* (*n*) supplies the answer. In that case, Sir John Barrington had by his will given £10,000 to one of his nieces, and had afterwards settled £10,000 on the marriage of the same niece; and the question was, whether he stood "*in loco parentis*" to the niece, so as to bring into application the doctrine of satisfaction. Now the niece was one of the daughters of Sir John's brother, Fitzwilliam, and the general relations subsisting between the uncle and his nieces "were thus stated in the evidence: That Sir Fitz- "william, in compliance with the wishes of Sir John, "resided near Sir John, in the Isle of Wight, and "maintained a more expensive establishment than "his (Fitzwilliam's) income (which did not exceed "£400 a year) would allow of; that Sir John and "his brother lived on the most affectionate terms "with each other; that for several years Sir John "gave his brother £1000 a year; that he took the "greatest interest in his nieces, behaving to them as "a father and as the kindest of parents, and not "showing more partiality to one than to another; "that he frequently gave them pocket-money, and

(*m*) *Lawes* v. *Lawes*, 20 Ch. Div. 81.
(*n*) 6 Sim. 544; 3 My. & Cr. 359.

"made them other presents, and occasionally ad-
"vanced money to defray the expenses of their
"clothing and education; that he allowed them to
"use his horses and carriages, and had them fre-
"quently to dine with him, and that one or other of
"them was almost constantly staying at his house;
"that he was consulted as to the appointment of their
"masters and governesses, and as to the marriages of
"such of them as were married; and that on the
"plaintiff's marriage the terms of the settlement were
"negotiated between the plaintiff and Sir John and
"their respective solicitors, without any interference
"on the part of Fitzwilliam." And upon these facts, the Lord Chancellor Cottenham held that Sir John had placed himself "*in loco parentis*" to this particular niece, observing:—"The authorities leave in
"some obscurity the meaning of the phrase, 'putting
"one's self *in loco parentis;' but it clearly has reference to "the office and duty of making provision for the child.*
"The rule, both as applied to a father and to one *in*
"*loco parentis*, is founded upon *the presumed intention;*
"a father, *e.g.*, is supposed to intend to do what he is
"in duty bound to do—namely, to provide for his
"child according to his means; and a stranger who
"has assumed that part of the office of a father may
"be supposed to intend the same thing; and the cir-
"cumstance of his having so acted towards the child
"as to raise a moral obligation to provide for it,
"affords a strong inference of an intention on his
"part to do so; *and the circumstance that the child has*
"*a father alive with whom it resides and by whom it is*
"*maintained, affords no inference against such intention.*"

The parent of the child may be alive.

(3.) Leaning against double portions.

It will be remembered that in the case of satisfaction of a debt by a legacy, equity leans most strongly against the presumption; but in the case of satisfaction of portion by legacy or of legacy by portion, the leaning of the court is all the other way; and the

presumption therefore will not be repelled "by slight "circumstances of difference between the advance and the portion;" nay, even material differences do not count when it is a question of the satisfaction of legacy by portion, or of portion by legacy. Thus, in *Lord Durham* v. *Wharton* (*o*), where a father by will bequeathed £10,000 to trustees, one-half to be paid at the end of three years, and the other half at the end of six years from his death, with interest in the meanwhile; and he declared the trusts to be for his daughter for life, and after her decease in trust for her children, as she should appoint by deed or will, and in default of appointment for all her children equally; and subsequently, on the marriage of the daughter, he agreed to give her £15,000, to be paid to the intended husband, he securing by the settlement pin-money and a jointure for his wife, and portions for the younger children of the marriage,—The £10,000 legacy was held to be satisfied by the £15,000 portion. Moreover, the same principle will be applied not only where, as in the above case, the will precedes the settlement, but where the order of events is, first, a settlement, secondly, a will; and this was in fact the decision in *Thynne* v. *Glengall* (*p*). In that case, a father having, upon the marriage of his daughter, agreed to give her a portion of £100,000 consols, made an actual transfer of one-third thereof to the *four trustees* of the marriage settlement, and gave them his bond for the transfer of the remainder in like stock upon his death,—the stock to be held by them in trust for the daughter's separate use for life, and after her death for the children *of the marriage*, as the *husband and she* should jointly appoint; and afterwards, by his will, the father gave to *two*

Same principles applicable when settlement comes before will,—at least in general.

(*o*) 3 Cl. & F. 146; *Tussaud* v. *Tussaud*, 9 Ch. Div. 363.
(*p*) 2 H. L. Cas. 131; *Mayd* v. *Field*, 3 Ch. Div. 587; *Bethell* v. *Abraham*, 3 Ch. Div. 590, 591 *n.*

of the trustees a moiety of the *residue* of his personal estate in trust for the daughter's separate use for life, remainder for *her* children generally as *she* should by deed or will appoint,—The court held that the moiety of the residue given by the will was a satisfaction of the sum of stock not actually transferred, being the portion thereof secured by the bond; and the court based its judgment on the following ground:—"Equity "leans against legacies being taken in satisfaction of a "*debt*, but leans in favour of a provision made by will "being in satisfaction of a *portion* by contract, feeling "the great improbability of a parent intending a "double portion for one child, *to the prejudice gene-* "*rally, as in the present case, of other children.* In the "case of a *debt*, therefore, small circumstances of dif- "ference between the debt and the legacy are held to "negative any presumption of satisfaction; whereas, in "the case of *portions*, small circumstances are disre- "garded. So in the case of a *debt*, a smaller legacy is "not held to be in satisfaction of part of a larger "debt; but in the case of *portions*, it is held to be a "satisfaction *pro tanto.* In the case of a *debt*, a gift "of the whole or part of the residue cannot be a "satisfaction, because it is said, the amount being un- "certain, it may prove to be less than the debt; but "the reason given for the rule as applicable to debts "cannot apply to portions; on the contrary, as the "residue must be supposed by the testator to have "been of some value, it ought to be considered as a "satisfaction either altogether or *pro tanto*, according "to the amount."

Where settlement comes first, persons taking under it are *quasi-purchasers*, with right to elect between the settlement and the will.

Where, however, the settlement precedes the will and the trusts are dissimilar, the persons entitled under the settlement are *quasi-purchasers*, and as such cannot be deprived against their will of their rights upon any presumed intention of the testator; at the utmost, they can only be put to elect whether to take

under the will or under the settlement; and the presumption against double portions will, in such a case, be much more easily rebutted than where the will precedes the settlement; or, to use the words of Lord Cranworth in *Chichester* v. *Coventry* (*q*):—"When the "will precedes the settlement, it is only necessary to "read the settlement as if the person making the pro- "vision had said, 'I mean this to be in lieu of what "I have given by my will;' but if the settlement "precedes the will, the testator must be understood "as saying, 'I give this in lieu of what I am already "bound to give, if those to whom I am so bound will "accept it;'" and, in fact, in the before-stated case of *Thynne* v. *Glengall*,—the settlement in that case having preceded the will,—an inquiry was directed whether it was for the benefit of the daughter and her children to take under the will or under the settlement, and she was to elect accordingly.

Satisfaction is only where both provisions remain *in fieri*.

It is also to be observed, that in *Thynne* v. *Glengall* the question of satisfaction arose only with regard to the *untransferred* stock; and, in fact, the principle of satisfaction does not apply at all *as regards advances actually made* upon a settlement or other advancement *previously* to the will (*r*). But it is otherwise when such advancement is made *subsequently* to the will; therefore, where a father bequeathed his residuary estate (which comprised his business of a bookseller) equally between his two sons and his three daughters, and subsequently assigned his business to his two sons, that was held to be a satisfaction of the son's bequest (*s*); and when a person *in loco parentis* gave a bond to A. for the payment to him of £10,000 on a day therein specified, and a few weeks before the

(*q*) L. R. 2 H. L. 87; *Bennett* v. *Houldsworth*, 6 Ch. Div. 671.
(*r*) *Watson* v. *Watson*, 33 Beav. 574; *Hatfield* v. *Minet*, 8 Ch. Div. 136; and see *Crichton* v. *Crichton*, 1895, 2 Ch. 853.
(*s*) *Vickers* v. *Vickers*, 37 Ch. 525.

day he took A. into partnership with him, that was held to be a satisfaction of the bond (*t*).

Appointments under special power,—when a satisfaction.

Where the donee of a special power of appointment appoints by will the whole fund equally among her children, and afterwards appoints by deed a portion of the fund to one of such children exclusively, the rule against double portions will not, in general, apply; and therefore the last-mentioned child (appointee by deed) will share also and equally with the whole class of children (appointees by will) (*u*),—unless the appointment by deed has been, in fact, a mere anticipation of the share appointed by the will, and has been accepted as such by the appointee (*v*).

The testator's intention, although not express, but implied only, may exclude satisfaction.

In all cases of alleged satisfaction, the surrounding circumstances (including the true construction of the will) must be considered, and the intention fairly gathered therefrom (*x*). Thus, in *Chichester* v. *Coventry* (*y*), where a testator had on the marriage of his daughter covenanted to pay to the trustees of the settlement, *three months after demand*, the sum of £10,000 upon the trusts of the settlement, and had paid interest thereon in the meantime, but died without having paid the principal sum; and by his will he gave his property to trustees on trust, in the first place to pay his *debts* and legacies, and *thereafter* to divide the residue into equal moieties, and to transfer the same to his daughters,—The court held, that the gift by the will, on the true construction thereof, was clearly not a satisfaction of the testator's covenant in the settlement; and that accordingly

(*t*) *Lawes* v. *Lawes*, 20 Ch. Div. 81.
(*u*) *Ingram* v. *Papillon*, 1897, 2 Ch. 574.
(*v*) *Ingram* v. *Papillon*, 1897, W. N. p. 178.
(*x*) *Whitehouse* v. *Edwards*, 37 Ch. Div. 683; *Gillings* v. *Fletcher*, 38 Ch. Div. 373.
(*y*) 2 H. & M. 159.

the £10,000 must be deducted from the testator's assets before the residue was divided into moieties,—and, in fact, the true construction of the will may be said to be the primary consideration, and it is only with a view to arriving at the true construction of the will that the surrounding circumstances may be taken into account (*z*).

Sum given by second instrument, if less, satisfaction *pro tanto*.

It was for some time an unsettled point as to whether, if the sum given by the second instrument was smaller than that given by the first, the less sum operated as a total satisfaction of the larger; and it was for a long time considered that the settlement of a smaller portion effected a complete ademption of a larger legacy given by a previous will; but in *Pym* v. *Lockyer* (*a*) the true rule was at length established, that an advancement subsequent to the will, if less in amount than the sum given by the will, was to be considered a satisfaction *pro tanto* only.

Legacy to a child or wife, being a creditor.

Where a parent or husband gives a legacy to his child (*b*) or wife (*c*), to whom he is already *indebted*, the case stands on the same footing as a legacy to any other person in satisfaction of a *debt;* hence a subsequent legacy will not, in the absence of intention, express or implied, be considered as a satisfaction of the debt,—unless it be given *simpliciter*, and be either equal to or greater than the debt; and the presumption of satisfaction will also, in these cases, be repelled by any of those slight circumstances which take a bequest to a stranger out of the general rule (*d*). But where a parent, being indebted to his

(*z*) *Lacon* v. *Lacon*, 1891, 2 Ch. 482.
(*a*) 5 My. & Cr. 29; *Pollock* v. *Worrall*, 28 Ch. Div. 552.
(*b*) *Stocken* v. *Stocken*, 4 Sim. 152.
(*c*) *Fowler* v. *Fowler*, 3 P. Wms. 353; *Cole* v. *Willard*, 25 Beav. 568.
(*d*) *Crichton* v. *Crichton*, 1895, 2 Ch. 853.

Advancement to child to whom father is indebted.

child, makes in his lifetime an advancement to the child upon marriage, or upon some other occasion, of a portion equal to or exceeding the debt, it will *primâ facie* be considered a satisfaction (*e*); and in such a case it is immaterial that the husband or wife may be ignorant of the debt (*f*),—there being few cases where a father will not be presumed to have paid the debt he owes to his son or daughter, when in his lifetime he gives her in marriage a greater sum than he owes her. Also, conversely, if a child is indebted to his father, and the father gives up the debt to the son and afterwards dies intestate, to the extent of the debt so forgiven the son is advanced, and must bring the amount into hotchpot, before he will be permitted to share with the other children in the distribution of the intestate's estate (*g*); but trivial sums paid by a father during his lifetime are not an advancement (*h*); also, sums of considerable amount even, may (under the special circumstances of the case) be deemed no advancement by the father (*i*).

Debt owing by child to father,—forgiven by father, is an advancement.

Extrinsic evidence,—question of its admissibility or non-admissibility.

The rule against double portions being a presumption of law, it may, like other presumptions of law, be rebutted by evidence of extrinsic circumstances, *i.e.*, evidence of facts not contained in the written instrument itself; and the rules on this subject may be gathered from the two cases of *Hall* v. *Hill* (*k*) and *Kirk* v. *Eddowes* (*l*). In *Hall* v. *Hill*, a testator, on the marriage of his daughter, and intending to provide a sum of £800 as her portion,

(1.) To *vary* or *contradict* the plain effect of document,

(*e*) *Lawes* v. *Lawes*, 20 Ch. Div. 81; *Gillings* v. *Fletcher*, 38 Ch. Div. 373.
(*f*) *Wood* v. *Briant*, 2 Atk. 521; *Plunkett* v. *Lewis*, 3 Hare, 316.
(*g*) *Blockley* v. *Blockley*, 29 Ch. Div. 250; *Oppenheim* v. *Schweder*, W. N. 1893, p. 12.
(*h*) *Montague* v. *Earl of Sandwich*. 32 Ch. Div. 525.
(*i*) *Crichton* v. *Crichton*, 1895, 2 Ch. 853.
(*k*) 1 Dr. & War. 94.
(*l*) 3 Hare, 509.

gave a bond for that amount to the husband, payable by instalments, part thereof to be paid during his life, and the residue upon his decease; and afterwards, by his will, he bequeathed to his daughter a legacy of £800. Parol evidence was tendered on the part of the defendants to show what was the real intention of the testator; and the question being whether the parol evidence was admissible, the Lord Chancellor said:—"There is no doubt of "the general rule, that *when by presumption you come "to a construction against the apparent intention of the "instrument, that may be rebutted by parol evidence;* "but here the will gives a legacy to the daughter "simply, and *no presumption of satisfaction is raised "by the law in such a case.* I am asked, however, "to insert in the will a declaration by the testator, "that he means the legacy to be a satisfaction of "the debt; and *I am of opinion I can do no such "thing.*" On the other hand, in *Kirk* v. *Eddowes* (*m*), a father bequeathed £3000 for the separate use of his daughter for life, with ulterior trusts for her children; and subsequently he gave the daughter and her husband a promissory note for £500. The defendants, in order to show that the £500 was intended as a satisfaction *pro tanto* of the legacy of £3000, tendered parol evidence of the declarations of the testator at the time of handing over the note; and the question being whether these contemporaneous declarations were to be admitted, Wigram, V.C., held, that the evidence was admissible, and on the following grounds:—"If a second instrument "do not in terms adeem the first, but the case is "of that class in which, from the relation between "the author of the instrument and the party claiming under it, *the law raises a presumption that the "second instrument was an ademption of the gift by the*

where there is no presumption of law contrary to that effect,—extrinsic evidence is not admissible,—*Hall* v. *Hill.*

(2.) To *confirm* the plain effect of the document, where there is a presumption of law contrary to that effect,—extrinsic evidence is admissible,—*Kirk* v. *Eddowes.*

(*m*) 3 Ha. 509; *In re Applebee, Leveson* v. *Bealcs*, 1891, 3 Ch. 422.

"*instrument of earlier date*, evidence may be gone "into to show that such presumption is not in "accordance with the intention of the author of "the gift; *and where evidence is admissible for that "purpose, counter-evidence is also admissible.* In such "cases, the evidence is NOT admitted on either side "for the purpose of proving *in the first instance* with "what intent either writing was made, *but for the "purpose only of ascertaining whether the* PRESUMPTION "*which the law has raised be well or ill founded.* . . . "The evidence does not touch the will; it proves "only that a given transaction took place after the "will was made, and proves what that transaction "was, and calls upon the court to decide whether "the legacy given by the will is not thereby "adeemed."

CHAPTER XIV.

ADMINISTRATION OF ASSETS.

Administration.

WHERE a testator dies indebted, having disposed of his divers properties among divers persons, it often becomes material to consider the order in which, and sometimes the extent to which, his several properties are applicable in or towards the liquidation of his debts. Every description of the testator's property, whether it be real or whether it be personal estate, is of course now liable for the payment of his debts; but for various reasons, some of them historical, and others of them merely natural, certain properties of a deceased testator are liable before others.

Assets.

The property of a testator (or intestate), regarded in the light of its liability to answer the debts of the deceased, is called assets; and assets are either *legal* or *equitable*,—legal assets comprising such portions of the property as were and are available at law for the payment of the debts, and with which accordingly the executor or administrator was and is chargeable as such in an action at law by a creditor of the deceased, and equitable assets comprising such portions of the property as were and are available *only* in a court of equity; so that the true distinction between legal and equitable assets is that which was laid down by Kindersley, V.C., in *Cook* v. *Gregson* (*a*), namely, "that the *distinction* "*refers to the remedies of the creditor, and not to the*

1. Legal assets.

2. Equitable assets.

(*a*) 3 Drew. 549.

"*nature of the property; and whatever assets the court* "*of law would, in a creditor's action, charge the executor* "*with,* must be regarded as legal assets . . . that is "to say, every item of property which the executor "has a right to recover, or which vests in him "merely *virtute officii.*"

Legal and equitable assets,—importance of distinction between, formerly and at present.

The distinction between legal and equitable assets was formerly of much more importance than it is now, that importance consisting in this, viz., that out of legal assets the specialty debts were paid before the simple contract debts, while out of equitable assets these two different species of debts were payable *pari passu*, without any priority the one over the other. Also, where the court had to deal with a mixed fund of legal and equitable assets, and specialty creditors by virtue of their legal priority had exhausted the legal assets, the court, on the ground that he who seeks equity must do equity, would marshal the equitable assets in favour of the simple contract creditors, by paying thereout the debts of the latter up to an equality with the specialty creditors, before proceeding to a *pari passu* distribution of the residue of the equitable assets (*b*). However, the distinction between legal and equitable assets latterly lost much of its importance, Hinde Palmer's Act (*c*) having abolished the priority of specialty over simple contract debts (*c*), in the administration of the *legal* assets of deceased persons whose deaths happened on or after the 1st January 1870; and the Supreme Court of Judicature Act, 1875, introduced a still greater equality in the payment of debts, in the case of people dying *insolvent* on or after the 1st November 1875. The distinction between legal and equitable assets is, however, still

(*b*) *Plunkett* v. *Penson*, 2 Atk. 290; *Bain* v. *Saddler*, L. R. 12 Eq. 570; and see *Ashley* v. *Ashley*, 4 Ch. Div. 757.
(*c*) 32 & 33 Vict. c. 46.

Present importance of the distinction.

of some importance, that is to say, in the following respects, namely:—(1.) In determining whether an executor or administrator is entitled to retain his own debt (whether simple contract or specialty) out of the assets; and (2.) In determining, *semble*, the extent of the execution available for the creditor (plaintiff in an action),—for when the court of law is sitting as such, that is to say, when the creditor's action is a purely legal action, the legal execution would, *semble*, still be against the legal assets only; while if the action was properly framed as an equitable action, the execution or equitable relief would, *semble*, extend to the equitable assets as well as to the legal assets.

The order of priority in the payment of debts,—out of *legal* assets as regards deaths before 32 & 33 Vict. c. 46.

In cases which do not fall within Hinde Palmer's Act, that is to say, in the case of persons dying before the 1st January 1870, the following was the order in which the different species of debts were payable out of *legal* assets:—

1. Debts due to the crown by record or specialty (*d*).
2. Debts to which particular statutes give priority (*e*), *e.g.*, income-tax (*f*); poor-rates (*g*); the amount due to a Building Society from the estate of its secretary,—in respect of his defalcations (*h*); and the amount due to a Savings-Bank from the estate of its actuary (*i*), or to a Friendly Society from the estate of its treasurer (*j*),—in respect of moneys received and not paid over.

(*d*) *Att.-Gen.* v. *Leonard*, 38 Ch. Div. 622.
(*e*) 17 Geo. II. c. 38, s. 3; 58 Geo. III. c. 73, ss. 1, 2; 4 & 5 Will. IV. c. 40, s. 12; 18 & 19 Vict. c. 63, s. 23.
(*f*) *Re W. J. Henley & Co., Limited*, 9 Ch. Div. 469.
(*g*) *Fisher* v. *Shirley*, 43 Ch. Div. 290.
(*h*) *Moors* v. *Marriott*, 7 Ch. Div. 543.
(*i*) *Jones* v. *Williams*, 36 Ch. Div. 573.
(*j*) *In re Miller, Ex parte Official Receiver*, 1893, 1 Q. B. 32; 59 & 60 Vict. c. 25, s. 35; and distinguish *Ex parte Fleet*, 4 De G. & Sm. 52; *Hagon* v. *Aberdein*, W. N. 1896, p. 154.

3. Judgments against the deceased duly registered (*k*); and unregistered judgments recovered against the personal representatives (*l*); but not mere orders to sign judgment (*m*).

4. Recognisances and statutes.

5. Debts by specialty contracts, for valuable consideration, whether the heir be or be not bound (*n*),—arrears of rent service, even though the rent be reserved by parol, ranking equally (in the case of lands in England or Wales only) (*o*) with specialties (*p*); and calls upon shareholders in the winding up of companies, being by statute (*q*) made specialty debts (*r*).

6. Debts by simple contract,—unregistered judgments against the deceased only ranking *pari passu* with debts by simple contract (*s*); also, dilapidations stated by the Bishop under the Ecclesiastical Dilapidations Act, 1871 (*t*), s. 34.

7. Voluntary bonds; but if a voluntary bond had been assigned for value, at any rate in the life of the obligor, it would, in the administration of assets, have stood on the same footing as a bond originally given for value, that is to say, in the fifth group of debts (*u*).

The order of priority in the payment of debts,—out of *equitable* assets, and also

By running together into one and the same group of debts the debts comprised in the fifth and the sixth of the above-mentioned groups, you obtain the order in which the different species of debts were

(*k*) Stats. 2 & 3 Vict. c. 11; 18 & 19 Vict. c. 15; 23 & 24 Vict. c. 38, ss. 3, 4, 5; 27 & 28 Vict. c. 112, s. 1.
(*l*) *Re Williams*, L. R. 15 Eq. 270; *Hanson* v. *Stubbs*, 8 Ch. Div. 154; *Smith* v. *Morgan*, 5 C. P. D. 337.
(*m*) *Clifford* v. *Gurney*, 1896, 2 Ch. 863.
(*n*) 9 Co. 88 *b*.
(*o*) *Vincent* v. *Godson*, 4 D. M. & G. 456.
(*p*) *Shirreff* v. *Hastings*, 6 Ch. Div. 610.
(*q*) 25 & 26 Vict. c. 89, ss. 75, 76.
(*r*) *Buck* v. *Robson*, L. R. 10 Eq. 629.
(*s*) *Kemp* v. *Waddingham*, L. R. 1 Q. B. 355; *Van Gheluive* v. *Nerinckz*, 21 Ch. Div. 189.
(*t*) *Wayman* v. *Monk*, 35 Ch. Div. 583.
(*u*) *Payne* v. *Mortimer*, 4 De G. & J. 447.

always payable out of *equitable* assets; and in cases where Hinde Palmer's Act applies, the order last mentioned is also the order in which the different species of debts are now payable out of *legal* assets also,—the effect of that Act (wherever it applies) being to abolish in every administration action the distinction between legal and equitable assets, so far as regards creditors whether by specialty or by simple contract, but without prejudice to the executor's retainer (*v*), and without prejudice to the crown's priority (*x*). (under the Act of 1869) out of *legal* assets.

The priority above specified is that which is observed where the assets are applied in a due course of administration; but there is nothing to prevent an executor, even to the present day, paying one creditor (although of an inferior degree) before any other creditor (although of a superior degree), or even paying a statute-barred debt (*y*),—at least at any time before decree in an administration action, when no receiver of the estate has been appointed or injunction obtained (*z*); and in order, therefore, to prevent such preferential payment, it is necessary either to obtain an injunction or the appointment of a receiver in the action before decree, or else to obtain a speedy consent decree for administration (*a*); and apparently now the injunction or receiver is the safer remedy, an administration decree, which was formerly a matter of right at the hearing (*b*), being no longer so, and the courts showing the greatest reluctance to make such a decree when a more par- Executor may prefer one creditor to another, although of different degrees,—until decree or receiver or injunction;

(*v*) *Job* v. *Job*, 6 Ch. Div. 562; *Wilson* v. *Coxwell*, 23 Ch. Div. 764; *Calver* v. *Laxton*. 31 Ch. Div. 440; *Earp* v. *Briggs*, W. N. 1894, p. 162.
(*x*) *In re Bentinck*, *Bentinck* v. *Bentinck*, 1897, 1 Ch. 673.
(*y*) *Bray* v. *Tofield*, 18 Ch. Div. 551.
(*z*) *In re Radcliffe*, 7 Ch. Div. 733; *Vibart* v. *Coles*, 24 Q. B. D. 364.
(*a*) *Hanson* v. *Stubbs*, 8 Ch. Div. 154.
(*b*) *Orr Ewing* v. *Orr Ewing*, 9 App. Ca. 34.

or, until issue of originating summons, involving the question.

ticular order appears likely to suffice (*c*). Still the mere issue of an originating summons under Order lv. Rule 3, has the effect of instantly checking the executor so far as regards anything necessarily involved in the relief or question asked for or raised by the summons (*d*),—but not as regards any other matter not necessarily involved therein (*e*): the court may, however, interfere, and of its own motion, to grant all due protection on (or pending the disposal of) such a summons (*f*). Also, where the will being disputed, the grant of probate is delayed, and an administrator pending that litigation has been appointed, any creditor may obtain a decree for administration against such administrator *pendente lite*, equally as if he were an executor who had duly obtained probate (*g*).

I. Legal assets,—enumeration of.

It is not worth while to enumerate all the varieties of legal assets; but it may be usefully noticed here, that lands not charged with the payment of debts were for the first time made liable for the payment of debts generally in 1833, and were made *legal* assets,—although to be administered only in equity,—by the statute 3 & 4 Will. IV. c. 104, which extended to deceased non-traders the remedy given in 1807 by the statutes 47 Geo. III. c. 74, and 11 Geo. IV. and 1 Will. IV. c. 47, against deceased traders (*h*), preserving, however, the rights of creditors by specialty in which the heirs were bound, and for that purpose providing that, in the administration of the real estate made liable by the Act, such creditors should be paid in full in priority to

(*c*) *Lane* v. *Lane*, 25 Ch. Div. 66; *Alexander* v. *Calder*, 28 Ch. Div. 457; *Brown* v. *Burdett*, 40 Ch. Div. 244.
(*d*) Order lv. Rule 12.
(*e*) *Whitaker* v. *Barrett*, 43 Ch. Div. 70.
(*f*) *Hunt* v. *Wenham*, 1892, 3 Ch. 59.
(*g*) *In re Toleman, Westwood* v. *Booker*, 1897, 1 Ch. 866.
(*h*) *Small* v. *Hedgeley*, 34 Ch. Div. 379.

simple contract creditors and to creditors by specialty in which the heirs were not bound; but Hinde Palmer's Act (where it applies) has clearly now abolished this priority. Also, where a vendor dies before completion of the sale, the unpaid purchase-moneys are *legal* assets receivable by his executor (*i*); and estates *pur autre vie* are *legal* assets, although the executor may have to go into a court of equity to obtain them (*k*); and the equity of redemption of a sum of money charged on land (*l*), and of leaseholds, is *legal* assets.

II. Equitable assets,—varieties of.

Equitable assets are of two kinds, being either (1) Equitable assets which are so by virtue of their own nature and character,—these not being attainable by the executor *virtute officii*, and not being chargeable against the executor in an action at law by the creditor, or rather not having been so chargeable prior to the Judicature Acts, 1873–75, although, *semble*, the executor would now be chargeable with them even at law if the action at law was properly framed for obtaining equitable relief; or (2) Equitable assets so created by the act of the testator. And the former of these two species of equitable assets consist of or comprise the following properties, namely,—(*a*.) Property over which the testator has exercised a general power of appointment (*m*); and when the testator is a female, and being the donee of a general power, she exercises that power by her will, she renders the appointment property equitable assets for the payment of her own debts,—not merely her ante-nuptial debts, but all her debts contracted with reference to her separate estate

1. Equitable assets by nature of property itself,—enumeration of.

(*a*.) Property actually appointed in exercise of general power.

(*i*) *Att.-Gen.* v. *Brunning*, 8 H. L. Ca. 258.
(*k*) *Christy* v. *Courtenay*, 26 Beav. 140.
(*l*) *Mutlow* v. *Mutlow*, 4 De G. & J. 539.
(*m*) *Pardo* v. *Bingham*, L. R. 6 Eq. 485.

(*b.*) Separate estate of married women.

during the coverture (*n*); and (*b.*) The separate estate of a married woman; and it was only through a court of equity that the creditors of a married woman could at one time make her separate property available (*o*),—and such property has, in fact (or at least prior to the Judicature Acts, 1873–75, had, in fact), no existence in the view of a court of common law, unless so far as regards statutory separate estate; and even now the remedy obtainable in a court of law against the separate estate of married women, whether the same be statutory separate estate or the separate estate which was and is the mere creature of equity, is the equitable remedy, and the action at law must be properly framed for obtaining such equitable relief (*p*).

2. Equitable assets by act of testator,—enumeration of,—

As regards those assets which are equitable, only because so created by the act of the testator, these consist of or comprise, (1) Lands charged with the payment of the debts, and (2) Lands devised for such payment; and besides the difference in the order of administration (*q*) to be hereafter noticed, there are two important distinctions between an *express* devise of lands on trust for the payment of debts and a mere *charge* of debts upon the lands. For, firstly, when lands are devised upon trust to pay the debts, the trust-devisee must retain the mesne rents and profits towards payment of the debts; but if the lands are merely charged with the payment of the debts, the person beneficially entitled to the lands takes for his own benefit the mesne rents and profits,

Charge of debts distinguished from trust,—

(1.) In a trust for payment of debts, mesne rents to be retained; *secus*, in a charge of debts.

(*n*) *Willoughby-Osborne* v. *Holyoake*, 22 Ch. Div. 238; *Bell* v. *Stocker*, 10 Q. B. D. 129; *Turner* v. *King*, 1895, 1 Ch. 361.

(*o*) *Bruere* v. *Pemberton*, cited as *Anon.*, 18 Ves. 258; *Owens* v. *Dickenson*, Cr. & Ph. 48, 53; *Murray* v. *Barlee*, 3 My. & K. 209; *In re Poole's Case, Thompson* v. *Bennett*, 6 Ch. Div. 739.

(*p*) *Thompson* v. *Bennett*, 6 Ch. Div. 739; *Bursill* v. *Tanner*, 13 Q. B. D. 691; *Scott* v. *Morley*, 20 Q. B. D. 120; *Donne* v. *Fletcher*, 21 Q. B. D, 11.

(*q*) *Harmood* v. *Oglander*, 8 Ves. 124.

and is not liable to refund same unless and until the sale proceeds of the lands prove insufficient for the payment of the debts (*r*); and in such a case, if the lands devised are charged with legacies, the legatees are not entitled as against the charged devisee to the back rents, even although the estate should prove insufficient for payment of the legacies (*s*). And secondly, it was always the rule of equity, and under the Judicature Act, 1873, sect. 25, sub-sect. 2, it is now a rule in all the courts, that (subject to any question as to the applicability of the Trustee Act, 1888, s. 8), as between an express trustee and his *cestui que trust*, no length of time is a bar (*t*); while if the creditors have merely a charge upon the lands in their favour, they must look after themselves, for otherwise they would have been barred after twenty years by the Statute of Limitations, 3 & 4 Will. IV. c. 27 (*u*), s. 40, and they would now be barred after twelve years by the present Real Property Limitations Act, 1874 (37 & 38 Vict. c. 57), s. 8; and for a devastavit by executors the remedy is barred after six years (*v*). Also, under the Real Property Limitations Act, 1874, s. 10, as regards any sum of money or any legacy charged upon, or payable out of, any land or rent, whether at law or in equity, the twelve years' limit of time for the recovery thereof is applicable, even although the money-legacy should also be secured by an express trust (*x*); and for this purpose, it makes no difference that the land is reversionary (*y*). And as regards the statutes of limitation generally, it is to

(2.) In a trust for payment of debts, lapse of time no bar;

in a charge, creditors may be barred by lapse of time.

(*r*) *Bowles* v. *Hyatt*, 38 Ch. Div. 609.
(*s*) *Allen* v. *Longstaffe*, 37 Ch. Div. 48.
(*t*) *Hughes* v. *Wynne*, T. & R. 309; *Townshend* v. *Townshend*, 1 Cox. 29, 34.
(*u*) *Jacquet* v. *Jacquet*, 27 Beav. 332; *Scott* v. *Jones*, 4 Cl. & Fin. 382.
(*v*) *Blake* v. *Gale*, 22 Ch. Div. 820; *Roe* v. *Birch*, 27 Ch. Div. 622.
(*x*) *Warburton* v. *Stephens*, 43 Ch. Div. 39.
(*y*) *In re Owen*, 1894, 3 Ch. 220.

Statute-barred debts,—when they may or may not be paid by the executor.

be observed, that the statutes 21 Jac. I. c. 16 (simple contract debts), and 3 & 4 Will. IV. c. 42 (specialty debts) bar the remedy only, but do not extinguish the right, *i.e.*, the debt; but that the statutes 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57 (which both relate to moneys charged on land), not only bar the remedy, but extinguish the right or debt itself (*z*). Consequently, an executor, or in fact any one else, may not pay a debt which has been wholly extinguished, and not merely the remedy therefor barred by the statutes 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57 (*a*); but an executor may, as we have seen,—and a trustee also may (*b*),—pay a debt barred by the statute 21 Jac. I. c. 16, or by the statute 3 & 4 Will. IV. c. 42, and he is not bound to plead either statute in bar,—although, if he intends to rely upon it, he must specially plead it; but *after judgment for administration*, the executor may of course no longer voluntarily pay a statute-barred debt, and any of the other creditors, or even the legatees or next of kin, may object to the payment of the statute-barred debt (*c*), other than the plaintiff's own debt (*d*); but if no one objected, the court would not itself have refused to pay the statute-barred debt (*e*). And further, a debt which is statute-barred under the statutes 21 Jac. I. c. 16, and 3 & 4 Will. IV. c. 42, may be revived by a written promise to pay, or by a written acknowledgment made to the creditor containing a promise to pay (*f*),—such acknowledgment when given by one of several executors sufficing

Effect of decree or judgment for administration,—as regards statute-barred debts.

Effect of acknowledgment of such debts;

(*z*) *Sanders* v. *Sanders*, 19 Ch. Div. 373; *Lyell* v. *Kennedy*, 18 Q. B. D. 794.
(*a*) *Coope* v. *Cresswell*, L. R. 2 Ch. App. 112.
(*b*) *Budgett* v. *Budgett*, 1895, 1 Ch. 202.
(*c*) *Moodie* v. *Bannister*, 4 Drew. 432.
(*d*) *Briggs* v. *Wilson*, 5 De G. M. & G. 21.
(*e*) *Aston* v. *Trollope*, L. R. 2 Eq. 205; *Hunt* v. *Wenham*, 1892, 3 Ch. 59.
(*f*) *Moodie* v. *Bannister*, 4 Drew. 432.

to bind the estate of the deceased, although not to bind the co-executors personally (*g*); but as regards debts within the statutes 3 & 4 Will. IV. c. 27, and 37 & 38 Vict. c. 57, if the debt be already extinguished by the statute, no acknowledgment can possibly revive it (*h*),—but any admission of such debt, made even to a stranger or third party, will make the statute of limitations run afresh; *scil.* if the debt has not already at the date of such admission been actually barred and extinguished (*i*). Also, the statute ceases to run as from the date of the issue of the writ or originating summons for administration, in favour of all creditors not then already barred who come in and prove under the decree (*k*),—but this is now a little doubtful (*l*); and when the estate is insolvent, and the administration thereof is within section 10 of the Judicature Act, 1875, no debt that is statute-barred may be paid in the administration,—for in that case the rules of bankruptcy are to prevail; and the executor may not pay a debt upon which no action could be brought for want of writing within the 4th section of the Statute of Frauds (*m*); nor may he pay a debt which the court has adjudged to be not recoverable (*n*).

or of the admission of such debts.

Effect, if estate insolvent.

Debts not evinced by writing.

Real estate (unless charged with debts) was not originally liable for the payment of any of the debts of the deceased testator, excepting only such debts as he had specially bound himself and his heirs to pay; and even as regards such last-mentioned debts,

Joint liability of heir and devisee under 3 Will. and Mary, c. 14.

(*g*) *In re Macdonald, Dick* v. *Fraser*, 1897, 2 Ch. 181; 9 Geo. IV. c. 14, s. 1.
(*h*) *Lyell* v. *Kennedy*, supra; *Sanders* v. *Sanders*, supra.
(*i*) *Moodie* v. *Bannister*, supra.
(*k*) *Sterndale* v. *Hankinson*, 1 Sim. 393.
(*l*) *Bray* v. *Tofield*, 18 Ch. Div. 551.
(*m*) *Field* v. *White*, 29 Ch. Div. 358.
(*n*) *Midgeley* v. *Midgeley*, 1893, 3 Ch. 282.

the testator might (prior to the 3 Will. and Mary, c. 14) have defeated the creditor by devising the lands to some person other than his heir whom alone he had bound; and the heir also might (prior to the same statute) have sold away the lands which had descended upon him,—in either of which cases, neither the lands so aliened nor the purchase-money so received were or was liable to the creditor; but by the statute just mentioned, and which is commonly called the Statute of Fraudulent Devises, the devisee of the lands of a debtor who had so bound his heir was made liable jointly with the heir; and if either the heir or the devisee aliened the lands, the purchase-moneys received on the sale thereof were declared liable for such debts (*o*); and the creditor was still further protected against such alienations by the statute 11 Geo. IV. and 1 Will. IV. c. 47, by which it was (in effect) enacted, that an heir or devisee alienating the lands made the testator's debts his own debts to the extent of the value of the land so alienated (*p*).

What amounts to a charge of debts.

In order to prevent the injustice which, previously to the statute 3 & 4 Will. IV. c. 104, many times resulted to creditors in consequence of a testator not having charged his debts upon his real estate, courts of equity, by straining a little the ordinary rules of construction, laid it down as a rule in this class of cases, that a mere general direction by a testator that his debts should be paid, effectually charged them on his real estate; and such rule of construction is still in practice in the courts, notwithstanding that the original occasion for it has either ceased altogether or been minimised (*q*). There are,

A general direction by testator for payment of his debts.

(*o*) *Hunting* v. *Sheldrake*, 9 M. & W. 256; *Wilson* v. *Kembley*, 7 East. 128; *Morse* v. *Tucker*, 5 Hare, 79.

(*p*) *Small* v. *Hedgeley*, 34 Ch. Div. 379.

(*q*) *Legh* v. *Earl of Warrington*, 1 Bro. P. C. 511; *Silk* v. *Prime*, 1 Bro. C. C. 139.

however, certain exceptions to this general rule; for, firstly, where the testator, after a general direction for the payment of his debts, has specified a particular fund for the purpose, "the general charge by "implication is in such a case controlled by the "specific charge made in the subsequent part of the "will" (*r*); and secondly, where the debts are directed to be paid by the executors, who are not at the same time devisees of the real estate (*s*), the presumption in that case is that the debts are to be paid exclusively out of the assets which come to them as executors. And here note, that a direction to raise money for payment of debts out of the rents and profits of real estate will authorise the sale or mortgage of the estate for that purpose (*t*); and in such a case, the court inclines to directing a sale rather than a mortgage, but will direct a mortgage where there are sufficient reasons against a sale (*u*); but an executor or trustee desiring in such a case to make a mortgage, ought, for his own greater safety, to obtain the direction of the court (*v*). And note, that a mere "*authority*" to pay debts is not equivalent to a "*direction*" to pay them, and therefore will not create an implied charge on the real estate (*x*). Note also, that where a person has a specific lien or charge upon the lands, his right of priority will not be affected by any such general charge of debts (*y*); but neither debts by specialty, in which the heirs are bound, nor of course simple contract debts, constitute any lien or charge upon the lands (*z*),—

Exceptions.

1. Where testator has specified a particular fund for payment of debts.

2. Where executors, not being also devisees, are directed to pay the debts.

Debts to be paid out of rents and profits,—

usually by sale, sometimes by mortgage.

Lien on land not affected by a charge of debts.

Neither specialty nor simple contract debts

(*r*) *Thomas* v. *Britnell*, 2 Ves. Sr. 313; *Price* v. *North*, 1 Ph. 85.
(*s*) *Cook* v. *Dawson*, 3 De G. F. & J. 127.
(*t*) *Bootle* v. *Blundell*, 1 Mer. 232.
(*u*) *Metcalfe* v. *Hutchinson*, 1 Ch. Div. 591.
(*v*) *Cosser* v. *Cartwright*, L. R. 7 H. L. 731; *Haldenby* v. *Spofforth*, 1 Beav. 390; *Thorne* v. *Thorne*, 1893, 3 Ch. 196.
(*x*) *In re Head's Trustees and Macdonald*, 45 Ch. Div. 310.
(*y*) *Child* v. *Stephens*, 1 Vern. 101, 103.
(*z*) *Morley* v. *Morley*, 5 De G. M. & G. 610; *Kinderley* v. *Jervis*, 22 Beav. 1.

are a lien on the lands;

so that a purchaser or mortgagee of the lands, even an equitable mortgagee thereof (*a*), before any action for administration of the real estate has been instituted, would take free of all such debts, and would not be bound by notice thereof, or bound to inquire into the existence of such debts; but if an action for such administration has been commenced, and a decree has been made therein, or if (even before decree) the action has been registered as a *lis pendens*, and in its purview it clearly extends to claiming against the specific real estate, the purchaser or mortgagee would not be safe in completing his purchase or mortgage (*b*).

but may become a lien.

Judgment debts,—when and when not, and how, made a lien on lands.

As regards judgment debts, they have ceased since 1864 to constitute any lien upon the lands of the debtor, unless execution has been sued out thereon and put in use; and it may be usefully stated here regarding judgment debts generally,—(1.) That, by the statute 4 & 5 Will. and Mary, c. 20, s. 3, a judgment debt, unless docketed, had no preference in the administration of assets, but ranked *pari passu* with simple contract debts, and the executor might therefore, without committing a devastavit, prefer any simple contract creditor (*c*). (2.) That, by the statute 23 & 24 Vict. c. 38, the protection which the executor had against undocketed judgments under the statutes of William and Mary, while that statute remained in force, was simply restored to him as against judgment debts remaining unregistered (*d*). (3.) That, by the statute 27 & 28 Vict. c. 112, a judgment debt, even although duly registered, is no longer a lien upon the lands of the

4 & 5 Will. and Mary, c. 20.

23 & 24 Vict. c. 38.

27 & 28 Vict. c. 112.

(*a*) *British Mutual Investment Co.* v. *Smart*, L. R. 10 Ch. App. 567; *Bellamy* v. *Sabine*, 2 Phil. 425; *Graham* v. *Drummond*, 1896, 1 Ch. 968.

(*b*) *Price* v. *Price*, 35 Ch. Div. 297.

(*c*) *In re Turner*, 1 B. & P. 307.

(*d*) *Van Gheluive* v. *Nerinckz*, 21 Ch. Div. 189.

debtor, unless execution has been sued out thereon (*e*), —either the legal execution by *elegit* and delivery of the lands thereon, or else the equitable "relief in the nature of execution" which results from the appointment of a receiver of the lands (*f*). (4.) That, by the statute 51 & 52 Vict. c. 51, the execution or receivership order must now be registered at the Land Registry in the register of "writs and orders;" and (5.) That by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 26, repeating the like provisions contained in the Statute of Frauds, a judgment debt is no longer a lien on the goods of the debtor, unless execution has been sued out thereon, either the legal execution by *fi. fa.* delivered to the sheriff, or the equitable execution by receivorship order (*g*). Consequently, judgment debts (unless such steps as aforesaid have been taken to constitute them liens) are not (at least as against purchasers and mortgagees) in the nature of charges upon the property of the debtor, but are merely debts payable like other debts out of the personal estate and (upon that proving insufficient) out of the real estate in a due course of administration; but (as already stated) the commencement of an action for administration may give all debts (including therefore judgment debts) the quality of a lien (*h*).

51 & 52 Vict. c. 51.

56 & 57 Vict. c. 71, s. 26.

General effect of the judgment acts.

By the Supreme Court of Judicature Act, 1875, it is enacted, that "in administration by the court "of the assets of any person who may die after the "commencement of the Act (*i*), *and whose estate may*

Administration under the Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 10.

(*e*) *Hood-Barrs* v. *Cathcart*, 1895, 2 Ch. 411.
(*f*) *Anglo-Italian Bank* v. *Davies*, 9 Ch. Div. 275; *Re Mersey Rail. Co.*, 37 Ch. Div. 610.
(*g*) *Slater* v. *Pinder*, L. R. 7 Exch. 95; *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Flegg* v. *Prentis*, 1892, 2 Ch. 428; *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202.
(*h*) *Price* v. *Price*, 35 Ch. Div. 297.
(*i*) *Sherwen* v. *Selkirk*, 12 Ch. Div. 68.

"*prove to be insufficient for the payment in full of his* "*debts and liabilities*" (including the costs of the action for administration) (*k*),—"and in the winding "up of any company under the Companies Acts, "1852 and 1867, whose assets may prove to be "insufficient for the payment of its debts and liabi- "lities and the costs of winding up,—the same rules "shall prevail and be observed *as to the respective* "*rights of secured and unsecured creditors*, and as to "*debts* and *liabilities provable*, and as to the *valuation* "of annuities and future and *contingent liabilities* "respectively, as may be in force for the time being "under the law of bankruptcy with respect to the "estates of persons adjudged bankrupt." Accordingly, where an estate is being administered in the Chancery Division, and it either is from the first known to be, or in the course of the administration is shown to be, insolvent,—but not when it proves to be solvent (*l*),—the rules for the time being in force in the Bankruptcy Division are applicable to the administration of the assets:—(*a.*) So far as regards the relative rights of secured and unsecured creditors; (*b.*) So far as regards the debts and liabilities provable; and (*c.*) So far as regards the valuation of annuities and future and contingent liabilities.

Bankruptcy rules applicable to the administration of insolvent estates.

(*a.*) Secured and unsecured creditors, *inter se.*

And, firstly, as regards the relative rights of secured and unsecured creditors,—The old rule in Chancery was that a secured creditor might, in addition to his rights under his security, prove for the *whole* amount of his debt against the general estate (*m*), but not of course so as to receive more than the full amount of his debt; but he will now have to elect between, on the one hand, resting on

(*k*) *Taru* v. *Emmerson*, 1895, 1 Ch. 652.
(*l*) *Alcock* v. *Henley*, W. N. 1896, p. 154.
(*m*) *Kellock's Case*, L. R. 3 Ch. App. 769.

his security and compelling the trustee in the bankruptcy to redeem him,—in which case he will not prove against the general estate at all; and between, on the other hand, realising his security and proving against the general estate for the deficiency (if any) (*n*), or else valuing his security (*o*),—and revaluing it, if need be (*p*),—and proving for the deficiency (*q*); or he may surrender his security, and only in that case may he prove for the whole amount of his debt (*r*). A secured creditor is either a mortgagee, or a judgment creditor who has obtained a charging order on stocks or shares (*s*), or who has obtained a garnishee order *nisi* (*t*), or who has obtained the appointment of a receiver by way of equitable "relief in the nature of execution" (*u*), and has duly proceeded under the order (*v*), or generally who has issued a *fi. fa.*, an *elegit*, or other legal execution, and has duly followed up the same; but (at least in bankruptcy) a receivership order or a legal execution, unless duly followed up, will not suffice (*x*). The holder of a bill of sale, although unregistered, used to be a secured creditor (*y*), and if registered would of course still be one; but a landlord, in respect of his arrears of rent, is not a secured creditor within the meaning of the Bankruptcy Act, 1883, or of the 10th section

Secured creditors, who are?

(*n*) *Quartermaine's Case*, 1892, 1 Ch. 639.
(*o*) *Deering* v. *Bank of Ireland*, 12 App. Ca. 20.
(*p*) *In re Newton, ex parte National Provincial Bank*, 1896, 2 Q. B. 403.
(*q*) *King* v. *Chick*, 39 Ch. Div. 567.
(*r*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), 2nd schedule; *In re Suche & Co.*, 1 Ch. Div. 48; *Williams* v. *Hopkins*, 18 Ch. Div. 370; *Couldery* v. *Bartrum*, 19 Ch. Div. 394; *In re Arden, ex parte Arden*, 14 Q. B. D. 121.
(*s*) *Bagnall* v. *Carlton*, 6 Ch. Div. 130.
(*t*) *Ex parte Joselyne, in re Watt*, 8 Ch. Div. 327.
(*u*) *In re Shephard*, 43 Ch. Div. 131.
(*v*) *Ex parte Evans, in re Evans*, 13 Ch. Div. 252; *Croshaw* v. *Lyndhurst Ship. Co.*, 1897, 2 Ch. 154.
(*x*) *In re Dickinson, ex parte Charrington*, 22 Q. B. D. 187; *In re Potts, ex parte Taylor*, 1893, 1 Q. B. 648.
(*y*) *Tadman* v. *D'Epineuil*, 20 Ch. Div. 217.

of the Judicature Act, 1875 (*z*),—the landlord's right of distress not being a security until the right has been exercised by an actual seizure.

(*b.* Debts and liabilities provable.

Section 37.

And secondly, as regards the debts and liabilities provable,—Under sect. 37 of the Bankruptcy Act, 1883, all debts and liabilities, present or future, certain or contingent (other than damages for a tort, and other than debts and liabilities contracted with notice of an act of bankruptcy), to which the debtor is subject at the date of the receiving order, or to which he may before his discharge become subject by reason of any obligation incurred before the date of the receiving order, are provable in the

Section 30.

bankruptcy; and, by sect. 30, the order of discharge releases the bankrupt from all debts and liabilities provable in the bankruptcy, other than the following, that is to say,—(1.) Debts due on recognisances; (2.) Debts due for offences against the revenue; (3.) Debts due on bail-bonds given in respect of revenue prosecutions; (4.) Debts incurred by means of any fraud; (5.) Debts incurred by means of any fraudulent breach of trust; and (6.) Debts and liabilities for-

Section 150.

borne by any fraud; and by sect. 150 the crown is

Section 37.

bound by the order of discharge. But, by sect. 37, any provable debt or liability (the value of which requires to be estimated) may be *declared by the court to be incapable of fair estimation*,—and in that case it ceases to be a provable debt, and will not be destroyed by the bankrupt's discharge; but such declaration is indispensable if the debt or liability is not to be destroyed by the bankrupt's discharge

Section 40.

(*a*). And, by sect. 40, all debts proved in the bankruptcy are to be paid *pari passu*,—other than moneys

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(*z*) *In re Coal Consumers' Co.*, 4 Ch. Div. 625; *Thomas* v. *Patent Lionite Co.*, 17 Ch. Div. 250.

(*a*) *Hardy* v. *Fothergill*, 13 App. Ca.

of a Friendly Society (*b*) in the hands of the bankrupt as the duly appointed officer of the society (which are to be paid before all other debts whatsoever); and other than the following three classes of debts, which are to have priority over the other debts, and *inter se* are to be paid *pari passu*, that is to say,—(1.) Parochial rates and local rates generally, due from the bankrupt at the date of the receiving order, and which have within the twelve months next before such date become due and payable; also, assessed taxes, land tax, and property or income tax (not exceeding, in the whole, one year's assessment), assessed on the bankrupt up to the 5th day of April next before the date of the receiving order; (2.) Wages and salaries (not exceeding £50 in each case) of clerks and servants for the four months next before the date of the receiving order; and (3.) Wages (not exceeding £50,—now £25 (*c*),—in each case) of labourers and workpeople for the two months next before the date of the receiving order (*d*). And, by sect. 41, an apprenticeship premium may (as to a reasonable part thereof) be repaid in full; also, by sect. 42, a landlord may distrain for (and thereby be paid in full) arrears of rent (not exceeding formerly one year's arrears, but now six months' arrears) (*e*), accrued due prior to the date of the order of adjudication; also, by sect. 38, a set-off is given in the case of mutual credits, mutual debts, and other mutual dealings between the bankrupt and the proving creditor (*f*). And lastly, by sect. 9 of the Act, no creditor of the bankrupt is to have, in respect of any debt provable in the bankruptcy, any remedy against either the person or the pro-

Section 41.

Section 42.

Section 38.

Section 9.

(*b*) *Jones* v. *Williams*, 36 Ch. Div. 573.
(*c*) 51 & 52 Vict. c. 62, s. 1; 60 & 61 Vict. c. 19.
(*d*) 51 & 52 Vict. c. 62.
(*e*) Bankruptcy Act. 1890 (53 & 54 Vict. c. 71), s. 28.
(*f*) *Palmer* v. *Day & Sons*, 1895, 2 Q. B. 618.

perty of the debtor, or is to commence (unless with the leave of the court) any action in respect of such debt; and by sect. 150 the crown is bound by this provision, so far as regards its remedies against the property of the bankrupt (*g*); but a mortgagee's remedy by foreclosure is not affected by any of these provisions (*h*).

Section 150.

Rules of proof in bankruptcy that are still inapplicable in Chancery.

It is to be observed, however, that the 10th section of the Judicature Act, 1875, in speaking of "debts and liabilities provable," says nothing regarding the "*priorities*" of such debts and liabilities *inter se*; and accordingly, although *all* debts (including even voluntary bonds) (*i*) are now payable *pari passu* in the administration of an insolvent estate in the Chancery Division, just as in bankruptcy, yet in the administration in Chancery of insolvent estates, crown debts retain (in effect) their priority,—not indeed in bankruptcy (for the Act of 1883, unlike the former Act of 1869 (*k*), expressly binds the crown), but in the administration of assets (*l*); also, a Savings-Bank still retains its priority for its actuary's receipts (*m*); and a judgment creditor still retains his priority (*n*); but local rates have no priority in Chancery by reason merely of sect. 10 (*o*), although they may be otherwise entitled to priority; but as regards these rates (just as in the case of rent), if they are due in respect of an occupation subsequent to the death of the testator, they are of course not

(*g*) *In re Thomas*, 21 Q. B. D. 380.
(*h*) *In re Champagne*, W. N. 1893, p. 153.
(*i*) *Ex parte Pottinger, in re Stewart*, 8 Ch. Div. 621; *Hardy* v. *Farmer*, 1896, 1 Ch. 904.
(*k*) *Ex parte Postmaster-General*, 10 Ch. Div. 595; *Winehouse* v. *Winehouse*, 20 Ch. Div. 545.
(*l*) *In re Oriental Bank*, 28 Ch. Div. 643; *In re West London Commercial Bank*, 38 Ch. Div. 364; *Maritime Bank of Canada* v. *New Brunswick*, 1892, A. C. 437.
(*m*) *Jones* v. *Williams*, 36 Ch. Div. 573.
(*n*) *In re Crowther, ex parte Ellis*, 20 Q. B. D. 37.
(*o*) *In re Albion Steel and Wire Co.*, 7 Ch. Div. 547.

debts or liabilities of the testator, but are debts of his executors, and therefore payable in full by the latter (*p*). Moreover, sect. 10 of the Judicature Act, 1875, has not introduced into the administration of insolvent estates in the Chancery Division the rules of bankruptcy as to the limitation of the landlord's right of distress for rent in arrear (*q*), or as to reputed ownership (*r*), or as to the avoidance of voluntary settlements (*s*), or as to the avoidance of executions for £50 (now £20), where the sheriff has notice within fourteen days after the levy (*t*). On the other hand, the rule in bankruptcy that servants' wages shall be paid in priority to all other debts is, by the 10th section, extended to the winding up of a company (*u*); and, by the Preferential Payments in Bankruptcy Act, 1888 (*v*), this preference has been for the future more unequivocally recognised both in bankruptcies and in the winding up of companies, not only as regards such wages and the salaries of clerks, but also as regards parochial and other rates, and as regards assessed taxes,—but not so as to affect debenture holders (*x*) or other secured creditors,—and these provisions are expressly made applicable to deceased insolvents, and therefore are applicable also in the administration of an insolvent estate in Chancery, when the death happens after the commencement of the Act (*y*); and the set-off or mutual credit clause in the Bankruptcy Act,

Rules of proof in bankruptcy that are applicable in Chancery.

(*p*) *Marine Hydropathic Co.*, 28 Ch. Div. 470; *National Arms Co.*, 28 Ch. Div. 474; *Norcliffe's Claim*, 37 Ch. Div. 128; *In re Blazer Fire Co.*, 1895, 1 Ch. 402.

(*q*) *Fryman* v. *Fryman*, 38 Ch. Div. 468.

(*r*) *In re Crumlin Viaduct Works Co.*, 11 Ch. Div. 755; *Gorring* v. *Irwell Co.*, 34 Ch. Div. 128.

(*s*) *In re Gould*, 19 Q. B. D. 92.

(*t*) *Withernsea Brick Works Co.*, 16 Ch. Div. 337; *In re Vron Colliery Co.*, 20 Ch. Div. 442; *Pratt* v. *Inman*, 43 Ch. Div. 175.

(*u*) *In re Association of Land Financiers*, 16 Ch. Div. 373.

(*v*) 51 & 52 Vict. c. 62.

(*x*) *Richards* v. *Kidderminster Overseers*, 1896, 2 Ch. 212.

(*y*) *Parkington* v. *Heywood*, 1897, 2 Ch. 593.

1883, is applicable in Chancery (*z*). Also, in the administration of an insolvent estate to which the Judicature Act, 1875, applies, a creditor on the estate whose debt bears interest is not entitled to interest up to the day of payment, but only (and at a rate not exceeding 5 per cent. per annum) (*a*), up to the date of the judgment for administration,—which, by virtue of the 10th section of the Act, is equivalent to the adjudication in bankruptcy (*b*); but if there is any surplus after payment of debts, then, under section 40 of the Bankruptcy Act, 1883, interest at the rate of 4 per cent. per annum on all debts, and at the rate of interest they bear on all interest-bearing debts (*c*), is payable from the date of the receiving order; also, so long as there are assets, creditors may come in and prove, not disturbing any prior dividend, in administration as in bankruptcy (*d*); and there is the like distinction in administration as in bankruptcy between the principal administration of assets and the administrations ancillary thereto in foreign countries (*e*).

(*c*.) Valuation of annuities, &c.

(*c.*) Thirdly, as regards the valuation of annuities and future and contingent liabilities,—By section 37 of the Act, the trustee in the bankruptcy is to make an estimate of the value of any provable debt or liability which does not bear a certain value; and on appeal from the trustee's estimate to the court, the court may (without a jury) assess the value, or may declare the debt or liability incapable of being fairly estimated; *e.g.*, the value of an annuity payable

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(*z*) *Green* v. *Smith*, 22 Ch. Div. 584; *Mersey Steel Co.* v. *Naylor*, 9 App. Ca. 434; *Sovereign Life Assurance* v. *Dodd*, 1892, 2 Q. B. 573.
(*a*) 53 & 54 Vict. c. 71, s. 23; *In re Fox*, 1894, 1 Q. B. 438.
(*b*) *Boswell* v. *Gurney*, 13 Ch. Div. 136; *King* v. *Chick*, 39 Ch. Div. 567.
(*c*) 53 & 54 Vict. c. 71, s. 23.
(*d*) *Hicks* v. *May*, 13 Ch. Div. 236.
(*e*) *Eames* v. *Hacon*, 18 Ch. Div. 347; *Re Briesemann*, 1894, P. 260.

to a female during life or widowhood (*f*) or *dum casta fuerit* (*g*), must be estimated,—due weight being of course given to the possibility of cesser during the life of the annuitant (*h*); and these rules apply in the administration of assets in Chancery (*i*); and to prevent such a debt or liability from being destroyed by the debtor's order of discharge, it is necessary (as above stated) that the court should declare the debt or liability incapable of fair valuation (*k*). But note, that where an estate is insolvent, it may be wholly wound up in the Bankruptcy jurisdiction (*l*),—the order in that behalf being made at any time after (or even now before) (*m*) the expiration of two months from the date of the grant of probate or of letters of administration,—provided that a legal personal representative has been appointed (*n*), and no administration proceedings have meanwhile been taken in the Chancery Division; and in the latter case, such proceedings may be transferred (but not as a matter of course)—either on the application of a creditor (*o*), or without any such application (*p*),—into the Bankruptcy Division (*q*); and the proceedings may (even after decree) be transferred into the county court (*r*); and the last-mentioned court may also, in lieu of ordering the payment of a debt by instalments (with a view to a committal of the debtor), now make an administration order, or order

Administration of insolvent estates,—may be in Bankruptcy Division;

and even in lifetime of debtor.

(*f*) *Ex parte Blakemore*, 5 Ch. Div. 372; *Ex parte Naden*, L. R. 9 Ch. App. 670.
(*g*) *Ex parte Neal*, 14 Ch. Div. 579.
(*h*) *Ex parte Pearce*, 13 Ch. Div. 262.
(*i*) *Hill* v. *Bridges*, 17 Ch. Div. 342; and see *Allen* v. *Sinclair*, 1897 1 Ch. 921.
(*k*) *Hardy* v. *Fothergill*, 13 App. Ca. 351.
(*l*) 46 & 47 Vict. c. 52, s. 125.
(*m*) 53 & 54 Vict. c. 71, s. 21.
(*n*) *In re Sleet, Ex parte Sleet*, 1894, 2 Q. B. 797.
(*o*) *Higgs* v. *Weaver*, 29 Ch. Div. 236; *Jones* v. *Williams*, 36 Ch. Div. 573.
(*p*) 53 & 54 Vict. c. 71, s. 21.
(*q*) *Hardy* v. *Farmer*, 1896, 1 Ch. 904.
(*r*) *Atkinson* v. *Powell*, 36 Ch. Div. 233.

to administer the estate, even during the lifetime of the debtor (*s*), staying all other civil proceedings against him (*t*).

Administration in Chancery,—In a creditor's action,—(*a.*) Personal estate: (*aa.*) In ordinary cases.

In a creditor's action for the administration of the personal estate, an account is directed of the debts generally and of the funeral expenses; and a further account is directed of the personal estate generally received or (in effect) received by the executor, and of what is outstanding. The executor is allowed in his accounts all his testamentary expenses (*u*); also all "just allowances,"—and neither of those need be specified in the decree for administration (*v*). After decree made, the executor should exercise his powers only with the sanction of the court (*x*); and therefore, in any case of difficulty, he applies at chambers for directions as to getting in the outstanding personal estate; and he may, on such an application, obtain leave to bring or to defend an action. The debts to be paid in such an administration action include all debts (the liability for which was contracted by the testator) becoming due before the date of the Chief Clerk's certificate (*y*); and the decree operates for the benefit of all the creditors who prove their debts under it; and interest is computed on all debts down to the date of payment, —on those that carry interest at the agreed rate, and on the others at the rate of 4 per cent.; but the last-mentioned debts do not receive interest unless the assets are sufficient for the payment of the costs (*z*), and of the principal of all the debts,—

(*s*) 46 & 47 Vict. c. 52, s. 122.
(*t*) *In re Frank*, 1894, 1 Q. B. 9.
(*u*) *Sharp* v. *Lush*, 10 Ch. Div. 472.
(*v*) Order xxxiii. Rule 8.
(*x*) *Berry* v. *Gibbons*, L. R. 8 Ch. App. 747.
(*y*) *Thomas* v. *Griffiths*, 2 De G. F. & J. 563.
(*z*) *Tarn* v. *Emmerson*, 1895, 1 Ch. 652.

including even any voluntary bonds, although in the hands of the volunteer (*a*),—and of the interest on the interest-bearing debts. But in the case of persons dying after the 1st November 1875, and whose estates are insolvent, the court, as we have seen, administers the estate according to the rules in bankruptcy, and therefore allows interest on the interest-bearing debts only, and on these up to the date of the judgment for administration only (*b*); and in such a case the plaintiff (creditor) gets his costs as between solicitor and client (*c*),—as of course does also the executor (*d*). But in case the plaintiff in the action for administration is a partnership creditor, and asks administration of the estate of a deceased partner, the judgment declares, firstly, that all the creditors of the deceased are entitled to the benefit of the judgment; and secondly, that the surplus of the deceased partner's estate, after satisfying his funeral expenses and separate debts, was liable in equity at the time of his death to the joint debts of the partnership, without prejudice to any question as between the surviving partner or partners and the estate of the deceased partner; and then directs an account of the funeral expenses, of the separate debts, and of the joint debts, and an inquiry what was the personal estate of the deceased (*e*); and for the purpose of the prosecution of the inquiries as to the joint debts, the surviving partner or partners must either be made parties to the action or be served with notice of the judgment for administration (*f*).

(*bb.*) Where deceased was in partnership.

(*a*) *Garrard* v. *Lord Dinorben*, 5 Ha. 213.
(*b*) *In re Summers*, 13 Ch. Div. 136.
(*c*) *Wright* v. *Woods*, 26 Ch. Div. 179; *Wilkins* v. *Rotherham*, 27 Ch. Div. 703.
(*d*) *Moore* v. *Dixon*, 15 Ch. Div. 566.
(*e*) *In re M'Rae*, 32 Ch. Div. 613.
(*f*) Order xvi. Rule 40.

(b.) Real and personal estates.

In an action for the administration of both the real and the personal estates of the deceased debtor, after the accounts usual in a judgment for the administration of the personal estate only, the judgment proceeds to direct, that (in case the personal estate is insufficient) an inquiry shall be made as to what real estates (*scil.* fee-simple estates) the testator was entitled to at the time of his death, and subject to what (if any) incumbrances thereon, and what are the priorities of such incumbrances; and then the judgment orders a sale of the whole or a sufficient part of such real estate, with the consent of such of the incumbrancers thereon as shall consent thereto, and subject to the incumbrances of those of them who do not consent to the sale; and the sale-proceeds are brought into court to the real estate account, and are afterwards applied in payment (according to their priorities) of the incumbrancers who consent to the sale, and subject thereto are applicable towards helping the personal estate to pay the costs of the action and the general debts of the testator (*g*).

Decree or judgment for administration, effect of,—where assets appropriated.

The common decree or judgment for the administration of the personal estate of the deceased is a judgment against the personal estate, whensoever realised, in favour of all the creditors who come in under the decree; and when the decree extends, or by any subsequent order is extended, to the administration of the real estate also, the judgment operates in like manner in favour of these creditors (*h*). And when by the Master's certificate and the order on further consideration, or by any other certificate or order in the action, the creditors are found, and proportions of the assets are set opposite their names, so as to be appropriated for or towards payment of

(*g*) *Crosse* v. *General Investment Co.*, 3 De G. M. & G. 698.
(*h*) *Ashley* v. *Ashley*, 4 Ch. Div. 757.

their individual debts, the sums so appropriated become the property of the specified creditors; and any subsequently accruing assets will (upon the principle of the judgment, which a single creditor might obtain at law, of assets *quando acciderint*) be appropriated in like manner, and in the like proportions, until the full amount of all the debts so specified, with interest thereon, is paid or provided for,—the order providing also for any other creditors who since the last appropriation may have come in and taken the benefit of the decree (*i*); and the statute of limitation ceases to run once the appropriation is made (*k*), and the amounts so appropriated become the property of the creditor-appropriatees (*l*); wherefore any amounts appropriated to individual creditors and never claimed by them do not become available, even at any distance of time, for the other creditors who come forward to claim payment,—for if A. leaves his money in court, it does not thereby become the property of B.; and the fact that A. and B. are both creditors of one testator, C., can make no difference. But as regards unclaimed dividends, being dividends declared by and due from a company, the statute of limitations (six years or twenty years, as the case may be) begins to run as from the date of the declaration of dividends,—and the company is not a trustee of such dividends for the shareholders entitled thereto,—at all events, unless some special portion of the assets is appropriated to the unclaimed dividends and notice of such appropriation is given to the shareholders (*m*).

How and when creditors may call upon the

The effect of an executor administering personal estate under the direction of the court, or administer-

(*i*) *Ashley* v. *Ashley*, supra.
(*k*) *In re Dennis, ex parte Dennis*, 1895, 2 Q. B. 630.
(*l*) *Bartlett* v. *Charles*, 45 Ch. Div. 458.
(*m*) *In re Severn, &c. R. C.*, 1896, 1 Ch. 557.

beneficiaries to refund assets.

ing it after advertising for creditors and claimants under sect. 29 of the statute 22 & 23 Vict. c. 35, is to protect him personally against any claims (of which he has no notice) thereafter brought forward by creditors of the testator remaining unpaid; and such creditors must pursue their remedy (if any) against the residuary legatees or next of kin (*n*). But if the executor has administered the estate neither in the one nor in the other of those two ways, then he remains liable to any unpaid creditor,—who may accordingly sue him, in which case the executor will be entitled to call upon the residuary legatees or next of kin to refund (*o*); or the creditor may proceed against such legatees or next of kin, adding or not adding (as he chooses) the executor as a co-defendant (*p*). The creditor's remedy against the residuary legatees is, however, a purely equitable right, and the court will not enforce it if there are circumstances rendering it inequitable to do so (*q*).

Legatees postponed to creditors.

Legatees and devisees are of course postponed to creditors,—on the ground that a man must first do what is just before he attempts what is generous. On the other hand, legatees and devisees, as being expressed objects of the testator's generosity or bounty, are respectively preferred to the next of kin and to the heir-at-law of the testator; and among legatees, residuary legatees are considered the least favoured objects of such express generosity,—although it is otherwise with residuary devisees, for these latter rank on the same level as other devisees (*r*); and from these and such-like considerations, the courts

Order of liability to debts of the

(*n*) *Thomas* v. *Griffiths*, 2 De G. F. & J. 555; *Doughty* v. *Townson*, 43 Ch. Div. 1.
(*o*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.
(*p*) *Hunter* v. *Young*, 4 Exch. Div. 256.
(*q*) *Blake* v. *Gale*, 32 Ch. Div. 571.
(*r*) *Kidney* v. *Coussmaker*, 12 Ves. 154; *Hooper* v. *Smart*, 1 Ch. Div. 90; *Roper* v. *Roper*, 3 Ch. Div. 714.

have established in the administration of assets the following order in the liability to debts of the different properties (but as between such properties themselves only) belonging to the testator at the time of his decease, that is to say,— different properties of testator,—as between such properties themselves only.

1. The general personal estate not bequeathed at all or by way of residue only.

2. Real estate devised for the payment of debts.

3. Real estate descended.

4. Real estate devised specifically or by way of residue, and being at the same time charged with the payment of debts.

5. General pecuniary legacies, including annuities, and including also demonstrative legacies which have become general.

6. Specific legacies (including demonstrative legacies that have remained demonstrative), and real estate devised specifically or by way of residue and not being at the same time charged with debts.

7. Personalty or realty subject to a general power of appointment, and which power has been actually exercised by deed (in favour of volunteers) or by will (*s*).

8. Paraphernalia of widow.

The general personal estate, not bequeathed at all or by way of residue only, and which is in general legal assets, is first liable; but the testator may have exonerated it from its primary liability. Such exoneration may be either express or implied; *e.g.*, if the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts in exoneration of the 1. The general personal estate,—primary liability of.

Question,—What exonerates the personalty?

(*s*) *Spurling* v. *Rochfort*, 16 Ch. Div. 18; *Nicols* to *Nixey*, 29 Ch. Div. 1005.

general residuary estate,—but in such a case, if the exonerated residue or any part thereof should lapse, the exoneration ceases to the extent of the lapse (*t*). Also, when it is attempted to exonerate the personal estate at the expense of the real estate, very clear language on the part of the testator is required; for in order to exonerate the general personal estate from its primary liability in such a case, he must show an intention, not only to charge his real estate but also to exonerate or discharge his personal estate; therefore, neither a general charge of the debts upon the real estate, nor an express trust created by the testator for the payment of his debts out of his real estate (*u*), will be sufficient to exonerate the personal estate from its primary liability to pay them (*v*); but if the personal estate be given to some legatee, and more particularly if the articles given be specially mentioned, the indication thus afforded of the testator's wish that the personalty shall come clear to the legatee will, if coupled with such a charge as aforesaid, or with an express trust for payment of the funeral and testamentary expenses or of the debts out of the real estate, be sufficient to exonerate the personalty (*x*). In other words, an intention must appear to give the personal estate *as a specific legacy* to the legatee; and if this be the case, it will be exempt, and will be removed to that distant rank in point of liability in which all specific devises and bequests are held to stand (*y*).

Answer,—There must be both a discharge of the personalty and a charge of the realty.

Exoneration of general personal estate

The primary liability of the general residuary personal estate to pay the testator's debts used to

(*t*) *Kilford* v. *Blaney*, 31 Ch. Div. 56.
(*u*) *Brydges* v. *Phillips*, 6 Ves. 570; *Tower* v. *Rouss*, 18 Ves. 132; *Collins* v. *Robins*, 1 De G. & Sm. 131.
(*v*) *Trott* v. *Buchanan*, 28 Ch. Div. 446.
(*x*) *Lance* v. *Aglionby*, 27 Beav. 65; *Aldridge* v. *Wallscourt*, 1 Ball & B. 312.
(*y*) *Broadbent* v. *Barrow*, 31 Ch. Div. 113.

extend to the mortgage debts of the testator; but by Locke King's Act (*z*) this rule was broken in upon, and the primary liability for mortgage debts was shifted from the general personal estate to the mortgaged estate itself,—that Act having enacted, that, "when any person shall, after the passing of "the Act, die seised of or entitled to any estate or "interest in *any lands or other hereditaments*, which "shall, at the time of his death, be charged with "the payment of any sum or sums of money by "way of mortgage, and such person shall not by "his will, or deed, or other document, *have signified* "*any contrary or other intention*, the heir or devisee "to whom such lands or hereditaments shall descend "or be devised shall not be entitled to have the "mortgage debt discharged or satisfied out of the "personal estate, or any other real estate of such "person; but the lands or hereditaments so charged "shall, *as between the different persons claiming* (*a*) "*through or under the deceased person*, be primarily "liable to the payment of all the mortgage debts "with which the same shall be charged,—every part "thereof, according to its value, bearing a propor-"tionate part of the mortgage debts charged on the "whole thereof;" and the Act, unless excluded, applies to every person claiming under a will, deed, or document dated on or after 1st of January 1855; but the Act has no application to an estate tail, for that descends *per formam doni* (*b*).

from mortgage debts otherwise than under the statute 17 & 18 Vict. c. 113. (Locke King's Act), and the amending Acts.

It is proposed briefly to consider—(1.) The law applicable to cases not within the statute, and (2.) The effect and construction of the statute. And under the law applicable to cases not within the statute:—(*a.*) The heir and also the devisee were

(1.) State of the law, before Locke King's Acts.

(*z*) 17 & 18 Vict. c. 113.
(*a*) *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186.
(*b*) *Anthony* v. *Anthony*, 1893, 3 Ch. 498.

(*a.*) Personalty was primarily liable unless mortgaged estate devised *cum onere*, or personalty exonerated.

primâ facie entitled to have the descended and devised realty exonerated from the mortgage debt, and to have that debt paid out of the personal estate; and if the debt had been contracted by the deceased person himself, this was reasonable enough,—for what went into the deceased's personal estate should again come out of same. But the mortgaged estate might by express words have been devised *cum onere*, or the personal estate might have been otherwise exempted (*c*),—in either of which cases, the mortgaged lands would have borne the burden of the mortgage debt. (*b.*) On the other hand, if the mortgage debt was not the personal debt of the deceased devisor or ancestor, but was the debt of a previous owner of the mortgaged estate,—in other words, if the mortgage debt was an *ancestral mortgage*,—the mortgaged estate was the primary, and the personalty was only the collateral, fund for its payment; consequently, the devisee or heir-at-law, as the case might be, would, as a general rule, take the devised or descended estate with the burden of the ancestral mortgage on it, and would not be entitled to call upon the personal estate for exoneration; and that again was reasonable enough. But if the ancestor or devisor had adopted the debt as his own personal debt, the ordinary rule applied (*d*); that is to say, the mortgaged estate was in that case entitled to exoneration at the expense of the personal estate; but such an adoption was not readily inferred, the owner's adoption of the debt for a particular purpose not being such an adoption as would have determined the rights of the beneficiaries *inter se* (*e*).

(*b.*) Mortgaged estate was primary fund, when mortgage was an ancestral debt.

Unless it had been adopted as a personal debt.

What was an adoption of the debt, for this purpose?

(*c*) *Townsend* v. *Mostyn*, 26 Beav. 76; *Newhouse* v. *Smith*, 2 Sm. & Giff. 344.

(*d*) *Scott* v. *Beecher*, 5 Mad. 96.

(*e*) *Evelyn* v. *Evelyn*, 2 P. Wms. 659; *Hedges* v. *Hedges*, 5 De G. & Sm. 330; *Swainson* v. *Swainson*, 6 De G. M. & G. 648; *Bond* v. *England*, 2 K. & J. 44; *Loosemore* v. *Knapman*, Kay, 123.

(2.) State of the law, since Locke King's Acts. Copyholds and freeholds are within the principal Act.

And now by the effect of the Act, every mortgage is to be treated as if it were an ancestral mortgage, unless a contrary intention is expressed; and copyholds as well as freeholds are within the Act. Leaseholds, however, were not within the Act (*f*); and accordingly an amending Act (*g*), commonly called the second amending Act, was passed for the purpose of bringing leaseholds within it; and this amending Act applied to any testator or intestate dying after the 31st December 1877 seised or possessed of or entitled to any *lands of whatever tenure*. The words "sums by way of mortgage," occurring in the principal Act, apply of course only to a defined or specified charge on a specified estate (*h*); and these words extended of course to include equitable mortgages (*i*). They were held, however, not to apply to a vendor's lien for unpaid purchase-money (*k*); consequently in the amending Act (*l*), commonly called the first amending Act, sect. 2, the word "mortgage" in the principal Act was made to extend to such lien; and that Act having (by what appears to have been a curious oversight) spoken not of *intestates* but only of *testators* (*m*), the second amending Act has supplied this omission, so far as regards the vendor's lien; and the charge to which a judgment creditor becomes entitled on the actual delivery of the land in execution is within the provisions of the Act (*n*),—unless the land is in entail (*o*). And where a mortgage is of a mixed fund of real and personal property, the incidence of the liability under the Act is upon

Leaseholds are within the amending Act, 1877.

Vendor's lien is within the amending Acts, 1867 and 1877.

Rateable incidence of mortgage in case of mixed security.

(*f*) *Piper* v. *Piper*, 1 J. & H. 91; *Hill* v. *Wormsley*, 4 Ch. Div. 665.
(*g*) 40 & 41 Vict. 34; *Drake* v. *Kershaw*, 37 Ch. Div. 674.
(*h*) *Hepworth* v. *Hill*, 30 Beav. 476.
(*i*) *Pembroke* v. *Friend*, 1 J. & H. 132.
(*k*) *Hood* v. *Hood*, 5 W. R. 747.
(*l*) 30 & 31 Vict. c. 69.
(*m*) *Harding* v. *Harding*, L. R. 13 Eq. 493; *Broadbent* v. *Groves*, 24 Ch. Div. 94.
(*n*) *Anthony* v. *Anthony*, 1892, 1 Ch. 450.
(*o*) *Anthony* v. *Anthony*, 1892, 3 Ch. 498.

"Contrary or other intention" in principal Act,—not what Campbell, L.C., thought.

both the real and the personal property equally, and is *pro ratâ*,—neither being exempt in favour of the other (*p*). Upon the question, what is a "*contrary or other intention*" within the meaning of the Act, the rule laid down by Lord Campbell in *Woolstencroft* v. *Woolstencroft* (*q*), to the effect that there must be both a discharge of the real estate and a charge of the personal estate, is not correct; and

The true rule,—it is sufficient to charge the personal, without at the same time discharging the real, estate.

the correct rule is that laid down by Turner, L.J., in *Eno* v. *Tatham* (*r*), to the effect that it is sufficient to show a discharge of the real estate,—for in *order to take a case out of the Act, it is sufficient to show a contrary or other intention* within the meaning of the *Act*, not a contrary intention to any settled *principle* of equity. Therefore, although a mere general direction by the testator that his debts should be paid "as soon as may be" (*s*), or that his debts should be paid by "his executors out of his estate" (*t*), was no indication of a contrary intention within the meaning of the Act; yet where the *personal* estate was bequeathed on trust to pay (*u*), or subject to the payment of (*v*), debts, these words sufficiently indicated, under the principal Act, a contrary intention, and so restored the rule which was applicable before the Act. However, by the first amending Act, 30 & 31 Vict. c. 69, in the construction of the will of any person who may die after the 31st day of December 1867, a mere general direction that the debts or all the debts of the testator shall be paid out of his personal estate, is no longer to be deemed a contrary intention within the meaning of

Under 30 & 31 Vict. c. 69, the intention to charge the personalty with the mortgage debts must be expressed or necessarily implied.

(*p*) *Trestrail* v. *Mason*, 7 Ch. Div. 655; *Athill* v. *Athill*, 16 Ch. Div. 211.
(*q*) 2 De G. F. & Jo. 347.
(*r*) 11 W. R. 475; *Colton* v. *Roberts*, 37 Ch. Div. 677.
(*s*) *Coote* v. *Lowndes*, L. R. 10 Eq. 376.
(*t*) *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & Jo. 347.
(*u*) *Moore* v. *Moore*, 1 De G. Jo. & Sm. 602.
(*v*) *Mellish* v. *Vallins*, 2 J. & H. 194.

the principal Act; but the contrary intention is to be declared by words expressly or by necessary implication referring to the testator's mortgage debts (*x*); and it follows, therefore, that the phrases "my just debts," "all my just debts," and the like, will no longer suffice to show a contrary intention within the meaning of the principal Act,—for these words do not either expressly or by necessary implication imply "mortgage debts;" and even when a testator devises part of his real estate "charged nevertheless, "*in aid of my personal estate* and in *exoneration of my* "*other real estate*, with the payment of all my *just* "*debts*," these words are not now sufficient to exonerate the mortgaged estate from the mortgage debt (*y*).

Liability of executors for mortgage debts of testator, and their protection against same, after distribution of estate.

The Acts we have been discussing, and which are sometimes called *Locke King's Acts*, and sometimes the *Real Estate Charges Acts*, do not, of course, affect the mortgagees themselves or their rights; and executors are therefore liable to provide out of the assets of their testator for all mortgage debts made by the testator himself or for which he is personally liable; and they will be liable, *as for a devastavit*, if they fail to do so before distributing the assets among the residuary legatees; and, apparently, no statute of limitations (unless, possibly, the Trustee Act, 1888, s. 8) will (without other circumstances combining therewith) protect them from their liability in this respect (*z*),—for it was their duty to have made provision for the mortgage debts. Nevertheless, when a mortgage debt has been left unprovided for by the executors, they may be protected by the statutes of limitation combined with acquiescence

(*x*) *Newmarch* v. *Storr*, 9 Ch. Div. 12; *Rossiter* v. *Rossiter*, 13 Ch. Div. 355.
(*y*) *Giles* v. *True*, 33 Ch. Div. 195.
(*z*) *Bowden* v. *Layland*, 26 Ch. Div. 783; *Bowles* v. *Hyatt*, 38 Ch. Div. 609.

on the mortgagee's part (*a*),—in which case, the mortgagee would only be able to proceed against the testator's estate in the hands of the distributees, calling upon them to refund; and it is only right that the executor should, in cases of this character, be protected against the mortgagee's claim,—for where an executor, with notice of a *debt* (*b*), as distinguished from a mere *liability* (*c*), parts with all the assets amongst the beneficiaries without providing for such debt, he has no right himself to call upon the beneficiaries to refund; and the court will not favour the mortgagee even, in his endeavour to follow the assets in the hands of the distributees (*d*).

Liability of distributees to refund, towards paying such mortgage debts.

2. Lands expressly devised for payment of debts, equitable assets.

3. Realty descended, legal assets.

4. Realty devised charged with debts, equitable assets.

Heir taking a lapsed devise.

Lands devised to pay debts, and not merely devised charged with debts, are liable next after the personalty (*e*); and these are equitable assets; and next after them, come real estates which have descended to the heir not charged with debts (*f*); and these (as we have seen) are legal assets. Then come, fourth in order, real estates devised specifically or by way of residue, and being at the same time charged with debts; and these are liable *pro ratâ* (*g*), and are equitable assets, and debts are payable out of them *pari passu;* and if the heir takes, by reason of a lapse, land devised charged with debts, the land so charged is (unlike lapsed personal estate) applicable for payment of debts in the same order as devised estates, and not till after the real estates (if any) which have descended (*h*),—that is to say, it remains

(*a*) *Blake* v. *Gale*, 22 Ch. Div. 820.
(*b*) *Whittaker* v. *Kershaw*, 45 Ch. Div. 320.
(*c*) *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18.
(*d*) *Blake* v. *Gale*, 31 Ch. Div. 196.
(*e*) *Harmood* v. *Oglander*, 8 Ves. 125.
(*f*) *Wood* v. *Ordish*, 3 Sm. & Giff. 125.
(*g*) *Irvin* v. *Ironmonger*, 2 Russ. & My. 531.
(*h*) *Stead* v. *Hardaker*, L. R. 15 Eq. 175; *Jones* v. *Caless*, 10 Ch. Div. 40; *Kirk* v. *Kirk*, 21 Ch. Div. 431; *Hurst* v. *Hurst*, 28 Ch. Div. 159.

where it would have stood if it had not lapsed; and since the Act for the amendment of the law of inheritance (*i*), when land is devised to the heir, he takes not as heir, but as purchaser, and as such is placed in the same position in all respects as any other devisee of lands (*k*). And note, that a residuary devise is ranked upon a level with a specific devise (*l*), although, of course, a residuary devise is now, for most purposes, a general devise.

Devise to heir makes him a purchaser.

A residuary devise is specific.

General pecuniary legacies are next liable, and are liable *pro ratâ* (*m*); and by this we mean, of course, that the proportion of the personal estate which the executor would (but for the debts) set apart to meet these legacies is next liable; and so far as that personal estate is diminished by the debts, the legatees will be deemed to contribute to their payment, and will *inter se* abate proportionately. Next come specific legacies (*n*), and real estates devised specifically or by way of residue and not being at the same time charged with the payment of debts (*o*); and these are liable *pro ratâ* to contribute to the payment of debts by specialty, in which the heirs are bound (*p*), and also to the payment of debts by simple contract, and by specialty in which the heirs are not bound (*q*); but any pecuniary legacies or portions charged on such devises do not contribute (*r*).

5. General pecuniary legacies.

6. Specific legacies and devises.

(*i*) 3 & 4 Will. IV. c. 106.
(*k*) *Strickland* v. *Strickland*, 10 Sim. 374.
(*l*) *Hensman* v. *Fryer*, L. R. 3 Ch. App. 420; *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136.
(*m*) *Clifton* v. *Burt*, 1 P. W. 680; *Headley* v. *Readhead*, Coop. 50.
(*n*) *Fielding* v. *Preston*, 1 De G. & Jo. 438.
(*o*) *Mirehouse* v. *Scaife*, 2 My. & Cr. 695; *Milnes* v. *Slater*, 8 Ves. 303.
(*p*) *Tombs* v. *Roch*, 2 Col. 490; *Gervis* v. *Gervis*, 14 Sim. 655.
(*q*) *Collis* v. *Robins*, 1 De G. & Sm. 131.
(*r*) *Saunders-Davies* v. *Saunders-Davies*, 34 Ch. Div. 482.

7. Property over which testator has exercised a general power of appointment.

Real or personal property over which the testator has a *general* power of appointment, if and so far as he has *actually* exercised that power (*s*), whether by deed *in favour of volunteers* or by will, is the property next applicable for the payment of the debts; and in this case the property appointed will in equity form part of the appointor's assets,—so as to be subject to the demands of his creditors in preference to the claims of his legatees or appointees (*t*). But for this purpose the testator must have shown a clear intention to make the property his own to all intents (*u*); and where any estate or property is so peculiarly circumstanced, as regards the testator, that it only becomes portion of his estate if he purports to dispose of it by his will, such estate or property will become assets for the payment of his debts if (and only if) he does so purport to dispose of it (*v*).

8. Widow's paraphernalia.

Lastly in order, come the paraphernalia of the testator's widow,—she being preferred to all legatees and devisees, and ranking, in fact, in the order of preference next after the creditors of the deceased; and this is, for the reason that her paraphernalia, although liable to her husband's debts, cannot be disposed away from her by his will alone.

Retainer by executor,—its origin and limits.

In the application of the testator's assets to or towards the payment of his debts in the order above expounded and exemplified, the testator's intention, expressed or presumed, is supposed to be the guide (*x*); but as regards the singularity next mentioned, viz., the executor's retainer, it is uncertain whether the right depends upon intention at all,—the right

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(*s*) *Fleming* v. *Buchanan*, 3 De G. M. & G. 976.
(*t*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165; *Spurling* v. *Rochfort*, 16 Ch. Div. 18; *Scott* v. *Hanbury*, 1891, 1 Ch. 298.
(*u*) *Thurston* v. *Evans*, 32 Ch. Div. 508; *Coxen* v. *Rowland*, 1894, 1 Ch. 406; and see *Kelly* v. *Boyd*, 1897, 2 Ch. 232.
(*v*) *Ashby* v. *Costin*, 21 Q. B. D. 401.
(*x*) *Talbot* v. *Frere*, 9 Ch. Div. 568.

having arisen partly from the executor's inability to sue himself (*scil.* in a court of law) for the recovery of his own debt (*y*), and the right existing in the case of legal assets only, and not also in the case of equitable assets (*z*). Whatever the origin of the right of retainer, it is a right only *inter pares*, *i.e.*, as against creditors in an equal degree with the executor (*a*); and if, therefore, the executor is a simple contract creditor, he cannot retain as against specialty creditors (*y*), not even since Hinde Palmer's Act (*b*). But the right, when it exists, is not lost by a decree in an administration action (*c*), nor by payment of the fund into court (*d*); and it exists, although the debt is a joint debt (*e*); also, one executor may retain out of a balance in the hands of both executors (*f*). The right exists also in favour of a married woman (executrix), in respect of moneys lent by her to the deceased,—although such deceased should have been her own husband, and the loan was made to him for the purposes of his business (*g*). Also, an administrator (equally with an executor) is entitled to the right (*h*); and the retainer may even be of the estate *in specie* (*i*); and an executor (*j*) or administrator (*k*), who claims only as having been a surety for the deceased, may retain,—the right of retainer being in respect of debts (arrears, *e.g.*, of an annuity) already accrued due, during the

(*y*) *Walters* v. *Walters*, 18 Ch. Div. 182; *International Marine Co.* v. *Hawes*, 29 Ch. Div. 934.
(*z*) *Thompson* v. *Bennett*, 6 Ch. Div. 739.
(*a*) *Laver* v. *Botham*, 1895, 1 Q. B. 59.
(*b*) *Calver* v. *Laxton*, 31 Ch. Div. 440; *Earp* v. *Briggs*, W. N. 1894, p. 162.
(*c*) *Campbell* v. *Campbell*, 16 Ch. Div. 198.
(*d*) *Richmond* v. *White*, 12 Ch. Div. 361.
(*e*) *Crowder* v. *Stewart*, 16 Ch. Div. 368.
(*f*) *Kent* v. *Pickering*, 2 Keen, 1; *Campbell* v. *Campbell*, supra.
(*g*) *Crawford* v. *May*, 45 Ch. Div. 499.
(*h*) *Fowler* v. *James*, 1896, 1 Ch. 48.
(*i*) *In re Gilbert, ex parte Gilbert*, 1897, W. N. p. 174.
(*j*) *Jones* v. *Pennefather*, 1896, 1 Ch. 956.
(*k*) *Adcock* v. *Evans*, 1896, 2 Ch. 345.

period of the administration,—but not in respect of mere liabilities as distinguished from debts (*l*). And note, that a receiver will not be appointed merely or chiefly for the purpose of *defeating* the right of retainer (*m*); and conversely, money in court will not be paid out for the purpose of *giving* the right of retainer (*n*). However, the right does not exist if the estate is being administered in the Bankruptcy Division; and it is lost if the administration action pending in the Chancery Division is transferred into the Bankruptcy Division (*o*). The executor cannot of course retain out of moneys which he holds as a trustee only for the estate of the testator (*p*); and he may otherwise be deprived of the full benefit of his retainer,—*e.g.*, where he has assented to a composition (*q*); and he cannot retain except out of assets come to his own hands, and therefore not out of assets (even although legal) come to the hands of a receiver appointed in a creditor's administration action (*r*). And although an executor may retain a debt which is statute-barred, just as he may lawfully pay same (*s*), still he cannot retain a debt not evidenced in writing as required by the Statute of Frauds (where the proof of the debt is required by that statute to be in writing),—for he could not without a devastavit pay such latter debt (*t*). Also, the executor's retainer is limited to such assets as come to his hands *during his lifetime;* but if, as regards such assets, the

No retainer in bankruptcy administration.

No retainer except out of assets come to the executor's own hands.

(*l*) *In re Watson, Turner* v. *Watson*, 1896, 1 Ch. 925; *In re Binns, Lee* v. *Binns*, 1896, 2 Ch. 584.
(*m*) *Molony* v. *Brooke*, 45 Ch. Div. 569.
(*n*) *Trevor* v. *Hutchins*, 1896, 1 Ch. 844.
(*o*) *Atkinson* v. *Powell*, 36 Ch. Div. 233; *Jones* v. *Williams*, 36 Ch. Div. 573.
(*p*) *Talbot* v. *Frere*, 9 Ch. Div. 568.
(*q*) *Beswick* v. *Orpen*, 16 Ch. Div. 202; *Birt* v. *Birt*, 22 Ch. Div. 604.
(*r*) *Latimer* v. *Harrison*, 32 Ch. Div. 395.
(*s*) *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415; *Coombs* v. *Coombs*, L. R. 1 P. & M. 388.
(*t*) *Field* v. *White*, 29 Ch. Div. 358.

executor asserts that right in his lifetime, his executors may afterwards insist upon the right (*u*). The retainer, when and so far as it exists, extends also to damages for breach of contract, when such damages are measurable (*v*). And here note, that an heir-at-law or devisee has no retainer out of lands which are made assets by the statute 3 & 4 Will. IV. c. 104,—nor generally out of any lands whatsoever, except possibly in respect of a specialty debt in which the heirs are specially bound (*x*).

No retainer by heir or devisee.

In general, the limit of the executor's liability is the assets of the testator which have come to his hands, or to the hands of any one on his behalf; but property will be deemed to have come to his hands if it is money owing by himself to the estate, or, *semble*, if it was his duty to have retained the amount thereof (as a debt owing to the estate) out of the share of the estate coming to the debtor as legatee (*y*),—for he is liable for what, but for his own "wilful default," he might have received (*z*). But it is by no means easy to prove wilful default against an executor (*a*); and in order to charge the executor as for wilful default, a case must, as a general rule, be made at the hearing; but provided the pleadings contain an allegation of wilful default (specifying one instance thereof at the least), then, if the allegation was not disproved at the hearing, and merely the ordinary administration judgment taken, that judgment may afterwards be added to, whenever the wilful default is made to appear,—by directing further accounts and inquiries to be taken and made on

Wilful default, —executor's liability for.

(*u*) *Norton* v. *Compton*, 30 Ch. Div. 15.
(*v*) *Loane* v. *Casey*, 2 W. Bl. 965.
(*x*) *Davidson* v. *Illidge*, 27 Ch. Div. 478.
(*y*) *Akerman* v. *Akerman*, 1891, 3 Ch. 212; *Taylor* v. *Wade*, 1894, 1 Ch. 671.
(*z*) *Job* v. *Job*, 6 Ch. Div. 562; *Scotney* v. *Lomer*, 31 Ch. Div. 380.
(*a*) *In re Stevens, Cooke* v. *Stevens*, 1897, 1 Ch. 422; 1898, 1 Ch. 162.

that footing (*b*). Under the old practice, this would have required a Bill of Review (*c*); under the present practice, the addition to the decree or judgment would be made on an ordinary summons intituled in the action.

Accountability of executors after distribution of estate.

It frequently happens with executors, where there is a residuary bequest among several contingently upon their attaining twenty-one years, that they pay some of the legatees their shares of the residue (*scil.* upon their attaining the age of twenty-one years), and retain in their hands the remaining shares of the residue (*scil.* until the other legatees successively attain the age of twenty-one years); now, if, after such partial distribution of the residue, the unpaid residuary legatees, or some of them, institute proceedings against the executors for the administration of the estate,—the rule is, in general, that the costs of the action must be borne by the shares coming to the plaintiffs, and by those shares exclusively,—assuming, of course, that the executors have been willing before action brought to produce proper accounts; but if the executors have made the distribution upon an erroneous principle, so that the accounts which they produce are erroneous, then the costs of the action will not be thrown exclusively upon the shares coming to the plaintiffs, but will be declared to be payable out of the entire residuary estate,—not so as to cause the paid residuary legatees to refund, but so as to make the executors personally liable for the proportion of such costs which would have been paid out of the shares that have been distributed, if such shares had not been distributed (*d*).

(*b*) *Barber* v. *Mackrell*, 12 Ch. Div. 538; *Smith* v. *Armitage*, 24 Ch. Div. 727.

(*c*) *Hodson* v. *Ball*, 1 Phil. 177; *Taylor* v. *Taylor*, 1 Mac. & Ger. 397.

(*d*) *Hilliard* v. *Fulford*, 4 Ch. Div. 389; *Frere* v. *Winslow*, 45 Ch. Div. 249,

What time bars the right to administration.

Actions for the administration of the estate of deceased persons can only be instituted by persons whose claims to recover are not barred by any statute of limitations; therefore, in the case of creditors by simple contract, only within six years from the time that their debt was demandable; and in the case of judgment creditors, whether their judgments are a charge on lands or not, within twelve years (*e*); and in the case of legatees, within twenty years (or, *semble*, now twelve years) after a present right to receive their legacies has accrued (*f*); and there is the like limit in the case of an intestate's estate (*g*). It appears, however, that the liability of the testator's (or intestate's) estate will be perpetuated or revived by any part payment or written acknowledgment,—and, when there are more legal personal representatives than one, by the acknowledgment of any one of them (*h*). An illegal trust, it is hardly necessary to observe, will not be administered by the court (*i*); also, special provisions have been now made, by the Regimental Debts Act, 1893 (*k*), in respect of the estates of officers and soldiers dying in actual service; and these provisions apparently exclude the court from assuming the administration.

Beneficial interest in settlement,—adjustment of rights between tenant for life and remainderman.

When the beneficial interest in any property is settled,—such settled property being portion of the testator's estate,—if it is subject to any mortgage or incumbrance, the rule is, that the tenant for life must, out of the rents and profits or income, keep down the interest on such mortgage or incumbrance, and sub-

(*e*) *Jay* v. *Johnstone*, 1893, 1 Q. B. 189; *Bland* v. *Lord*, 1894, 1 Ch. 147.
(*f*) 3 & 4 Will. IV. c. 27, s. 40; 37 & 38 Vict. c. 57, s. 8; *Buxton* v. *Campbell*, 1892, 2 Ch. 491.
(*g*) 23 & 24 Vict. c. 38, s. 13; *Sly* v. *Blake*, 29 Ch. Div. 964.
(*h*) 9 Geo. IV. c. 14, s. 1; *In re Macdonald*, *Dick* v. *Fraser*, 1897, 2 Ch. 181.
(*i*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154.
(*k*) 56 & 57 Vict. c. 5.

ject thereto the mortgage or incumbrance falls on the inheritance, *i.e.*, on the remainderman (*l*); and in such a case, if the mortgage or incumbrance is an annuity (terminable with the life of the annuitant), and the rents and profits are insufficient to pay it, it must be valued or capitalised, and then, as between the tenant for life and the remainderman, the burden of it will be borne between them in proportion to the value of their respective interests (*m*).

(*l*) *Bute* (*Marquess*) v. *Ryder*, 27 Ch. Div. 196.
(*m*) *Jones* v. *Mason*, 39 Ch. Div. 534; *Townson* v. *Harrison*, 43 Ch. Div. 55.

CHAPTER XV.

MARSHALLING ASSETS.

The general principle of marshalling explained.

It must not be forgotten that the order (stated and expounded in the preceding chapter) in which the several properties liable to the payment of debts are to be applied, regulates the administration of the assets *only as between or among the testator's own representatives, devisees, and legatees;* and it does not affect the right of the creditors themselves to resort, in the first instance, to all or any of the funds to which their claims extend. It might have happened, therefore, in times preceding the Act 3 & 4 Will. IV. c. 104,—although it can hardly (if at all) happen now, —that a creditor having a right to proceed against two or more funds, proceeded against some fund which was the only resource of some other creditor less amply provided for than himself; and in such a case, equity would have held, that the creditor having two funds should not, by resorting to the fund which was the only resource of another creditor, disappoint that other; but would have permitted the latter to stand, *to the extent of his disappointment*, in the place of the more favoured creditor, against the other fund to which the less favoured creditor had no direct access, —the object of the court in all this being to secure that all creditors should be satisfied, so far as, by any arrangement consistent with the nature of their several claims, the property permitted (*a*); and this was

(*a*) *Aldrich* v. *Cooper*, 2 L. C. 80; *In re Ward*, 20 Ch. Div. 356.

Two varieties of marshalling.

called a marshalling of the assets; and the marshalling might be, not only as between the creditors, but also as between the beneficiaries.

1. As between creditors.

Under old law, simple contract creditors permitted to stand in shoes of specialty creditors as against the realty.

And *firstly*, Marshalling as between the creditors. —Simple contract creditors had (as we have seen) no claim originally against the real assets,—unless these assets were charged with, or were devised for, the payment of the debts; and in the absence, therefore, of such a charge or devise, specialty creditors might resort to the personal estate in priority to, and to the real assets in exclusion of, simple contract creditors; therefore equity compelled these specialty creditors to resort in the first place to the real assets, —so as to leave the personalty for the simple contract creditors; and if the specialty creditors exhausted the personal assets, the simple contract creditors were put in their place against the real assets, *as far as the specialty creditors had exhausted the personal assets* (*b*); also, if the vendor of an estate, the contract for which had not been completed by the testator in his lifetime, was afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator were put in the place of the vendor, *to the extent of his lien on the estate sold*, as against the devisee of that estate (*c*). But, of course, all lands being now liable to simple contract debts, the court is no longer under any necessity of marshalling to enforce their payment (*d*); and the statute 32 & 33 Vict. c. 46 having abolished the priority of specialty over simple contract debts, in the administration of the estates of all persons dying after the 1st January 1870, questions of marshalling *as between creditors* have now become of little practical importance, and of yet less importance in the case of persons dying

Marshalling against a mortgagee, who exhausted or diminished the personalty.

Also, against an unpaid vendor, who did the like.

Realty now assets for payment of all debts, 3 & 4 Will. IV. c. 104.

Priority of creditors abolished, 32 & 33 Vict. c. 46, and 38 & 39 Vict. c. 77, s. 10.

(*b*) *Aldrich* v. *Cooper*, 2 L. C. 80.
(*c*) *Selby* v. *Selby*, 4 Russ. 336.
(*d*) *Cradock* v. *Piper*, 15 Sim. 301.

insolvent on or after the 1st November 1875 (*e*). Of course, the doctrine of marshalling as between creditors was enforced only as between creditors of the same debtor; and the creditors of B. had therefore no right to compel one who was a creditor of both A. and B. to seek payment from A. (*f*), in the absence at least of some equity. Nevertheless, in the marshalling of securities, the court applied certain rules, which were not limited (or not very strictly limited) to the creditors of the same debtor (*g*); but the barest statement of these rules (which are exceedingly intricate) is all that can be here attempted; and, in the words of Lord Hardwicke in *Lanoy* v. *Duke of Athole* (*h*), the general principle is,—that if a person having two real estates mortgages both estates to A., and afterwards mortgages one only of the estates to B., whether or not B. had notice of A.'s mortgage (*i*), the court directs A. (but always without prejudice to A.) to realise his debt out of that estate which is *not* in mortgage to B.,—so as to leave the one estate which is in mortgage to B. to satisfy B. so far as it goes; and this general principle is applicable also as against a surety, to whom (on payment by him of the debt) A. may have assigned his two securities (*k*). The general principle is subject, however, to the following restriction, viz., that the marshalling of securities is not enforceable by B. to the prejudice of C. (a third person) (*l*); and the general principle, in the case of mortgages with a surety, is subject to certain very

No marshalling except between creditors of the same person.

Marshalling of securities,—general rules regarding.

(*e*) 38 & 39 Vict. c. 77, s. 10.

(*f*) *Ex parte Kendall*, 17 Ves. 520.

(*g*) *Blackburn and District B. B. Society* v. *Cunliffe*, 29 Ch. Div. 902; *Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155; *Webb* v. *Smith*, 30 Ch. Div. 192.

(*h*) 2 Atk. 446.

(*i*) *Tidd* v. *Lister*, 10 Hare, 157.

(*k*) *South* v. *Bloxam*, 2 Hem. & Mill. 457; *Robinson* v. *Gee*, 1 Ves. Sr. 252.

(*l*) *Averall* v. *Wade*, L. & G. t. Sugd. 252; *Barnes* v. *Racster*, 1 Yo. & Col. Ch. Ca. 401; *Flint* v. *Howard*, 1893, 2 Ch. 54; *Farrington* v. *Foster*, ib. 461.

minute distinctions, according as the surety is a surety simply, or is both a surety and a co-mortgagor.

2. As between the beneficiaries entitled under the will.

Secondly, Marshalling as between the divers beneficiaries entitled under the will, and (in the case of partial intestacies) as between also the heir-at-law and the next of kin.—In this group of cases, it is usually by reason of the disturbing action of the creditors of the deceased that the question of marshalling arises,—although occasionally (as will be shown later on in this present chapter) it may arise from other causes. Now, where it arises from the disturbing action of creditors, the general principle which runs through all the cases of marshalling as between beneficiaries may be arrived at in this way, viz.:—Taking the various properties specified on p. 301, *supra*, in the order of their respective liabilities to the payment of debts in the administration of assets as shown on that page, and substituting in the same order the various persons to whom these various properties would go if there were no debts to pay,—and to whom they do in fact go, so far as they are not exhausted by the payment of debts,—we obtain the following list of the persons entitled under the will (and otherwise) to participate in the property of the deceased testator, that is to say,—1. The next of kin or the residuary legatees; 2. The heir-at-law; 3. The heir-at-law; 4. The charged devisees (specific and residuary); 5. The pecuniary legatees; 6. The devisees (specific and residuary) and the specific legatees; 7. The voluntary appointees by deed or will; and, 8. The widow. And from that list of beneficiaries the general rule of marshalling is derived in this way, and is to this effect, namely,—that if any beneficiary in the list is disappointed of his benefit under the will through the creditor (in effect) seizing upon (as he may) the fund intended for such disappointed person, then such person may recoup or

The general principle of marshalling,—how derived from the order of the liability of the divers properties.

The general principle of marshalling—statement of.

compensate himself for that disappointment (*to the extent thereof*) by going against the fund or funds intended for (and in that way similarly disappointing in his turn) any one or more of the beneficiaries prior to himself in the list; and such secondly disappointed person or persons may in his or their turn do the like against those prior to him or them, so that eventually the next of kin or residuary legatees (as the case may be) have to bear the disappointment without any means of redress,—they having, in fact, no title to anything save what remains upon a due administration of the estate (*m*); but nobody may go against any one posterior to himself on the list; and persons occupying the same rank in the list have contribution as against each other.

The general principle,—application of.

Widow's paraphernalia preferred to a general legacy.

We proceed to test this rule in its application to the decisions. And firstly, as regards the widow's paraphernalia: although that (with the exception of necessary wearing apparel) (*n*) is liable to her deceased husband's debts, she will be preferred to a general legatee, and be entitled therefore to marshal assets in all cases in which a general legatee would be entitled to do so (*o*); and on principle, a widow, as to her paraphernalia, is entitled to precedence also over specific legatees and devisees (*p*); and, in fact, both principle and the weight of authority point to the conclusion, that a widow, as to her paraphernalia, is entitled to rank next after creditors (*q*). So again, if the heir-at-law has paid any debts which ought to have been paid, first, out of the general personal estate, or, secondly, out of lands

Right of heir as to descended lands.

(*m*) *Att.-Gen.* v. *Lord Sudeley*, 1896, 1 Q. B. 354; 1897, A. C. 11.
(*n*) *Lord Townshend* v. *Windham*, 2 Ves. Sr. 7.
(*o*) *Tipping* v. *Tipping*, 1 P. W. 730; *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576.
(*p*) *Probert* v. *Clifford*, Amb. 6; *Graham* v. *Londonderry*, 3 Atk. 395.
(*q*) Wms. Real Assets, 118.

subject to a trust or power for their payment, he will have a right to have the assets marshalled in his favour as against those two funds,—but not to the prejudice of pecuniary legatees; still less to the disappointment of specific legatees (*r*). So also, a devisee of lands charged with the payment of debts, paying any debts whilst any of the previously liable property remains unexhausted, will have a right to have the assets marshalled in his favour, and to stand in the place of the creditors so far as regards, first, the general personal estate; second, land subject to a trust or power for raising the debts; and third, lands descended to the heir (*s*),—and a residuary devisee stands for this purpose in the same position as a specific devisee (*t*). Also pecuniary legatees, if the personal estate out of which they are to be paid has been exhausted by creditors, are entitled to be paid—(*a.*) Out of lands which descend to the heir (*u*); (*b.*) Out of lands devised subject to debts (*v*); and (*c.*) Out of lands subject to a mortgage,—to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate (*x*); but pecuniary legatees have no right to marshal against lands comprised in a residuary devise, any more than against specific legatees and devisees (*y*),—unless of course such residuary devise should be charged with the payment of these legacies, either expressly or by implication, as hereinafter explained (*z*). And

Devisee of lands charged with debts.

Position of a residuary devisee.

Against whom pecuniary legatees may marshal.

(*r*) *Hanby* v. *Roberts*, Amb. 128.
(*s*) *Harmood* v. *Oglander*, 8 Ves. 106.
(*t*) *Hensman* v. *Fryer*, L. R. 3 Ch. App. 420; *Lancefield* v. *Iggulden*, L. R. 10 Ch. App. 136; *Farquharson* v. *Floyer*, 3 Ch. Div. 109.
(*u*) *Sproule* v. *Prior*, 8 Sim. 189.
(*v*) *Rickard* v. *Barrett*, 3 K. & J. 289; *In re Salt, Brothwood* v. *Keeling*, 1895, 2 Ch. 203.
(*x*) *Johnson* v. *Child*, 4 Hare, 87; *Lutkins* v. *Leigh*, Cas. t. Talb. 53 (where the creditors were mortgagee '; *Lord Lilford* v. *Powys-Keck*, L. R. 1 Eq. 347 (where the creditors e unpaid vendors).
(*y*) *Lancefield* v. *Iggulden*, supra.
(*z*) *Elliott* v. *Dearsley*, 16 Ch. Div. 2 ; *Knight* v. *Knight*, 1895, 1 Ch. 499.

Specific legatees and devisees,—

as regards specific legatees and devisees (including residuary devisees), these have the right, if called on to pay any debts of their testator, to have the whole of his other property, real or personal, marshalled in their favour,—so as to throw the debts as far as possible on the other assets, which are antecedently liable. And, in general, a specific devisee (including a residuary devisee) and a specific legatee will contribute *pro ratâ* to satisfy the debts of the testator, which the property antecedently liable has failed to satisfy,—for the testator's intention of bounty is equal in all these cases (*a*). If, however, the subject of any specific devise (including a residuary devise) or specific bequest is liable to any particular burden of its own, the devisee or legatee must bear it alone, and cannot call the other specific legatees or the other devisees to his aid; *e.g.*, the devisee of land bought by the testator but not paid for, cannot call on the other devisees, or on the specific legatees, to pay a proportion of the purchase-money to which his land is subject by reason of the vendor's lien for the unpaid purchase-money (*b*); and when a specific (including a residuary) devise is charged with a legacy or portion, the devisee is liable in his proper order for the debts, but the legatee or portionist contributes nothing thereto (*c*).

contribute rateably *inter se.*

If specific devisee or legatee take subject to a burden, he cannot compel the others of the same class to contribute.

Marshalling between legatees, where certain legacies are charged on real estate, and the others are not so charged.

There is another group of cases in which equity, out of regard to the testator's intention, marshals assets in favour of legatees; that is to say, when some of the legacies are charged on the real estate, and the others are not so charged. And the marshalling in this group of cases does not arise from any disturbing action of creditors, but arises simply from

(*a*) *Tombs* v. *Roch*, 2 Coll. 490; *Lancefield* v. *Iggulden*, supra.
(*b*) *Emuss* v. *Smith*, 2 De G. & Sm. 722.
(*c*) *Saunders-Davies* v. *Saunders-Davies*, 34 Ch. Div. 482; *Le Bas* v. *Herbert*, 1894, 3 Ch. 250.

the presumption, that when a testator leaves legacies, he wishes that if possible they shall all be paid. To understand this branch of the subject, the reader must bear in mind, that, *even to the present day, legacies are not payable out of real estate directly,* UNLESS *the testator has charged his real estate with their payment,*— there never having been any statute passed to do for legacies what the statute 3 & 4 Will. IV. c. 104, has done for simple contract debts. If, therefore, a testator should leave certain legacies payable only out of his personal estate, and certain others which (in aid of his personal estate) he has charged on his real estate, equity will, in case the personal estate is insufficient to pay all the legacies, marshal the legacies,—so as to throw those charged on the real estate entirely on that estate, in order to leave more of the personal estate for the other legacies (*d*).

Legacies, when deemed to be charged on real estate.

It is important therefore to inquire, what amounts to a charge of legacies on the real estate. And, firstly, it may be stated, that the intention to create such a charge is not so readily presumed as we have seen that a charge for the payment of debts is presumed, but the intention to charge legacies must be manifest (*e*). And, secondly, the rule is well established, that (in the absence of an express charge) an implied charge of the legacies on the real estate arises if, after a gift of legacies, the testator gives "all the rest and residue of his real and personal estate" to specified persons,—the word "residue" meaning that out of which something given before has been taken; and this implied charge arises also where the will directs that any legacies which fail shall fall into the residue (*f*); and for the applica-

(*d*) *Bonner* v. *Bonner*, 13 Ves. 379; *Scales* v. *Collins*, 9 Hare, 656.
(*e*) *Bench* v. *Biles*, 4 Madd. 188; *Hassel* v. *Hassel*, 2 Dick. 527.
(*f*) *Bray* v. *Stevens*, 12 Ch. Div. 162.

tion of the rule, the word "residue" need not be used, if there are other words to the like effect (*g*). But it does not result from such a gift of residue, that the real and personal estate comprised therein is made a *mixed fund*, liable proportionately and rateably to the payment of the legacies,—although that was at one time considered to be the effect of the charge,—the true result being (as above indicated), that in such a case the personal estate retains its primary liability, and the real estate is only liable for the deficiency of the trust estate (*h*). And note, that where the charge of a legacy upon real estate fails to affect it, in consequence of an event happening subsequently to the death of a testator,—as the death of the legatee before the time of payment,—the court will not treat the legacy as not so charged, in order merely to vest the legacy and render it transmissible (*i*).

Where a legacy charged on real estate fails, it will not be treated as if it were not so charged, so as to be made transmissible.

Assets used never to be marshalled in favour of legacies given to charities; and this was upon the ground that a court of equity was not warranted in setting up a rule of equity contrary to the common rules of the court, merely to support a bequest which was contrary to law. If, therefore, a testator should have bequeathed to a charity a legacy payable out of the produce of his real and personal estate (*k*), or a simple legacy without expressly charging it on that part of his personal estate which he might lawfully bequeath to charitable uses, the legacy would have failed by law in the proportion which the real

Assets used not to be marshalled in favour of charities,—

(*g*) *Bawden* v. *Cresswell*, 1894, 1 Ch. 693.

(*h*) *Greville* v. *Browne*, 7 H. L. Ca. 689; *Gainsford* v. *Dunn*, L. R. 17 Eq. 405; *Brooke* v. *Brooke*, 3 Ch. Div. 630; *Broadbent* v. *Barrow*, 31 Ch. Div. 113; *Elliott* v. *Dearsley*, 16 Ch. Div. 322; and *Knight* v. *Knight*, 1895, 1 Ch. 499.

(*i*) *Prowse* v. *Abingdon*, 1 Atk. 482; *Henty* v. *Wrey*, 21 Ch. Div. 332.

(*k*) *Currie* v. *Pye*, 17 Ves. 462.

estate and personalty in the one case, or such personalty in the other, bore to the whole fund out of which the legacy was made payable (*l*),—the rule in all such cases having been to appropriate the fund as if no legal objection existed, and then to hold so much of the charity legacies to fail as would in that way have fallen to be paid out of the prohibited fund (*m*). But when it was said that the court would not marshal legacies in favour of charities, it was meant that the court would not have done so when the will was silent: because if (as was usually the case) the will expressly directed that the legacies should be marshalled in favour of the charities, then the court was ready to carry out that direction, and it did so with a liberal hand (*n*); but the mere gift to a charity of the residue of a testator's personal estate, save and except such part thereof as could not by law be bequeathed to charities, was not, of course, and was not considered to be, a direction to marshal in favour of the charity (*o*). However, when a testator gave and devised the residue of his estate, both real and personal, to his trustees (whom he also appointed his executors) upon trust, thereout in the first place to pay certain specified sums to specified persons, and as to the residue thereof, or such part or parts thereof as might be lawfully appropriated for the purpose, for such one or more charities, and in such proportions, as the trustees in their uncontrolled discretion might think fit, the trustees were entitled to appropriate the surplus (even the proceeds of the

unless by virtue of express direction;

or unless (in the case of charities authorised to take real estate by devise) under discretionary gifts to executors.

(*l*) *Robinson* v. *Geldard*, 3 Mac. & G. 735; *Fourdrin* v. *Gowdey*, 3 My. & K. 397; *Hobson* v. *Blackburn*, 1 Keen, 273.

(*m*) *Williams* v. *Kershaw*, 1 Keen, 275 *n.*; *Blann* v. *Bell*, 7 Ch. Div. 382; *Kilford* v. *Blancy*, 31 Ch. Div. 56; *Ashworth* v. *Munn*, 34 Ch. Div. 391.

(*n*) *Miles* v. *Harrison*, L. R. 9 Ch. App. 316; *Ravenscroft* v. *Workman*, 7 Ch. Div. 637; *Beaumont* v. *Oliveira*, L. R. 4 Ch. App. 309.

(*o*) *Wegg-Prowse* v. *Wegg-Prowse*, 1895, 2 Ch. 449.

real estate sold) to charities duly authorised to take land by devise (*p*). But all these rules as to marshalling will now, for the future, continue to exist only as regards the wills of testators who shall have died before the 5th August 1891; for by the Mortmain and Charitable Uses Act, 1891 (*q*), it has been enacted (but only as regards the wills of testators who shall die after 5th August 1891), that (in effect) land may now be given by will to a charity (subject to the duty of selling it within a year), and that money secured on land, or arising out of or connected with land, shall not, as regards charitable bequests, be considered as land at all within the Mortmain Acts; and that where money is given by will to charity, with a direction superadded to lay the money out in land, the gift will be good, and the superadded direction only shall be void; and the court may, by order, authorise the retention of the devised land unsold, or the acquisition of the land directed to be purchased,—*scil.* when it is wanted for occupation by the charity.

Marshalling in case of charitable legacies,—no necessity for, in future.

(*p*) *Broadbent* v. *Barrow*, 31 Ch. Div. 113.
(*q*) 54 & 55 Vict. c. 73.

CHAPTER XVI.

MORTGAGES.

Definition of mortgage.

A LEGAL mortgage may be defined as a debt secured on land, the legal ownership of the land becoming vested in the creditor, the equitable ownership (or effective actual ownership) remaining in the debtor.

What properties are mortgageable, and what are not, or only to a limited extent, or subject to certain restrictions.

All kinds of property are, as a rule, mortgageable,—hereditaments, whether corporeal or incorporeal, and personal estates, whether in possession or in action, and whether the estate or interest therein be for life or be the absolute interest, and whether it be a vested, expectant (*a*), or contingent estate or interest. Nevertheless, some species of property are, for special reasons, not mortgageable; *e.g.*, the profits of an ecclesiastical benefice are, by the 13 Eliz. c. 20, not capable of being charged, either directly (*b*) or indirectly (*c*),—and this prohibition extends to pew-rents (*d*); but these benefices may, to the extent of two years of the clear annual income, be charged for building, rebuilding, or repairing the rectory-house or vicarage (*e*); also, generally, loans made by the Governors of Queen Anne's Bounty, on the security of the endowments of the benefice, are now excepted from the disabling provisions of the statute

(*a*) *Coombe* v. *Carter*, 36 Ch. 348.
(*b*) 13 Eliz. c. 20; 57 Geo. III. c. 99; 23 & 24 Vict. c. 142; *M'Bean* v. *Deane*, 30 Ch. Div. 520.
(*c*) *Hawkins* v. *Gathercole*, 1 Jur. N. S. 481.
(*d*) *Ex parte Arrowsmith, in re Leveson*, 8 Ch. Div. 96.
(*e*) 17 Geo. III. c. 53, s. 6; 51 & 52 Vict. c. 20.

13 Eliz. c. 20. It will be remembered also, that the assignment of certain classes of property (*e.g.*, half pay) is void on the ground of public policy, and a mortgage of such property would be equally void (*f*); but these properties may be got at (and the profits of a benefice may also be got at) under the Bankruptcy Act, 1883, subject to leaving enough to satisfy the requirements of the living or other the demands of public policy (*g*). Again, property is sometimes given for an estate or interest expressly made defeasible on an attempt to mortgage same,—and, of course, such property is not mortgageable (*h*); and the separate property of a married woman, which she is restrained from anticipating, and the estates of infants and lunatics, are, of course, not mortgageable,—except with the aid of the court.

Mortgages by companies.

Also, in the case of public companies incorporated by special Act, the properties of the company may be of such a character as that they are mortgageable; and yet if the company has no power to borrow, or only a limited power to do so, any mortgage, or (as the case may be) any mortgage in excess of the limited power, would be void as being *ultra vires* (*i*); and this rule is equally applicable where the company is merely incorporated under the provisions of the Companies Acts, 1862–1890 (*k*); but an ordinary trading company may borrow for the legitimate purposes of the company (*l*). Where a company has the power to borrow, and mortgages

"Undertaking,"—mortgage of.

(*f*) *L'Estrange* v. *L'Estrange*, 13 Beav. 281.
(*g*) *In re Ward, ex parte Ward*, 1897, 1 Q. B. 266; *Lawrence* v. *Adams*, W. N. 1896, p. 154, applying *In re Meredith, ex parte Chick*, 11 Ch. Div. 731.
(*h*) *Montefiore* v. *Behrens*, L. R. 1 Eq. 171.
(*i*) *Wenlock* v. *River Dee Co.*, 10 App. Ca. 354.
(*k*) *Ashbury Co.* v. *Riche*, L. R. 7 H. L. 653.
(*l*) *General Auction Co.* v. *Smith*, 1891, 3 Ch. 432.

its "undertaking" (*m*), the mortgage extends not to the thing itself, but to the produce or profits thereof, —at least in the case of a public company, such as a railway (*n*); and, apparently, not only calls already made (*o*), but also "future calls" (*p*),—up to the date of an order for the winding up of the company (*q*),—may be mortgaged; and note, that a power in Turnpike Road Trustees to mortgage the undertaking and tolls of the road does not extend to authorise a mortgage of the toll-houses or gates on the road (*r*); and, generally, it may be said, that in taking securities from incorporated companies (whether public or private), the utmost vigilance must be used to see, firstly, that the company can borrow; secondly, that it is not exceeding its borrowing powers, or borrowing for purposes other than those authorised; and, thirdly, what property of the company it can validly charge, and what is the effect of the charge (*s*).

General precautions,—in mortgages by companies.

Mortgage at common law. An estate upon condition.

By the old common law, the ordinary mortgage, or *mortuum vadium*, as it was called, was strictly an estate upon condition; that is, a feoffment of the land, with a condition, either in the deed of feoffment itself or in a deed of defeasance executed at the same time, by which it was provided, that, on payment by the feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter; and immediately on the livery made, the feoffee became the legal owner of the land, subject

(*m*) *Gardner* v. *London, Chatham, and Dover Railway Company*, L. R. 2 Ch. App. 201.
(*n*) *In re Panama, &c. Mail Co.*, L. R. 5 Ch. App. 318.
(*o*) *In re Sankey Brooke Co.*, L. R. 10 Eq. 381.
(*q*) *In re Streatham Estates Co.*, 1897, 1 Ch. 15.
(*p*) *In re Pyle Works*, 44 Ch. Div. 534; and disting. *Bartlett* v. *Mayfair Property Co.*, W. N. 1897, p. 174
(*r*) *Myatt* v. *St. Helen's Railway Company*, 2 Q. B. D. 365.
(*s*) *Ex parte Watson*, 21 Q. B. D. 301.

to the condition,—and if the condition was performed, the feoffor re-entered; but if the condition was not performed, the feoffee's estate became absolute and indefeasible as from the time of the feoffment, the legal right of redemption being then lost for ever. Happily, however, a jurisdiction arose under which the harshness of the old law in this respect was softened without any actual interference with its principles; for the courts of equity, leaving the legal effect of the transaction unaltered, declared it to be against conscience and unreasonable, that the mortgagee should retain as owner for his own benefit what was intended as a mere security; and they adjudged, that the breach of the condition should be relieved against,—so that the mortgagor, although he lost "his legal right to redeem," nevertheless had "an equity to redeem," on payment within a reasonable time of the principal, interest, and costs; and although the common law judges at first strenuously resisted the introduction of this new principle, they were ultimately defeated by the increasing power of equity; but in their own courts they still adhered to the rigid doctrine of forfeiture, with the result that the law relating to mortgages fell almost entirely within the jurisdiction of equity.

Forfeiture at law on condition broken.

Interference of equity.

Mortgage held a mere pledge.

Mortgagor's equity to redeem, notwithstanding forfeiture at law.

No sooner, however, was this equitable principle established, than the cupidity of creditors induced them to attempt its evasion; and it was necessary therefore for equity, if the right to redeem subsequently to the legal forfeiture was to be maintained, to hold,—and equity accordingly held,—that the legal maxim, "*modus et conventio vincunt legem*," was inapplicable in the case of mortgages, that is to say, that the debtor could not, even by the most solemn engagements entered into *at the time of the loan*, preclude himself from his equitable right to redeem; for, looking always at the intent rather than the

Mortgages an exception to the maxim, *modus et conventio vincunt legem*.

Debtor cannot at time of loan part with his right to redeem.

form of things (*t*), it was inequitable that the creditor should, through the necessities of his debtor, obtain a collateral or additional advantage beyond the payment of principal, interest, and costs (*u*); and the courts therefore established it as a principle not to be departed from, that "once a mortgage always a mortgage,"—in other words, that an estate could not at one time be a mortgage and at another time cease to be so *by one and the same deed;* and that whatever clause or covenant there might be in the conveyance, yet, if the intention of the parties was that such conveyance should be a mortgage only, or should pass only a redeemable estate, a court of equity would always so construe it (*v*); wherefore also a conveyance, although it may be absolute in its terms, yet if it be shown to have been intended as a security only, will be redeemable as a security (*x*); nor may the equity of redemption be "clogged" with any restrictions (*y*).

"Once a mortgage always a mortgage."

Right of pre-emption in mortgagee.

These rules, however, did not prevent a mortgagee agreeing with the mortgagor for a preference or right of pre-emption in case of a sale (*z*); and any other agreements between mortgagor and mortgagee (provided they did not exclude or fetter the equity of redemption) were and are good,—*e.g.*, an agreement not to call in the principal moneys so long as the interest is paid (*a*). And mortgages must also be distinguished from absolute *bonâ fide* sales accompanied with a collateral agreement for re-purchase

Conveyance with option of re-purchase in mortgagor.

(*t*) *Bonham* v. *Newcombe*, 2 Vent. 364; *Howard* v. *Harris*, 1 Vern. 19.

(*u*) *Leith* v. *Irvine*, 1 My. & K. 277; *Broad* v. *Selfe*, 11 W. R. 1036.

(*v*) *Northampton* (*Marquess*) v. *Pollock*, 45 Ch. Div. 190; and (sub nom. *Salt* v. *Northampton*), 1892, A. C. 1.

(*x*) *Barton* v. *Bank of New South Wales*, 15 App. Ca. 379.

(*y*) *Field* v. *Hopkins*, 44 Ch. Div. 524; *Eyre* v. *Wynn-Mackenzie*, 1894, 1 Ch. 218.

(*z*) *Orby* v. *Trigg*, 9 Mod. 2; *Cookson* v. *Cookson*, 8 Sim. 529.

(*a*) *Keene* v. *Biscoe*, 8 Ch. Div. 201.

by the mortgagor on repayment of the purchase-money within a stipulated time (*b*),—which collateral agreement may be either introduced into the agreement for sale at the time, or may be made at a subsequent period; and whether any particular transaction is a mortgage properly so called, or is a sale with an option of re-purchase, depends on the special circumstances of the case; and parol evidence will always be admitted to show, that what on the face of the deed is an absolute conveyance was intended to be a conveyance by way of security only (*c*),—*e.g.*, if the money paid would be grossly inadequate as the price for the absolute purchase of the estate; or if the grantee was not let into immediate possession of the estate; or if he accounted for the rents to the grantor, and only retained an amount equivalent to his interest (*d*),—in all these cases, the conveyance will be deemed to be by way of security only. And the difference between a transaction by way of sale with a right of re-purchase and a mortgage is very important with reference to the consequences of each; for whereas in a mortgage, even after forfeiture at law, the mortgagor has his right of redemption in equity, yet in the case of a sale with a right of re-purchase, the time limited must be exactly observed, and there is no principle on which the court of equity can in the latter case relieve, if the time be not exactly observed (*e*); and there is also this further important difference, viz., that in the case of a sale with an option to re-purchase, if the purchaser die seised, and *then* the right to re-purchase is exercised, the money goes to his

Circumstances distinguishing a mortgage from a sale with right of re-purchase.

Effects of this distinction:

(1.) In a sale with right of re-purchase, time is strictly to be observed.

(2.) In a sale with right of re-purchase, if purchaser die seised, money goes to real representative.

(*b*) *Birmingham Canal Co.* v. *Cartwright*, 11 Ch. Div. 421.
(*c*) *Maxwell* v. *Montacute*, Prec. Ch. 526; *Douglas* v. *Calverwell*, 3 Giff. 251.
(*d*) *Brooke* v. *Garrod*, 3 K. & J. 608; *Williams* v. *Owen*, 5 My. & Cr. 303.
(*e*) *Barrell* v. *Sabine*, 1 Vern. 268; and see *Dibbins* v. *Dibbins*, 1896, 2 Ch. 348.

real representative, and not, as in case of a mortgage, to his personal representatives (*f*).

Other forms of securities.

1. *Vivum vadium*,—lender to pay himself from rents and profits.

There were anciently some other species of securities for money, namely, (1) The *vivum vadium*,—in which the owner of an estate, in consideration of money lent, conveyed it to the lender, with a condition that as soon as the lender repaid himself out of the rents and profits the principal and interest of the loan, the debtor might re-enter; and it was called a *vivum vadium*, because as the security itself worked off the debt, it was deemed to possess a sort of vitality; (2) The *mortuum vadium*,—which, according to Glanville (*g*), was a feoffment to the creditor, to be held until the debtor paid him a given sum, until which time the creditor received the rents *without account*, so that the security in this case, not of itself working off the debt, was in a manner *dead;* and (3) The *Welsh mortgage*,—in which, as in the *mortuum vadium*, the rents and profits were received by the mortagee without account, and the principal therefore remained undiminished; and in all these three species of ancient mortgages, the rule was, that on the one hand the mortgagee should not foreclose or sue for his money, and that on the other hand the mortgagor might redeem at any time (*h*); but in the modern mortgage, as we shall presently see, the mortgagee is strictly *accountable*, and may also foreclose and sue for his money.

2. *Mortuum vadium*,—creditor took rents and profits without account.

3. Welsh mortgage,—mortgagor may redeem at any time.

Modern mortgage.

The nature of an equity of redemption,—it is an estate in the land,

In early times, it was said, that an equity of redemption was a mere *right;* but in *Casborne* v. *Scarfe* (*i*) Lord Hardwicke laid it down, that this equity was

(*f*) *Thornbrough* v. *Baker*, 2 L. C. 1046; *Drant* v. *Vause*, 1 Y. & Co. C. C. 580.
(*g*) Lib. 10, c. 6.
(*h*) *Howell* v. *Price*, Prec. Ch. 423, 477.
(*i*) 1 Atk. 603.

an estate in the land; and this is now the accepted opinion; and the person entitled to the equity of redemption, being in equity the real owner of the land, may (subject only to the rights of the mortgagee) exercise all acts of ownership over the land; *e.g.*, may settle or devise, or even again mortgage the land (*k*), —subject only to this, namely, he must on creating such second mortgagee disclose the existence of the first, under pain of forfeiting his equity of redemption (*l*); but even a forfeited equity of redemption may be again effectively mortgaged (*m*),—the forfeiture, *semble*, not really taking effect until the court has made a declaration of forfeiture; and the court is very hostile to declaring the forfeiture (*n*), and the costs of the action for such a declaration would be much more than the costs of an ordinary action for foreclosure, so that the provisions as to forfeiture are practically a dead letter. Also, the mortgaged estate is governed, in the course of its descent, by the general law,—so that if the land be of gavelkind tenure, the equity of redemption will descend in gavelkind; and if the tenure be borough-English, the youngest son will be entitled (*o*); and in the case of copyhold lands, the equity of redemption will descend according to the customary rules of descent; and *a fortiori*, if the lands are of freehold tenure, the equity of redemption will descend according to the common law canons of descent.

over which the mortgagor has full power, subject to the incumbrance.

Devolution of equity of redemption,—same as of the land.

The equity of redemption being an estate in the land, all persons entitled to any estate or interest in that equity are entitled, before foreclosure, to come into a court of equity to redeem,—that is to say—

Who may redeem.

(*k*) *Casborne* v. *Scarfe*, 1 Atk. 603.
(*l*) 4 & 5 Will. & Mary, c. 16, s. 3.
(*m*) Ibid., s. 4.
(*n*) *Kennard* v. *Futvoye*, 2 Giff. 81.
(*o*) *Fawcett* v. *Lowther*, 2 Ves. Sr. 301.

(1.) The heir (*p*), or (in the case of copyhold lands) the customary heir; (2.) The devisee (*q*); (3.) A tenant for life, a remainderman, a reversioner, a dowress, a jointress, a tenant by the curtesy, or other limited owner; (4.) An assignee or grantee (*i.e.*, a purchaser) (*r*), including a lessee (*s*); (5.) A subsequent mortgagee (*t*); (6.) A judgment creditor even (*u*); (7.) The crown, or the lord, on a forfeiture (*v*); and (8.) A volunteer, even (*x*), although he claim under a deed which under 27 Eliz. c. 4 was fraudulent and void; but as regards tenants for life, when they redeem a mortgage which is on the inheritance, they do so in general for their own benefit, —and therefore the mortgage is kept alive, equally as if it had been transferred to the tenant for life (*y*); and as regards remaindermen and reversioners, they may indeed take a transfer of the mortgage without consulting the wishes of the prior life tenants, but cannot, *semble*, redeem against the wishes of such "prior life tenants" (*z*); and the question as to there being or not a present right of redemption will be determined by the court,—either upon an offer to redeem (*a*), or without any such offer (*b*).

Mortgage,—when redeemed by, will be kept alive by, tenant for life.

The price of redemption.

Every one who has a right to redeem may redeem any prior incumbrancer by payment to him of his

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(*p*) *Pym* v. *Bowreman*, 3 Swanst. 241 *n.*
(*q*) *Lewis* v. *Nangle*, 2 Ves. Sr. 431.
(*r*) *Anon.*, 3 Atk. 314.
(*s*) *Tarn* v. *Turner*, 39 Ch. Div. 456.
(*t*) *Fell* v. *Brown*, 2 Bro. C. C. 278.
(*u*) *Beckett* v. *Buckley*, L. R. 17 Eq. 435; *Bryant* v. *Bull*, 10 Ch. Div. 153.
(*v*) *Lovel's Case*, 1 Eden, 210; *Downe* v. *Morris*, 3 Hare, 394.
(*x*) *Rand* v. *Cartwright*, 1 Ch. Ca. 59.
(*y*) *Burrell* v. *Egremont*, 7 Beav. 205.
(*z*) *Ravald* v. *Russell*, Younge, 9; *Prout* v. *Cock*, 1896, 2 Ch. 808.
(*a*) *West Derby Union* v. *Metropolitan Life Society*, 1897, A. C. 647; and 1897, 1 Ch. 335.
(*b*) *Nobbs* v. *Law Reversionary Society*, 1896, 2 Ch. 830.

principal and interest (*c*), together with his costs (if any),—and the aggregate amount of all which is commonly called "the price of redemption;" the redeeming party being in his turn liable to be redeemed by those below him, and these latter being all liable to be redeemed by the mortgagor; and the rule or practice in a bill or action of foreclosure is, to offer to redeem all incumbrancers prior in date to the plaintiff, and to claim to foreclose all incumbrancers posterior in date to the plaintiff,—unless these latter, or some or one of them, should redeem the plaintiff (*d*); which rule is familiarly expressed in the phrase, "*Redeem up, foreclose down.*" When the mortgagor is the redeeming party, his redemption of any prior mortgage will, in general, enure to give the next puisne mortgagee the priority of the redeemed mortgage (*e*); and care must therefore be taken, in such and the like cases, to keep the prior mortgage alive, if that is the intention, by obtaining a transfer thereof (*f*).

Successive redemptions,—order of, and general principle regarding.

In quite recent times, the practice has been to give, in general, only one time for redemption to all the puisne mortgagees, including the mortgagor (*g*), and not (as formerly) successive times to each; and if the defendants (the puisne incumbrancers and the mortgagor) all make default, either in appearing to the writ or in pleading to the statement of claim, one time only will be given for redemption (*h*),—unless

Usually, only one time now given for redemption.

(*c*) *Sheffield* v. *Eden*, 10 Ch. Div. 291; *In re Wade & Thomas*, 17 Ch. Div. 348; *Elton* v. *Curteis*, 19 Ch. Div. 49.

(*d*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.

(*e*) *Watts* v. *Symes*, 1 De G. M. & G. 240; *Otter* v. *Lord Vaux*, 6 De G. M. & G. 638; *Toulmin* v. *Steere*, 3 Mer. 210.

(*f*) *Adams* v. *Angell*, 5 Ch. Div. 634; *Thorne* v. *Cann*, 1895, A. C. 11; *Willoughby's Case*, 1896, 1 Ch. 726.

(*g*) *Smith* v. *Olding*, 25 Ch. Div. 462; *Mutual Life* v. *Longley*, 32 Ch. Div. 460; *Smith* v. *Hesketh*, 44 Ch. Div. 161.

(*h*) *Platt* v. *Mendel*, 27 Ch. Div. 246; *Doble* v. *Manley*, 28 Ch. Div. 664; *Jennings* v. *Jordan*, 6 App. Ca. 711; *Biddulph* v. *Billiter Street Co.*, W. N. 1895, p. 98.

the mortgagee-defendants appear on the motion for judgment and request successive periods for redemption (*i*), and there is no dispute as to priority between the mortgagee-defendants (*k*); but if the defendants all duly appear to the writ and duly deliver their defences,—so that the plaintiff cannot have judgment on motion for judgment or as on admissions, and especially if he himself is mixed up in any question of priority among the defendants,—then the old rule of giving successive periods for redemption will be observed.

Arrears of interest recoverable.

The arrears of interest recoverable upon a redemption or foreclosure are usually six years only (*l*), but are occasionally the entire arrears (*m*),—*e.g.*,in the case of the mortgage of a reversionary interest in personal estate (*n*); and when the order directs the mortgagee to add his cost of action to his security, such costs when taxed (but only as from the date of the taxing-master's certificate) carry interest at the rate of 4 per cent. per annum (*o*). An auctioneer-mortgagee may be entitled to add to the "price of redemption" his commission,—that not being (*p*), at least in the general case (*q*), a secret profit. Also, one of several co-mortgagees can sue the mortgagor for redemption, making the other mortgagees co-defendants when they refuse to be co-plaintiffs (*r*).

Interest on costs.

Right to compel a transfer, instead of being foreclosed,—

Should the mortgagee threaten foreclosure, the mortgagor, if not then minded to redeem, may require the mortgagee (not being or having been in pos-

(*i*) *Platt* v. *Mendel*, supra; *Mutual Life* v. *Longley*, supra.
(*k*) *Bartlett* v. *Rees*, L. R. 12 Eq. 395.
(*l*) 3 & 4 Will. IV. c. 27, s. 42.
(*m*) *Smith* v. *Hill*, 9 Ch. Div. 143; *Marshfield* v. *Hutchings*, 34 Ch. Div. 721.
(*n*) *Mellersh* v. *Brown*, 45 Ch. Div. 225.
(*o*) *Eardley* v. *Knight*, 41 Ch. Div. 537.
(*p*) *Clegg's Case*, 22 Ch. Div. 549.
(*q*) *Field* v. *Hopkins*, 44 Ch. Div. 524.
(*r*) *Luke* v. *South Kensington Hotel Co.*, 11 Ch. Div. 121.

session) to transfer the debt and to convey the estate to any nominee of the mortgagor, on receiving from such nominee "the price of redemption" as above defined (*s*); and where there are successive mortgages, this right to *compel* a transfer belongs to each puisne incumbrancer as well as to the mortgagor,—the incumbrancers having precedence of the mortgagor, and the incumbrancers *inter se* having precedence according to their priorities; but so long as any puisne mortgagee does not himself exercise the right to compel the transfer, any subsequent mortgagee or the mortgagor himself may exercise this right (*t*). But in every case, *the transfer of the debt and the conveyance of the estate are compellable only upon the terms upon which a reconveyance would be compellable*,—so that, unless a reconveyance would be compellable by the puisne mortgagee, it does not clearly appear how the right of (say) a fourth mortgagee could be exercised as against a first mortgagee when the second mortgagee had given to the first mortgagee notice of his mortgage, or against a second mortgagee when the third mortgagee had given to the second mortgagee notice of his mortgage (*u*). And although, where the hereditaments comprised in the mortgage are settled (subject thereto) on A. for life, with remainder to another or others in fee-simple, A. will be entitled to require the transfer, due provision being made for the protection of the remainderman; still, if there is interest in arrear which A. as tenant for life ought to have kept down, then, *semble*, A. cannot compel the transfer if the remainderman objects,—and at all events, A. cannot, by any such transfer, entitle himself to any further

Even where there are successive mortgages;

And even where the mortgaged land is settled.

(*s*) Conveyancing Act, 1881, s. 15; *Everitt's Case*, 1892, 3 Ch. 506; *Teevan* v. *Smith*, 20 Ch. Div. 724.

(*t*) Conveyancing Act, 1882, s. 12.

(*u*) *Teevan* v. *Smith*, supra; and see *Pearce* v. *Morris*, L. R. 5 Ch. App. 227; *Hall* v. *Howard*, 32 Ch. Div. 430.

respite from the payment of the interest in arrear and growing due (*v*).

Time to redeem,—six months' notice, or else six months' interest, in general.

A person cannot, as of right, redeem before the time appointed in the mortgage deed (*x*); and if the mortgagee should, as a matter of indulgence, consent (at the request of the mortgagor) to accept payment before the legal period of redemption, he is entitled to the full amount of interest up to that time (*y*). So, likewise, if, after the legal period of redemption is passed, the mortgagor should wish to pay off the mortgage, he must give to the mortgagee six calendar months' previous notice in writing of his intention so to do, and must then punctually pay or tender the money at the expiration of the notice (*z*),—for otherwise the mortgagee will be entitled to fresh notice, it being only reasonable that he should have time afforded him to look out for a fresh security for his money; but if the mortgagee should himself commence an action to recover his debt (*a*), or if the mortgage is merely an equitable one by deposit of title-deeds with or without an accompanying memorandum (*b*), he is not entitled to six months' notice or to interest in lieu thereof; nevertheless, in a foreclosure action, where the usual certificate has been made of the amount of interest which will have accrued due on the day therein specified for redemption, the full interest up to the day so specified must be paid (*c*).

Even prior to the statute 3 & 4 Will. IV. c. 27,

(*v*) *Alderson* v. *Elgey*, 26 Ch. Div. 567.
(*x*) *West Derby Union* v. *Metropolitan Life Society*, 1897, 1 Ch. 335; 1897, A. C. 647.
(*y*) *Brown* v. *Cole*, 14 Sim. 427.
(*z*) *Smith* v. *Smith*, 1891, 3 Ch. 550; *Leeds Theatre* v. *Broadbent*, W. N. 1898, p. 1.
(*a*) *Prescott* v. *Phipps*, 23 Ch. Div. 372.
(*b*) *Fitzgerald's Trustee* v. *Mellersh*, 1892, 1 Ch. 385.
(*c*) *Hill* v. *Rowlands*, 1897, 2 Ch. 361.

the rule in equity was, "that after twenty years' "adverse possession by the mortgagee, he should "not be disturbed" (*d*); but where the mortgagor was prevented from asserting his claim by reason of, *e.g.*, imprisonment, infancy, coverture, or other like legal disability, equity allowed ten years after the removal of the disability (*e*); and an acknowledgment given by the mortgagee, before the equity of redemption was wholly barred, of the existence of such equity, would have sufficed to save the equity of redemption (*f*); and in all these particulars, equity (although not bound by the then statutes of limitations) chose to follow their provisions. Then came the statute 3 & 4 Will. IV. c. 27 (which is expressly binding on courts of equity); and by section 28 of that statute, as explained by 7 Will. IV. and 1 Vict. c. 28, whenever a mortgagee obtained possession of the land comprised in his mortgage, the mortgagor might not bring a suit to redeem the mortgage but within twenty years (with or without ten years more for disability) next after the time when the mortgagee obtained possession, or next after any *written* acknowledgment of the title of the mortgagor, or of his right or equity of redemption, had been given to him or his agent, signed by the mortgagee (*g*); and now, under the Real Property Limitations Act, 1874 (*h*), s. 7, the period of twenty years is twelve years, and no further time is allowed for any disability (*i*); but otherwise the law is as it was under the statute 3 & 4 Will. IV. c. 27,—*e.g.*, where the mortgage is of a remainder or reversion in land, it

Statutes of Limitations. Old law,—21 Jac. I. c. 16.

Present law,—3 & 4 Will. IV. c. 27, s. 28, explained by 7 Will. IV. and 1 Vict. c. 28, as modified by 37 & 38 Vict. c. 57.

(*d*) *Anon.*, 3 Atk. 313.
(*e*) *Beckford* v. *Wade*, 17 Ves. 99.
(*f*) *Marwick* v. *Hardingham*, 15 Ch. Div. 339.
(*g*) *Batchelor* v. *Middleton*, 6 Hare, 75; *Hickmann* v. *Upsall*, 4 Ch. Div. 144.
(*h*) 37 & 38 Vict. c. 57.
(*i*) *Kinsman* v. *Rouse*, 17 Ch. Div. 104; *Forster* v. *Patterson*, 17 Ch. Div. 132; *Sands* to *Thompson*, 22 Ch. Div. 614.

is only as from the time that the remainder or reversion falls into possession, that the twelve years for bringing an action of foreclosure begin to run (*k*); also, where and so long as the mortgagor and the mortgagee are one and the same person (which occasionally happens), the time does not begin to run at all (*l*). And note, that the mortgagee's remedy on the covenant contained in his mortgage deed (*m*), or on a bond collateral thereto (*n*), (*scil.* as against the mortgagor himself and his representatives (*o*),—and *semble*, even as against the mortgagor's surety) (*p*), is now barred after twelve years, although the time in general for suing on a covenant or bond remains as heretofore twenty years (*q*); but the twelve years reckon, of course, only as from the time when the right of action on the covenant is complete; and there may occasionally be no complete right of action until after demand made for payment (*q*). Note also, that the statutes of limitation in relation to *land* bar and extinguish the title, and not merely the action or remedy, of the dispossessed person (*r*), although in relation to personal property their effect is to merely bar the remedy without extinguishing the right. Also, it should be observed, that the right of foreclosure in the mortgagee is not kept alive by the payment to him of rent by a tenant without the knowledge or subsequent adoption of the mortgagor (*s*); nor by the payment to him of what purports to be the accruing interest on the

Remedy on bond or covenant,—time for.

What payments save the statute, and what not.

(*k*) *Hugill* v. *Wilkinson*, 38 Ch. Div. 480.
(*l*) *Topham* v. *Booth*, 35 Ch. Div. 607.
(*m*) *Sutton* v. *Sutton*, 22 Ch. Div. 511.
(*n*) *Fearnside* v. *Flint*, 22 Ch. Div. 579.
(*o*) *Allison* v. *Frisby*, 43 Ch. Div. 106.
(*p*) *Lindsell* v. *Phillips*, 30 Ch. Div. 291.
(*q*) *Brown* v. *Brown*, 1893, 2 Ch. 300; *Allison* v. *Frisby*, supra.
(*r*) *Johnson* v. *Mounsey*, 11 Ch. Div. 284; *Kibble* v. *Fairthorne*, 1895, 1 Ch. 219.
(*s*) *Harlock* v. *Ashberry*, 19 Ch. Div. 539.

mortgage debt, when made by any one other than the mortgagor himself or a person acting with the mortgagor's authority in that behalf (*t*); but, of course, the payment of interest by the tenant for life keeps alive the debt as against the remainderman (*u*).

Of the estate of the mortgagor.

In modern times, the doctrine of courts of equity recognising the mortgagor to be the actual owner of the land was to a large extent imported into the common law by statute; *e.g.*, by 15 & 16 Vict. c. 76, ss. 219, 220, if, the mortgagor being in possession, an ejectment was brought by the mortgagee, and no suit was then pending in any court of equity for redemption or foreclosure, the mortgagee was required to discontinue his action, on payment of principal, interest, and costs; and by the Judicature Act, 1873, "a mortgagor entitled for the time being "to the possession or receipt of the rents or profits "of any land, as to which no notice of his intention "to take possession, or to enter into the receipt of "the rents and profits thereof, shall have been given "by the mortgagee, may sue for such possession or "for the recovery of such rents and profits, or to "prevent (or recover damages in respect of) any "trespass or other wrong relative thereto, in his "own name only."

Mortgagor in possession, not accountable for rents and profits.

The mortgagor, where he is in possession, is not bound to account to the mortgagee for the rents and profits arising or accruing while in possession, even although the security should afterwards prove in-

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(*t*) *Newbould* v. *Smith*, 29 Ch. Div. 882; 33 Ch. Div. 127; *Lindsell* v. *Phillips*, 30 Ch. Div. 291; and disting. *Adnam* v. *Sandwich* (*Earl*), 2 Q. B. D. 485.

(*u*) *Roddam* v. *Morley*, 1 De G. & J. 1; *Hollingshead* v. *Webster*, 37 Ch. Div. 651; *Dibb* v. *Walker*, 1893, 2 Ch. 429; and see *Steward* v. *England*, 1895, 2 Ch. 100, 820.

sufficient (*v*),—he is not, in fact, the bailiff or agent of the mortgagee; nevertheless, on the mortgagor's death, different considerations may arise (*x*). But, of course, equity will so restrain the mortgagor's right of ownership as that his ownership may not operate to the detriment of the mortgagee; *e.g.*, the court will grant an injunction against the felling of timber by the mortgagor, the court being first satisfied that the security is insufficient (*y*). Also, equity will not hinder the mortgagee from evicting the mortgagor after default, but will consider the mortgagor as being for such purpose a mere tenant at will (*z*); but the mortgage contains occasionally a re-demise of the mortgaged premises to the mortgagor, although more usually it contains a mere attornment clause, whereby it is expressed that the mortgagor attorns and becomes tenant to the mortgagee (*a*); and in either case, the mortgagee must, in proceeding to evict the mortgagor, have regard to the provisions of the mortgage deed.

Mortgagor restrained from waste, if security be insufficient.

Mortgagor, tenant at will to mortgagee.

The mortgagor could not make a valid lease binding on the mortgagee: and if he had made such a lease, the mortgagee might without notice have ejected his lessee (*b*); and as a consequence of this rule, both mortgagor and mortgagee used to combine in making the lease, wherever at least (as in the case of mines) expense was to be incurred by the lessee, or there was a reasonable probability of the mortgagee proceeding to eviction. But now, under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41),

Mortgagor could not make leases binding on mortgagee; *secus*, now.

(*v*) *Ex parte Wilson*, 2 Ves. & Beav. 252.

(*x*) See and consider *In re Hyatt, Bowles* v. *Hyatt*, 38 Ch. Div. 609.

(*y*) *Farrant* v. *Lovell*, 3 Atk. 723; *King* v. *Smith*, 2 Hare, 239; *Russ* v. *Mills*, 7 Gr. 145.

(*z*) *Cholmondeley* v. *Clinton*, 2 Mer. 359.

(*a*) *Ex parte Williams*, 7 Ch. Div. 138; *In re Stockton Iron Furnace Co.*, 10 Ch. Div. 335; *Ex parte Jackson, in re Bowes*, 14 Ch. Div. 725; and see *In re Kitchen*, 16 Ch. Div. 226; *Ex parte Voisey, in re Knight*, 21 Ch. Div. 442; *Ex parte Isherwood, in re Knight*, 22 Ch. Div. 394.

(*b*) *Keech* v. *Hall*, Doug. 22.

s. 18, the mortgagor while in possession may make a valid lease (as may also the mortgagee while in possession),—provided the lease do not exceed twenty-one years for an agricultural or occupation lease, or ninety-nine years for a building (or repairing) lease; and provided the lease otherwise complies with the requisites of the Act (*c*); and where the mortgagor is the leasing party, he is to deliver to the mortgagee a counterpart of the lease; and in such a lease, the concurrence of the mortgagee is in effect *implied* by the statute (*d*); but these provisions do not extend to mining leases.

Mortgagee entering into possession,—effect of.

And where the mortgagee, by virtue of his legal title as mortgagee, takes the actual possession,—*e.g.*, by giving notice to the tenants to pay their rents to him, and by taking into his own hands the management of the estate,—this is in the general case regarded as an assertion of his paramount title as mortgagee; and thereupon the mortgagor's tenants, although for terms of years, *being terms created subsequently to the mortgage*, become tenants from year to year only to the mortgagee (*e*); but, by a recent statute (*f*), the compensation (if any) to which such tenants would be entitled as against their own lessors is preserved to them as against the mortgagee so taking possession. The mortgagee, it seems, may enter into possession of part of the mortgaged property, without also entering into possession of the rest of the property (*g*); but a mortgagee, when he has once taken possession, cannot at pleasure give up the possession again (*h*). A mortgagee who has entered into possession is entitled, out of the profits,

Tenant-right valuation,—mortgagee now liable for.

Receiver of mortgaged estates.

(*c*) *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522.
(*d*) *Municipal Permanent Building Society* v. *Smith*, 22 Q. B. D. 70.
(*e*) *Corbett* v. *Plowden*, 25 Ch. Div. 678; *Towerson* v. *Jackson*, 1891, 2 Q. B. 484.
(*f*) 53 & 54 Vict. c. 57.
(*g*) *Simmins* v. *Shirley*, 6 Ch. Div. 173.
(*h*) *Pryterch* v. *Williams*, 42 Ch. Div. 590.

to repay himself all the necessary expenses attending the collection of the rents (*i*); and he may stipulate with the mortgagor for the appointment of a receiver to be paid by the mortgagor (*k*); and under the statute 23 & 24 Vict. c. 145, a power to require the appointment of a receiver was made incident to every mortgage of lands, unless the mortgage deed expressly excluded such power; and the Conveyancing Act, 1881, ss. 19, 24, contains similar provisions. When a receiver is appointed, the tenants pay to him all rents accrued and unpaid, besides all accruing rents; and if the mortgagor is himself the occupying tenant, he pays to the receiver an occupation rent, accruing from the date of the demand therefor (*l*).

Mortgagee shall not charge for personal trouble.

But courts of equity, fearful of opening a door to fraud, have imposed this restriction on mortgagees when in possession, namely, that they shall not be permitted to make any charge on the estate for their own personal trouble (*m*); nor appoint themselves receivers of the mortgaged estate, even by express agreement with their mortgagors (*n*). And with regard to mortgages of West India estates, although the mortgagee, whilst he is out of possession, may stipulate for the consignment to himself of the produce, and charge commission on the net produce as a compensation for his trouble (*o*), still, when he is in possession, he stands in precisely the same situation as a mortgagee in possession in England, and if he chooses in such a case to be consignee himself, he receives no commission (*p*). The powers of a receiver extend, of course, only to the property comprised in

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(*i*) *Godfrey* v. *Watson*, 3 Atk. 518.
(*k*) *Davis* v. *Dendy*, 3 Mad. 170.
(*l*) *Yorkshire Banking Co.* v. *Mullan*, 35 Ch. Div. 125.
(*m*) *Tillet* v. *Nixon*, 25 Ch. Div. 238; *Mason* v. *Westoby*, 32 Ch. Div. 206.
(*n*) *French* v. *Baron*, 2 Atk. 120.
(*o*) *Faulkner* v. *Daniels*, 3 Hare, 218.
(*p*) *Leith* v. *Irving*, 1 My. & K. 277.

the security; consequently, in the case of a mortgage of lands on which an hotel is built, the receiver is not (or not necessarily) of the hotel business, but of the rents and profits only of the mortgaged property,—wherefore the receiver will not, in general, be appointed to be manager also of the hotel business (*q*): *secus*, if the hotel as such is comprised in the security (*r*). Also, in the case of a mortgage of mines, if the colliery business is comprised in the security, a receiver and manager will be appointed (*s*); but otherwise a receiver only.

Receiver and manager,—or receiver only,—when?

A stipulation that the mortgagee shall receive interest at £4 per cent. if regularly paid, but £5 per cent. if default is made, is good if £5 per cent. be reserved by the deed; and in the case of interest being so stipulated for, the higher and not the lower rate is taken upon redemption and foreclosure accounts (*t*); and also where the mortgagee is in possession (*u*). But if £4 per cent, only is reserved, a stipulation that £5 per cent. shall be paid if the interest be not regularly paid is in the nature of a penalty, against which the court will relieve (*v*). But the fines and penal payments contained in mortgages to building societies, being reasonable within the Building Society Acts, are recoverable in full (*x*); and the premiums charged for loans are in the nature of principal moneys advanced (*y*); moreover, the rules for the time being

Stipulation for lower rate of interest on punctual payment.

Fines in building society mortgages.

(*q*) *Whitley* v. *Challis*, 1892, 1 Ch. 64.
(*r*) *Truman* v. *Redgrave*, 18 Ch. Div. 547; *Makins* v. *Percy Ibbetson*, 1891, 1 Ch. 133.
(*s*) *Gloucester Bank* v. *Rudry Colliery Co.*, 1895, 1 Ch. 629.
(*t*) *Union Bank of London* v. *Ingram*, 16 Ch. Div. 53.
(*u*) *Bright* v. *Campbell*, 41 Ch. Div. 388.
(*v*) *Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.*, 7 Ch. Div. 192.
(*x*) *Provident Permanent Building Society* v. *Greenhill*, 9 Ch. Div. 122; *Protector Endowment Co.* v. *Grice*, 5 Q. B. D. 592.
(*y*) *Ex parte Bath, In re Phillips*, 27 Ch. Div. 509.

of such societies regulate, as between them and their mortgagees, the provisions of the mortgage deed (*z*),—save upon a dissolution or winding up of the society (*a*).

Mortgagee must keep estate in necessary repair with surplus rents.

It is the duty of the mortgagee in possession to keep the premises in neeessary repair; and to see to the renewal of leases, and to otherwise maintain the title (*b*). But a mortgagee is not bound to lay out money on the estate,—save for neeessary repairs, and to the amount only of the surplus rents; and he eannot, in the absenee of an express agreement to that effect, compel the mortgagor to advanee money for the renewal of leases (*c*); but if the mortgagee should himself pay any fine or premium in order to obtain a renewal of the lease, that would be a necessary outlay, and he would be entitled as against the mortgagor eoming to redeem him to inelude that payment with interest thereon in the "price of redemption"—and this upon the plainest principles of equity. A mortgagee in possession, being in equity a sort of trustee or bailiff for the mortgagor, is accountable, of course, for the rents and profits; and therefore, if, *without the assent of the mortgagor*, he assigns over the mortgage to another, he will be held liable to aeeount for the profits reeeived *subsequently* even to the assignment,—on the prineiple that, having turned the mortgagor out of possession, it is incumbent on him to take eare in whose hands he plaees the estate (*d*). But this rule of equity applies

Mortgagee in possession must account, —even though he has assigned the mortgage, —unless such assignment is either: (*a*.) With the consent of the mortgagor;

(*z*) *Dewhurst* v. *Clarkson*, 3 Ell. & Bl. 194; *Rosenberg* v. *Northumberland Building Society*, 22 Q. B. D. 373; *Bradbury* v. *Wild*, 1893, 1 Ch. 377; *Strohmenger* v. *Finsbury Building Society*, 1897, 2 Ch. 469.

(*a*) *Kemp* v. *Wright*, 1895, 1 Ch. 121; *Botten* v. *City and Suburban Society*, 1895, 2 Ch. 441; Building Societies Act, 1894 (57 & 58 Vict. c. 47), ss. 1, 10; *In re Ambition Society*, 1896, 1 Ch. 89.

(*b*) *Godfrey* v. *Watson*, 3 Atk. 518.

(*c*) *Manlove* v. *Bale*, 2 Vernon, 87; *Godfrey* v. *Watson*, supra.

(*d*) *National Bank of A.* v. *United Hand in Hand Co.*, 4 App. Ca. 391.

only when the assignment is the mortgagee's own voluntary act, and is not applicable when the assignment is by direction of the court in a redemption suit (*e*). But a mortgagee is not deemed to be a mortgagee in possession merely because the mortgage deed contains an attornment clause (*f*); and the mere fact that mortgagees are in receipt of the rents and profits does not necessarily make them chargeable as mortgagees in possession,—*but they are mortgagees in possession if they have taken out of the mortgagor's hands the power and duty of managing the estate and of dealing with the tenants* (*g*).

or (*b.*) By direction of the court.

Taking of possession by mortgagee,—what is and what is not.

Similarly, when there are successive mortgages, the first mortgagee, if in possession, is accountable to the second mortgagee of whose mortgage he has had notice; and he will not be allowed any sums (on account of rents received) which after such notice he may have paid over to the mortgagor (*h*),—*secus*, as to any rents paid over before receiving such notice (*h*); and when a receiver has been appointed on behalf of the first mortgagee, the subsequent incumbrancers may apply to such receiver and obtain payment of their interest out of any surplus rents in his hands (*i*); but if they make no such application, they are taken to rely, for both their principal and their interest, on their security against the lands (*i*). Where a second mortgagee is in possession, he is accountable like any other mortgagee in possession; but as a general rule, he is not accountable to the first mortgagee for the back-rents received (*k*), —unless the first mortgagee has given notice to the tenants to pay their rents to him (*k*); and when a

Back-rents,—accountability therefor,—when successive mortgagees.

(*e*) *Bickerton* v. *Walker*, 31 Ch. Div. 151.
(*f*) *Stanley* v. *Grundy*, 22 Ch. Div. 478.
(*g*) *Noyes* v. *Pollock*, 32 Ch. Div. 53.
(*h*) *Berney* v. *Sewell*, 1 Jac. & W. 647.
(*i*) *Bertie* v. *Lord Abingdon*, 3 Mer. 560.
(*k*) *Law* v. *Glenn*, L. R. 2 Ch. App. 639.

receiver has been appointed on behalf of the second mortgagee, that appointment is always made subject to the rights of the prior incumbrancer (if any) who shall be in, or who shall enter into, possession of the mortgaged hereditaments; and in such a case, if the occupying tenant pays his back-rents or his accruing rents to the first mortgagee after notice from the latter so to do, he is not liable to pay the same rents over again to the second mortgagee or to the receiver of the latter (*l*).

Mortgagee is accountable for what he actually receives, or what (but for his *wilful default*) he might have received.

But although the mortgagee is liable to account, he is not obliged to account according to the actual value of the land, nor is he bound by any proof that the land is worth so much; unless it can be proved that he made so much out of it, or might, but for his own wilful default, have done so,—as if, without cause, he turns out a sufficient tenant who held at so much rent, or refuses to accept a tenant who would give so much rent (*m*); or unless he makes a gross mistake, whereby the value of the security is damaged, in the exercise of his power of sale (*n*). This limited protection is accorded to the mortgagee, because it is the laches of the mortgagor (or of his subsequent mortgagees) (*o*), that he lets the land lapse into the hands of the mortgagee by the non-payment of the money; therefore, when the mortgagee enters, he is only accountable (save in cases of wilful default) for what he actually receives; and he is not bound to make the most of another's property; and above all, he is not bound to work or to keep working, at a speculative profit, the minerals in

(*l*) *Underhay* v. *Read*, 20 Q. B. D. 209.
(*m*) *Simmins* v. *Shirley*, 6 Ch. Div. 173; *Eyre* v. *Hughes*, 2 Ch. Div. 148; *Taylor* v. *Mostyn*, 33 Ch. Div. 226.
(*n*) *Tomlin* v. *Luce*, 41 Ch. Div. 573.
(*o*) *Mainland* v. *Upjohn*, 41 Ch. Div. 126.

the land mortgaged (*p*); and in case he does make any considerable outlay on the mortgaged premises, he is entitled to an inquiry whether such outlay has been beneficial (*q*); and this rule, limiting the accountability of a mortgagee in possession, applies to mortgagees selling under their power of sale (*r*). Also, for advantages of a purely collateral character derived by the mortgagee out of his possession of the mortgaged property, and which do not affect the mortgagor, the mortgagee is not accountable (*s*); and one of two co-owners of a patent, who is also mortgagee of the other co-owner's share, is not liable to account at all for the profits which he makes by himself working the patent,—for he works as co-owner and not as mortgagee (*t*); but for any royalties received under licences to work the patent, he would, *semble*, be liable to account as mortgagee.

Annual rests, —when and when not directed.

In taking a mortgagee's accounts, the rents are in general written off against interest; and if at the time the mortgagee takes possession, the interest on his principal money is not in arrear, and there is no other serious danger overhanging his security which his entry into possession was intended to forestall,—or if the mortgagee remains in possession after he has been fully paid his mortgage debt (*u*),—then (as a general rule) the account will, in either of these cases, be taken with "annual assets,"—that is to say, if the rents exceed the amount of the interest, the excess will in every year of such excess be applied in reduction of the principal moneys due (*v*); but otherwise annual rests will not be directed.

(*p*) *Rowe* v. *Wood*, 1 Jac. & Walk. 315.
(*q*) *Shepard* v. *Jones*, 21 Ch. Div. 469; *Astwood* v. *Cobbold*, 1894, A. C. 150.
(*r*) *Bompas* v. *King*, 33 Ch. Div. 279.
(*s*) *White* v. *City of London Brewery Co.*, 42 Ch. Div. 237.
(*t*) *Steers* v. *Rogers*, 1892, 2 Ch. 13; 1893, A. C. 232.
(*u*) *Ashworth* v. *Lord*, 36 Ch. Div. 545.
(*v*) *Shephard* v. *Elliott*, 4 Mad. 254; *Patch* v. *Wild*, 30 Beav. 99.

Mortgagee until payment could not be compelled to produce his title-deeds; *secus*, now.

A mortgagee could not formerly have been compelled by the mortgagor to produce the title-deeds until payment of his principal, interest, and costs,—even though production was required for the purpose of enabling the mortgagor to negotiate a loan to pay off the mortgagee (*x*); but the law in this respect is now altered as regards all mortgages made subsequently to the 31st December 1881 (*y*); that is to say, the mortgagee is now compellable to produce the title-deeds before payment of his debt,—but that, of course, does not mean that he is compellable to produce *the mortgage deed* itself before payment; and upon redemption, the mortgagee must, of course, hand over all the title-deeds, and will be liable in damages to the mortgagor for any title-deed that is missing or fraudulently disposed of (*z*); and where there is a mortgage, and the mortgagee assigns the mortgage debt and the principal security therefor, he must also assign all (if any) collateral securities he may hold for the same debt,—for the transferee must occupy the same position (neither better nor worse) that the transferror occupied,—*scil.* as regards the mortgagor (*a*).

Mortgagee's liability for loss of deeds.

Mortgagee cannot take a valid lease from mortgagor.

It seems that a mortgagee cannot accept a valid lease from the mortgagor, even though free from circumstances of fraud, and at a fair rent,—the reason for this disability being the power which, if the law were otherwise, the mortgagee would possess of "harassing" the mortgagor (*b*); and the same principle forbids the mortgagee from purchasing

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(*x*) *Sheffield* v. *Eden*, 10 Ch. Div. 291,

(*y*) 44 & 45 Vict. c. 41, s. 16; *New South Wales Bank* v. *O'Connor*, 14 App. Ca. 273.

(*z*) *James* v. *Rumsey*, 11 Ch. Div. 398.

(*a*) *Walker* v. *Jones*, L. R. 1 P. C. 50; *Parker* v. *Clarke*, 30 Beav. 54.

(*b*) *Webb* v. *Rorke*, 2 Sch. & Lefr. 661; *Ex parte Buxton*, 15 Ch. Div. 289.

under the power of sale contained in the mortgage deed (*c*); but a second mortgagee may lawfully purchase from the first mortgagee (*d*). And a mortgagee could not have made a valid or binding lease, unless of necessity and to avoid a probable loss (*e*); but now, under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 18, the mortgagee, while in possession, may by himself, and without the concurrence of the mortgagor, make a valid lease,—provided the lease do not exceed twenty-one years for an agricultural or occupation lease, or ninety-nine years for a building (or repairing) lease, and provided the lease otherwise complies with the requisites of the Act; but these provisions do not apply to mining leases. Equity holds also, that if the property in mortgage be renewable leaseholds, and the mortgagee renew, he will take the renewal subject to the old equity of redemption (*f*); and if an advowson be in mortgage, and the living become vacant, the mortgagor, and not the mortgagee, shall (in effect) present (*g*),—that is to say, the mortgagor nominates to the mortgagee a person to be appointed to the living, and requests the mortgagee to present such nominee to the bishop for institution and induction; and equity will not permit the mortgagor to agree to the contrary (*h*). In general, also, a mortgagee in possession shall not waste the estate (*i*); and if he have felled timber, an account will be decreed, and the produce applied, first, in payment of the interest, and then in sinking the principal; and equity will grant an injunction to restrain the

Second mortgagee may purchase from first mortgagee.

Mortgagee could not in equity make a binding lease; *secus*, now.

Renewed leaseholds.

Advowson.

Mortgagee could not fell timber;

(*c*) *Martinson* v. *Clowes*, 21 Ch. Div. 857; *Bailey* v. *Barnes*, 1894, 1 Ch. 25; *Astwood* v. *Cobbold*, 1894, A. C. 150.
(*d*) *Shaw* v. *Bunney*, 33 Beav. 494.
(*e*) *Corbett* v. *Plowden*, 25 Ch. Div. 678.
(*f*) *Holt* v. *Holt*, 1 Ch. Ca. 190.
(*g*) *Mackenzie* v. *Robinson*, 3 Atk. 559.
(*h*) *Welch* v. *Bishop of Peterborough*, 15 Q. B. D. 432.
(*i*) *Hanson* v. *Derby*, 2 Vern. 392.

unless security was insufficient;

mortgagee from continuing to fell the timber,—unless the security is insufficient, in which latter case the court will not restrain him, but the produce will be applied in case of the estate (*k*); and the like rules applied, and still apply, to the opening of new mines (*l*); but as regards trees, the mortgagee in possession may now cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, and may even employ a contractor for the purpose, the cutting by such contractor to be completed within twelve months from the date of the contract (*m*); and if the mortgagee unnecessarily, and without the consent of the mortgagor, pulls down buildings and erects new buildings, he is liable for any loss of rent thereby occasioned (*n*).

but may now do so in a proper manner.

The doctrine of tacking,—its principle and origin.

The doctrine of tacking is one which affects more or less the rights of mesne or intermediate incumbrancers, the usual effect of the application of the doctrine being to squeeze out a second (or mesne) mortgage, and to add on the amount of the third (or other subsequent) mortgage to the first mortgage,—or, in other words, to postpone such second mortgage until the third as well as the first mortgage is paid; for *in æquali jure, melior est conditio possidentis*, and where the equity is equal, the law shall prevail; and as a mortgagee comes in upon a valuable consideration without notice, therefore by purchasing in a first mortgage (being a legal mortgage), he shall thereby protect his estate against any mortgage subsequent to the first,—for he hath both law and equity (*o*). And in a case of *London and*

Legal estate,—effect of obtaining;

(*k*) *Withrington* v. *Bankes*, Sel. Ch. Ca. 30.
(*l*) *Hanson* v. *Derby*, 2 Vern. 392; *Millet* v. *Davie*, 31 Beav. 470.
(*m*) Conveyancing Act, 1881, s. 19.
(*n*) *Sandon* v. *Hooper*, 6 Beav. 246.
(*o*) *Wortley* v. *Birkhead*, 2 Ves. Sr. 574; *Rooper* v. *Harrison*, 2 K. & J. 108, 109.

County Bank v. *Goddard* (*p*), where A., while being equitable owner only, created an equitable mortgage by deposit in favour of B.; and subsequently, and when he had become legal owner, he created an equitable mortgage by deposit in favour of the plaintiffs,—executing also to them (and at the same) a deed of charge, whereby he declared himself a trustee for the plaintiffs, and gave them power to remove him from the trusteeship and to appoint a new trustee in his place; and subsequently he created a legal mortgage in favour of C.; and the plaintiffs, in exercise of their power in that behalf, duly removed A. from the trusteeship and appointed new trustees in his place, and (by declaration under the Conveyancing Act, 1881) vested in the new trustees the legal estate theretofore vested in A. as trustee,—The court held (the plaintiffs having had no notice of B.'s mortgage), that the plaintiffs' charge was entitled to priority over B., in respect that the legal estate had (by the vesting declaration) been got in for the plaintiffs' benefit; and further (C. having had full notice of the plaintiffs' mortgage), that the plaintiffs' priority over B. held good also against C., although the legal estate had vested in C. until divested out of him by the vesting declaration.

even when obtained by a vesting declaration.

The leading rules of the doctrine are stated in *Brace* v. *Duchess of Marlborough* (*q*) as follows:—(1.) "If a third mortgagee buys in the first mortgage, "being a legal mortgage, though it be *pendente lite*, "pending a bill brought by the second mortgagee to "redeem the first, yet the third mortgagee having "obtained the first mortgage, and got the law on his "side and equal equity, he shall squeeze out the

The doctrine of tacking,—its rules.

1. Third mortgagee without notice of second, buying in first mortgage with notice of second, may tack.

(*p*) 1897, 1 Ch. 642.
(*q*) 2 P. W. 491.

"second mortgagee,—and this the Lord Chief-Justice "Hale called a 'plank' gained by the third mort- "gagee, or *tabula in naufragio*, which construction is "in favour of a purchaser, every mortgagee being "such *pro tanto*;" and in this case, although the third mortgagee get in the first mortgage *pendente lite*, i.e., *with notice*, he shall, nevertheless, be allowed to tack; for the rule of equity only requires that *the third mortgagee shall not have had notice of the second* AT THE TIME OF LENDING HIS MONEY; and he does not look about him for protection till his debt is afterwards found to be in danger (*r*). But if an owner having the legal estate create a charge in favour of A., then a second charge in favour of B., and then a third in favour of C., he cannot by his own voluntary act alter the equities by transferring the legal estate to any one of them (*s*); *secus*, if such transfer is not merely voluntary on the part of such owner (*t*). But (2) "If a judgment-creditor buys in "tho first mortgage, although being a legal mort- "gage, he shall not tack or unite the mortgage to "his judgment, and thereby gain a preference,"—for such judgment-creditor has by his judgment at the best only an inchoate right against the land; and *non constat*, that he will ever make use of it, for he may take his debt out of the goods of the debtor; and besides, he *does not lend his money on the immediate view or contemplation of the land*, and is not therefore deceived or defrauded though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged the estate to another (*u*). Moreover, the effect of the judgment

Because he is *without notice* when he parts with his first cash;

and may therefore protect his honest debt against subsequently discovered dangers.

2. Judgment creditor buying in the first mortgage shall not tack.

(*r*) *Marsh* v. *Lee*, 1 L. C. 659; *Wilmot* v. *Pike*, 5 Hare, 14.
(*s*) *Shropshire Rail. Co.* v. *Reg.*, L. R. 7 H. L. 496; *Union Bank* v. *Kent*, 39 Ch. Div. 238.
(*t*) *Taylor* v. *Russell*, 1892, A. C. 244.
(*u*) *Lacy* v. *Ingle*, 2 Ph. 413; *Spencer* v. *Pearson*, 24 Beav. 266.

being only to charge the interest which remains in the debtor, the creditor can have no right, by means of tacking, to cut off an incumbrance which preceded his judgment (*v*). On the other hand, (3.) "If a first "mortgagee, being a legal mortgagee, lends a further "sum to the mortgagor upon a statute or judgment, "he shall retain against a mesne mortgagee until both "his securities are satisfied (*x*),—and *à fortiori* if the "first mortgagee lends on a mortgage" (*y*). But for this purpose, the first mortgagee must have *the legal estate or the better right to call for it;* and, of course, the rule will not apply if the mortgagee had notice of the mesne incumbrance at the time of making the further advance (*z*); and although the first mortgage was expressly made to secure a sum and *further advances*, still if the first mortgagee make a further advance *with notice* of the mesne incumbrance, he will not be entitled to tack such further advance (*a*); and this rule is applicable even as against companies (*e.g.*, banks) who have a lien on their own shares for all moneys due and *growing due* to them from the shareholder as a customer of the bank (*b*).

3. First mortgagee lending a further sum on a judgment may tack against a mesne mortgagee.

But as regards the mortgage debentures of a company, these, although they may be a first charge on the property (or on some specified property) of the company, are in the nature of a "floating security" only, and therefore will not have priority over a sale (*c*) or mortgage (*d*) of the company's property, or of

As to "floating securities" of a company.

(*v*) *Whitworth* v. *Gaugain*, 3 Hare, 416; *Arden* v. *Arden*, 29 Ch. Div. 702; *Ex parte Whitehouse*, 32 Ch. Div. 512; *Davis* v. *Freethy*, 24 Q. B. D. 519.

(*x*) *Shepherd* v. *Titley*, 2 Atk. 348.

(*y*) *Wylie* v. *Pollen*, 11 W. R. 1081.

(*z*) *Credland* v. *Potter*, L. R. 10 Ch. App. 8.

(*a*) *Shaw* v. *Neale*, 20 Beav. 157; *Rolt* v. *Hopkinson*, 9 H. L. Cas. 514; *London and County Bank* v. *Radcliffe*, 6 App. Ca. 722.

(*b*) *Bradford Bank* v. *Briggs*, 12 App. Ca. 29; *Miles* v. *New Zealand Co.*, 32 Ch. Div. 266; *Union Bank* (*Scotland*) v. *National Bank* (*Scotland*), 12 App. Ca. 53.

(*c*) *In re Horne and Hellard's Contract*, 29 Ch. Div. 736.

(*d*) *Wheatley* v. *Silkstone, &c. Co.*, 29 Ch. Div. 715.

part thereof, made to one individual; and they will not have priority over an execution duly perfected (*e*), nor over a garnishee order even (*f*),—for the very intention of a "floating security" is, that it shall affect only the property of the company which shall be and remain the unincumbered property of the company at the time of realisation of the security (*g*); and any provision contained in the debenture, whereby the company purports to be restrained from making such sale or mortgage with such priority as aforesaid, would probably be deemed repugnant and be inoperative, and would certainly not prevent a charge which (like a solicitor's lien) should arise by operation of law (*h*); and it would not retain its precedence over a voluntary charge taken without notice (*i*); and now, by the 60 & 61 Vict. c. 19, it is in all cases subject to the debts which (upon the bankruptcy of an individual) are entitled, under the 51 & 52 Vict. c. 62, s. 1, to be paid in preference to the general debts of the company. And here note, that, as between themselves, floating securities will, in general, rank according to the respective dates of their creation, *i.e.*, of their issue (*k*).

Where legal estate is outstanding, incumbrancers rank according to time.

The following five further points with regard to tacking must now be mentioned, that is to say:—Firstly, it is a well-settled rule, that, when a puisne mortgagee has bought in a prior incumbrance, but has not obtained the legal title, or when he takes such prior incumbrance *en autre droit* (*l*), in either

(*e*) *In re Opera Limited*, 1891, 3 Ch. 260; *Taunton* v. *Sheriff of Warwickshire*, 1895, 1 Ch. 734.
(*f*) *Robson* v. *Smith*, 1895, 2 Ch. 118.
(*g*) *Government Securities Investment Co.* v. *Manila Co.*, 1897, A. C. 81.
(*h*) *Brunton* v. *Electrical Corporation*, 1892, 1 Ch. 434; and see *Brabourne* v. *Anglo-Austrian Union*, 1895, 2 Ch. 891.
(*i*) *English and Scottish Mercantile* v. *Brunton*, 1892, 2 Q. B. 700.
(*k*) *Lister* v. *Lister Co.*, W. N. 1893, p. 33.
(*l*) *Morret* v. *Paske*, 2 Atk. 52.

of these two cases he gets no advantage from the prior incumbrance,—because generally in all cases where the legal estate is outstanding, the several incumbrancers must be paid according to their priorities, upon the maxim *qui prior est tempore, potior est jure;* still, if any one of the incumbrancers has a better title than the others to call for the legal estate, he will in equity be in the same situation as if he had obtained such estate (*m*). Secondly, it was for a long time considered, that no tacking properly so called existed in the case of successive mortgages, where the first mortgage was to a building society and was paid off by the third mortgagee, and the society indorsed the statutory receipt, which was equivalent to a reconveyance, but such third mortgagee (it was considered) had priority only for the sum paid to the building society, with interest thereon (*n*); in other words, the legal estate which was obtained by virtue of the statute and under the reconveyance implied from the indorsement of the receipt, was considered to have been obtained for the benefit of all the mortgagees according to the priority of their dates—that is to say, for the benefit of no one of them in particular; and this was also the effect, if the legal estate was expressly reconveyed to the mortgagor. But quite recently, the old opinion (which was a very reasonable one) has been held to be erroneous (*o*); so that tacking applies in the case of building society mortgages equally as in the case of ordinary mortgages; and when the building society indorses the statutory receipt, and a new mortgage is made (without notice of a mesne mortgage) to a third person who pays off the society, and who takes over all the title-deeds from the society,—in such a case, the

In building society mortgages,—tacking was at one time not recognised.

Secus, now.

(*m*) *Wilmot* v. *Pike*, 5 Hare, 14; *Cook* v. *Wilton*, 29 Beav. 100.
(*n*) *Pease* v. *Jackson*, L. R. 3 Ch. App. 576; *Robinson* v. *Trevor*, 12 Q. B. D. 423; *Carlisle Banking Co.* v. *Thompson*, 28 Ch. Div. 398.
(*o*) *Hosking* v. *Smith*, 13 App. Ca. 582.

new mortgage ranks as the first mortgage, not only for the amount paid to the society, but for the whole sum secured thereby. Thirdly, regarding mortgages with a surety, some rather nice distinctions require to be taken; for if A. is the mortgagor, B. the surety, and C. the mortgagee, and C. lends a further sum to A., C. will in general have the right as against B. to tack the further advance to the first mortgage debt (*p*); but if A. is the mortgagor, B. the surety, and C. the mortgagee, and B. is not merely a covenantor for the payment of the debt, but is also a co-mortgagor with A., bringing some property of his (B.'s) own into the security, then if C. lends a further sum to A., C. cannot in general as against B. tack this further advance to the first mortgage debt,—because B. has in this latter case not merely a right (on payment of the first mortgage debt) to the delivery up of the security, but has an actual right or equity of redemption (*q*); and the consequences of this distinction are very curious, because, in the latter case, if B. redeems C. his first mortgage, then C. will be liable to redeem B. what he has paid; and in effect, therefore, when B. is a co-mortgagor, C.'s making the further advance operates to discharge B. altogether from the suretyship (*r*). Fourthly, it appears that a prior mortgagee having a bond debt, whether prior or subsequent to his mortgage (*s*), cannot tack it against any intervening incumbrancer, or against an intervening judgment creditor or bond creditor (*t*), or even against the mortgagor himself (*u*), or a purchaser from him of the equity of re-

Mortgages with a surety,—distinction as regards tacking, according as the surety is a mere covenantor or is a co-mortgagor.

When a bond debt may be tacked,—(*a.*) During life of debtor,—never. (*b.*) After death of debtor,—only as against volunteers.

(*p*) *Williams* v. *Owen*, 13 Sim. 597.
(*q*) *Bowker* v. *Bull*, 1 Sim. N. S. 29.
(*r*) *Beevor* v. *Luck*, L. R. 4 Eq. 537; *Kinnaird* v. *Trollope*, 39 Ch. Div. 636.
(*s*) *Windham* v. *Jennings*, 2 Ch. Rep. 247.
(*t*) *Lowthian* v. *Hazel*, 3 Bro. C. C. 162.
(*u*) *Jones* v. *Smith*, 2 Ves. 376.

demption; but can tack it only as against the heir (*v*), or beneficial devisee (*x*),—and that only for the purpose of avoiding circuity of action (*y*); in other words, the bond debt, or in fact any other unsecured debt, cannot be tacked at all during the life of the mortgagor, but only after his death and upon an administration of his assets,—when, of course, it will be preferred to the heir or beneficial devisee (*z*); but in case of the bankruptcy of the mortgagor, the "*mutual dealings*" or "*mutual credit*" clause might possibly give in such cases a right to (in effect) tack an unsecured debt (*a*). Fifthly, it seems to follow from the provisions of the Yorkshire Registries Act, 1884 (*b*), that, as regards all lands in Yorkshire, the doctrine of tacking is wholly abolished, it having been provided by that Act for the registration of all mortgagees whatever, whether legal or equitable,—and if equitable and by deposit, then whether with or without an accompanying written memorandum,—and the Act enacts, that, as between the successive mortgages, the date of registration shall determine the order of priority, excepting in cases of actual fraud (*c*); and as regards a duly registered mortgage which provides for further advances, it is not clear how the rule in *Rolt* v. *Hopkinson* (*d*) would be applied; but the tendency of the court would most probably be against allowing the further advance to be tacked, unless a memorandum thereof was registered before the subsequent mortgage was registered (*e*).

Tacking, non-existent under Yorkshire Registries Act, 1884.

(*v*) *Shuttleworth* v. *Laycock*, 1 Vern. 245.
(*x*) *Du Vigier* v. *Lee*, 2 Hare, 326.
(*y*) *Heames* v. *Bance*, 3 Atk. 630; *Talbot* v. *Frere*, 9 Ch. Div. 568.
(*z*) *In re Hazelfoot's Estate, Chauntler's Claim*, L. R. 13 Eq. 327; and see *In re Gregson, Christison* v. *Bolam*, 36 Ch. Div. 223.
(*a*) *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. D. 459.
(*b*) 47 & 48 Vict. c. 54, amended by 48 Vict. c. 4, and 48 & 49 Vict. c. 26. See the chapter on the Maxims of Equity, pp. 30, 31, *supra*; and consider *Credland* v. *Potter*, L. R. 10 Ch. App. 8.
(*c*) *Battison* v. *Hobson*, 1896, 2 Ch. 403.
(*d*) 9 H. L. Cas. 514.
(*e*) *Credland* v. *Potter*, L. R. 10 Ch. App. 8.

Actions to establish priorities.

Suits in equity to establish priorities as between successive mortgagees have been (and still are) very frequent; and the court has regard, in such suits, to the doctrine of tacking, to the doctrine of notice, and in general to every consideration which ought to influence a court of equity. For although the first in time retains in general his priority,—*scil.* if he have also the legal estate; yet he may lose his priority, and that either by fraud or by negligence. For if a man by any suppression of the truth which he was bound to communicate, or by any suggestion of falsehood, be the cause of prejudice to another, his claim shall be postponed to that of such defrauded person; and where a mortgagee of leasehold property lent the lease to the mortgagor for the purpose of obtaining a further advance upon it, and on the assurance of the mortgagor that he would inform the lender of the prior charge; and the mortgagor deposited the lease with his bankers without informing them of the prior charge, it was held that negligence of this sort on the part of the prior mortgagee, being negligence which had put it in the power of the mortgagor to commit the fraud, postponed his mortgage to the security of the bankers (*f*). And observe that, in the case referred to, there was a *positive* act by the first mortgagee, and which conduced directly to the deception practised by the mortgagor upon the bank (*g*); and some such positive act is required to postpone a legal mortgage,—for in general a legal mortgagee will not be postponed to a subsequent equitable mortgagee, merely because the latter has been deceived through the fraud of the mortgagor, notwithstanding that some carelessness on the part

Priority may be lost by mortgagee's fraud.

Priority may be lost by mortgagee's negligence inducing deception.

But not by any mere carelessness on the part of the mortgagee.

(*f*) *Briggs* v. *Jones*, L. R. 10 Eq. 92; *Lloyd's Bank* v. *Jones*, 29 Ch. Div. 221; *National Provincial Bank* v. *Jackson*, 33 Ch. Div. 1.

(*g*) *Shropshire Union Rail.* v. *Reg.*, L. R. 7 H. L. 496; *Union Bank* v. *Kent*, 39 Ch. Div. 238; *Farrand* v. *Yorkshire Bank*, 40 Ch. Div. 182; *Jones* v. *Ingham*, 1893, 1 Ch. 352; *In re Castell and Brown*, 1898, W. N. 7.

of the legal mortgagee may have conduced to the fraud (*h*). For example, where, as in *Northern Counties Fire Insurance* v. *Whipp* (*i*), C., the manager of the company executed a legal mortgage to the company of his own freehold estate and handed over the title-deeds to the company, and the deeds were placed in a safe of the company, the duplicate key of which was intrusted to C. as manager; and C. some time afterwards took out of the safe the deeds (except his own mortgage) and handed them to the defendant, to whom at the same time he executed a mortgage for money then advanced by the defendant without notice of the company's prior mortgage,—The court held, that the mortgage to the company retained its priority over the defendant's mortgage; for the legal mortgagee had not connived at the mortgagor's fraud, or done any act which had led to the subsequent advance. And here it may be convenient to note, that in these actions to establish priorities, a plaintiff, although unsuccessful in establishing his own priority, may (and usually will) get his costs of the action, if the proceedings therein have enured for the benefit of the other mortgagees, and some proceedings of the sort were absolutely necessary to be taken by some one (*k*). Note also here, that a solicitor is usually liable as for negligence in not discovering a mesne or prior mortgage (*l*); and if he take a cheque in payment, it is negligence in him to part with the deeds before the cheque is cashed (*m*).

Secus, if such carelessness amounts to fraud.

Solicitor's negligence.

As a general rule, and as regards all mortgages made prior to the 1st January 1882,—but not, in

(*h*) *Manners* v. *Mew*, 29 Ch. Div. 725; *Hewitt* v. *Loosemore*, 9 Hare, 458.
(*i*) 26 Ch. Div. 482; *In re Vernon Ewens & Co.*, 32 Ch. Div. 165.
(*k*) *Ford* v. *Earl of Chesterfield*, 21 Beav. 426; *Batten* v. *Dartmouth Commissioners*, 45 Ch. Div. 612.
(*l*) *Whiteman* v. *Hawkins*, 4 C. P. Div. 13; *In re Dangar's Trusts*, 41 Ch. Div. 178.
(*m*) *Pape* v. *Westacott*, W. N. 1893, p. 167.

Consolidation of mortgages. Mortgagor must redeem *all* the mortgages which the mortgagee holds on his property.

general, mortgages made after that date,—both in suits for foreclosure, and in suits for redemption, the mortgagor cannot redeem one mortgage without redeeming all other mortgages which the mortgagee holds upon any part of his property,—for these the mortgagee has a right to consolidate together (*n*); and he does not lose this right by giving a notice to the mortgagor to pay off one of the mortgages (*o*). And the rule is applicable as well to mortgages of realty (*p*) as to mortgages of personalty (*q*), and holds good against a purchaser for value of the equity of redemption, and also against a subsequent mortgagee thereof, although each is without notice of the other mortgages (*r*); but there was no consolidation, where there had been no default (*s*), or where one of the mortgages had ceased to exist (*t*).

Consolidation distinguished from tacking.

The doctrine of consolidation depended,—and (so far as it still exists) depends—upon a principle altogether different from that upon which tacking depends; because in tacking, the right is to throw together several debts lent on the *same* estate, and to do so under the priority and protection afforded by the legal estate; but in consolidation, the right was,—and (so far as it still exists) is,—to throw together on one estate several debts lent on *different* estates, and to do so *without reference to any priority or protection afforded by the legal estate;* and not only was getting in the legal estate not necessary as a preliminary to consolidation, as it is to tacking, but

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(*n*) *Selby* v. *Pomfret*, 1 J. & H. 336; *Tassel* v. *Smith*, 2 De G. & Jo. 713–718; *Mills* v. *Jennings*, 13 Ch. Div. 639; *Jennings* v. *Jordan*, 6 App. Ca. 698.

(*o*) *Griffith* v. *Pound*, 45 Ch. Div. 553.

(*p*) *Neve* v. *Pennell*, 11 W. R. 986.

(*q*) *Watts* v. *Symes*, 1 De G. M. & G. 240; *Tweedale* v. *Tweedale*, 23 Beav. 341.

(*r*) *Beevor* v. *Luck*, L. R. 4 Eq. 537.

(*s*) *Cummins* v. *Fletcher*, 14 Ch. Div. 699.

(*t*) *In re Raggett, ex parte Williams*, 16 Ch. Div. 117; *In re Gregson, Christison* v. *Bolam*, 36 Ch. Div. 223.

even *notice* at the time of lending the mortgage money on the second estate, which would have been fatal to any right of tacking, was wholly immaterial as regards the right of consolidation (*u*). But the right of consolidation was not available in favour of a mortgagee *whose mortgage was not yet existing at the time* of the execution of the mortgage (or purchase) against which he claimed to consolidate (*v*),—a limit to the right of consolidation which became well established (*x*). Also, now, under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 17, as regards mortgages which are (or one of which is) made after the 1st January 1882, unless the effect of the Act is expressly excluded or varied, a mortgagor seeking to redeem any one mortgage is entitled to do so, without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem; and the costs and charges of the mortgagee, which he is entitled to charge against the property in mortgage, will not be consolidated,—excepting where and so far as the principal and interest may be consolidated (*y*). But consolidation being applicable (where still applicable) to two or more distinct mortgages made upon two or more distinct properties by two or more distinct transactions and for two or more distinct loans,—it is a wholly different case, where two or more distinct properties are included in one mortgage and for one advance; and the Conveyancing Act, 1881, s. 17, has no application to this latter case; therefore, where

Consolidation, —necessary limit to.

Consolidation, —abolition of, under Conveyancing Act, 1881.

Consolidation distinguished from two or more properties mortgaged for one debt by the same mortgage deed.

(*u*) *Vint* v. *Padgett*, 2 De G. & Jo. 611; *Bird* v. *Wenn*, 33 Ch. Div. 215; *Pledge* v. *White*, 1896, A. C. 187.

(*v*) *Baker* v. *Gray*, 1 Ch. Div. 491; *Cracknall* v. *Janson*, 11 Ch. Div. 1.

(*x*) *Mills* v. *Jennings*, 13 Ch. Div. 639; *Jennings* v. *Jordan*, 6 App. Ca. 698; *Harter* v. *Colman*, 19 Ch. Div. 630; *Minter* v. *Carr*, 1884, 2 Ch. 321; 1894, 3 Ch. 498; *Pledge* v. *Carr*, 1895, 1 Ch. 51.

(*y*) *De Caux* v. *Skipper*, 31 Ch. Div. 635.

real and personal estates were mortgaged together (*z*), and the mortgagor died leaving a will of personalty, but intestate as to his real estate, and the mortgagee entered into possession, and the executrix of the mortgagor claimed to redeem the whole of the mortgaged property, and the mortgagee resisted her claim, and insisted that her only right was to redeem the personal estate in mortgage on payment of a proportional part of the mortgage debt,—The court held, that the executrix, as owner of the equity of redemption of the personal estate, *could not insist on redeeming that estate separately, and therefore could not be compelled to redeem it separately, her right* (*and her duty*) *being to redeem the whole, subject to the equities of the other persons interested;* and the court therefore made a decree for the usual accounts, as against a mortgagee in possession, and directed that, on payment of what was found due, the mortgagee should reconvey the real estate and assign the personal estate to the plaintiff (the executrix), *subject to such equity of redemption as might be subsisting therein in any other person or persons.*

No *compulsory* redemption of one only of the properties.

Special remedies of mortgagee.—(*a*.) Foreclosure.

Equity having determined that, the mortgage debt being merely money secured on land, the mortgagor, notwithstanding his breach of the condition, and the consequent forfeiture at law of his estate, shall be relievable, on payment of principal, interest, and costs (including the costs, charges, and expenses properly incurred) (*a*), and that the mortgagee in possession shall be accountable for the rents and profits,—it became, on the other hand, just, that, after a fair and reasonable time given to the mortgagor to discharge the debt, he should, upon default in so doing, lose his equity, or be foreclosed his right

(*z*) *Hall* v. *Heward*, 32 Ch. Div. 430; and see *Pearse* v. *Morris*, L. M. 5 Ch. App. 227.

(*a*) *Bolingbroke* v. *Hinde*, 25 Ch. Div. 795; *N. P. Bank of England* v. *Eames*, 31 Ch. Div. 582; and see *Crozier* v. *Dowsett*, 31 Ch. Div. 67.

of redemption (*b*). An intermediate mortgagee is entitled, therefore, to commence an action of foreclosure, against the mortgagor and all mortgagees subsequent to himself (*c*); and in his action he usually offers to redeem any mortgagees prior to himself, whom he makes parties to the action; and the judgment for foreclosure directs the necessary accounts to ascertain what is due to the mortgagee, giving any special directions where there are special circumstances which will affect the account (*d*); and the judgment directs foreclosure in case of failure to pay the amount ascertained to be due, and may also go on and give the mortgagee possession of the mortgaged hereditaments (*e*); but the remedy by foreclosure is, of course, only available after the mortgagor is in default; and for this purpose the default must be complete (*f*). When the mortgagor is a bankrupt, the remedy may, at the mortgagee's option, be obtained in the Court of Bankruptcy, under section 102 of the Bankruptcy Act, 1883; but the mortgagee may proceed also in the Chancery Division (*g*). The action must be brought within twelve years next after the right to bring the action first accrued, or within twelve years after the last written acknowledgment, or after the last payment of any part of the principal money or interest (*h*). In case the mortgagor's estate is vested in an infant at the date of the judgment for foreclosure, it is usual to give the infant a day to show cause against the judgment (*i*); but when it is manifest that a decree

Foreclosure action,—nature of, and time for.

(*b*) *Heath* v. *Pugh*, 6 Q. B. D. 34.
(*c*) *Greenough* v. *Littler*, 15 Ch. Div. 93.
(*d*) *Sanguinetti* v. *Stuckey's Bank*, 1896, 1 Ch. 502.
(*e*) *Keith* v. *Day*, 39 Ch. Div. 452.
(*f*) *Moore* v. *Shelley*, 8 App. Ch. 285.
(*g*) *Ex parte Fletcher, in re Hart*, 10 Ch. Div. 610; *In re Jordan, ex parte Symmonds*, 14 Ch. Div. 693.
(*h*) 3 & 4 Will. IV. c. 27, ss. 24, 28; 7 & 8 Will. IV. and 1 Vict. c. 28; 37 & 38 Vict. c. 57, s. 7.
(*i*) *Mellor* v. *Porter*, 25 Ch. Div. 158.

absolute will be more beneficial for the infant, the day to show cause will be dispensed with (*k*). The mortgagor may, *semble*, insist upon the usual accounts being taken, although the taking thereof might in any particular case be vexatious (*l*). Should the plaintiff in a suit for redemption fail to redeem, his action will be dismissed with costs (*m*). The remedy of a debenture holder is usually (upon a declaration of charge first made) (*n*), the appointment of a receiver (*o*), and sometimes of a manager (*p*); but he may also, in a proper case, have a winding-up order (*q*), or even a sale of the undertaking and property of the company,—*scil.* being a private company (*r*), but not when it is a school (*s*) or a public company such as a Tramway Company (*t*); and he may also, sometimes, obtain a foreclosure order (*u*).

Judgment for foreclosure, and personal judgment for the mortgage debt,—form of.

A mortgagee being, since the Judicature Acts, entitled to combine in one action his right to foreclosure with his right to judgment on the mortgagor's covenant or bond for payment of the debt (*x*), the form of judgment in such a case (*y*) is as follows:—Firstly, if the amount of the mortgage debt is either proved, admitted, or agreed at the

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(*k*) *W. & S. Banking Co.* v. *George*, 24 Ch. Div. 707.
(*l*) *Taylor* v. *Mostyn*, 25 Ch. Div. 48.
(*m*) *Hallet* v. *Furze*, 31 Ch. Div. 312.
(*n*) *Marwick* v. *Lord Thurlow*, 1895, 1 Ch. 776.
(*o*) *Tillet* v. *Nixon*, 25 Ch. Div. 238; *In re H. Pound & Co.*, 42 Ch. Div. 402; *Re Barton-upon-Humber Waterworks Co.*, 42 Ch. Div. 585; *Strong* v. *Carlyle Press*, 1893, 1 Ch. 268.
(*p*) *Edwards* v. *Standard Rolling Stock*, 1893, 1 Ch. 574.
(*q*) *In re Portsmouth Tramways Co.*, 1892, 2 Ch. 362.
(*r*) *Elias* v. *Oxygen Co.*, 1897, 1 Ch. 511.
(*s*) *Hornsey District Council* v. *Smith*, 1897, 1 Ch. 843.
(*t*) *Marshall* v. *South Staffordshire Tramway Co.*, 1895, 2 Ch. 36, disapproving *Bartlett* v. *West Metrop. Trams*, 1894, 2 Ch. 286.
(*u*) *Sadler* v. *Worley*, 1894, 2 Ch. 170; *Oldrey* v. *Union Works*, W. N. 1895, p. 77.
(*x*) *Farrer* v. *Lacy Hartland & Co.*, 31 Ch. Div. 42; *Bisset* v. *Jones*, 32 Ch. Div. 935.
(*y*) *Faithful* v. *Woodley*, 43 Ch. Div. 287; *Simmons* v. *Blandy*, 1897, 1 Ch. 19.

trial or hearing, the judgment is, that the plaintiff do recover against the defendant the debt, and also so much of his taxed costs of the action as would have been incurred if it had been an action brought for payment only; Secondly, if the amount of the mortgage debt is not proved, admitted, or agreed at the trial or hearing, the judgment is, that an account be taken of what is due to the plaintiff for principal and interest under the covenant to pay, and that the plaintiff do recover against the defendant the amount which shall be certified to be due to him on taking the said account, and also so much of his taxed costs of the action as would have been incurred if it had been brought for payment only; and Thirdly, whether the amount of the mortgage debt is or is not proved, admitted, or agreed at the trial or hearing, the judgment proceeds to direct an account of what is due to the plaintiff under and by virtue of his mortgage security and for his taxed costs of the action; and in taking such account, what (if anything) the plaintiff shall have received from the defendant under the aforesaid personal judgment is to be deducted, and the balance due to the plaintiff is to be certified; and the defendant is usually allowed one month for payment under the personal judgment (*z*); but there can, of course, be no personal judgment when there is no personal liability for the debt,—as, *e.g.*, when the defendant is a mere transferee of the equity of redemption (*a*).

(*a.*) Where amount of debt ascertained.

(*b.*) Where amount of debt not ascertained.

(*c.*) Whether amount of debt is ascertained or not.

Where the mortgagee is in possession by himself or by a receiver at the date of the foreclosure judgment, the account directed to be taken will extend to rents received by him, and to just allowances for his outlay or expenditure on the mortgaged property;

Account of rents, when directed.

(*z*) *Farrer's Case*, supra; *Hunter* v. *Myatt*, 28 Ch. Div. 181.
(*a*) *In re Errington, ex parte Mason*, 1894, 1 Q. B. 11.

and if any rents are received after the certificate of the amount due, and *before* the day fixed for redemption, a new day for redemption must be fixed, and a new account taken of what is due (*b*); but not if the receipt of rents is *after* the day fixed for redemption (*c*). And note, that where there is such a receiver, a specially indorsed writ, although not specifically inapplicable to the case (*d*), is attended with no convenience whatsoever, — *scil.* because leave to defend will invariably be given where the receiver has received (or, *semble*, expended) anything (*e*).

(*b*.) Sale,— either, (1.) Under Conveyancing Act, 1881, by order of the court;

Before the statute 15 & 16 Vict. c. 86, courts of equity refused, except in a few cases, to decree a sale against the will of the mortgagor; but under that statute, sect. 48, the Court of Chancery was enabled at the trial, but not on an interlocutory application, to direct a sale of the mortgaged property instead of a foreclosure thereof (*f*); and now, under section 25 of the Conveyancing Act, 1881, the sale may be directed on such terms as the court thinks fit, and without previously determining the priorities of incumbrancers, and even upon an interlocutory application (*g*); and the court may order such sale, whether in a foreclosure or in a redemption action, at any time before the action is concluded by the decree absolute (*h*). But, in fact, a power of sale is usually inserted in mortgage deeds, giving the mortgagee authority to sell the premises;

Or, (2.) Under power of sale in the mortgage deed.

(*b*) *Jenner Fust* v. *Needham*, 32 Ch. Div. 582; *Hoare* v. *Stephens*, ib. 194; *Cheston* v. *Wells*, 1893, 2 Ch. 151.
(*c*) *Raper's Case*, 1892, 1 Ch. 54; *Barber's Case*, W. N. 1893, p. 91; *Lusk's Case*, W. N. 1894, p. 134; *Ellenor* v. *Ugle*, W. N. 1895, p. 161.
(*d*) *Earl Poulett* v. *Hill*, 1893, 1 Ch. Div. 204.
(*e*) *Lynde* v. *Waithman*, 1895, 2 Q. B. 180.
(*f*) *London and County Banking Co.* v. *Dover*, 11 Ch. Div. 204.
(*g*) *Wooley* v. *Colman*, 21 Ch. Div. 169.
(*h*) *Bank of London* v. *Ingram*, 20 Ch. Div. 463.

and the concurrence of the mortgagor in the sale is not in such a case necessary to perfect the title of the purchaser (*i*); and the mortgagee, having sold, is at liberty to retain to himself his principal, interest, and costs; and having done this, the surplus, if any, must be paid over to the person or persons who (but for the sale) would have been entitled to redeem; and of such surplus the selling mortgagee is a trustee (*k*),—although a constructive trustee only (*l*),—and will have to pay interest on such surplus at the rate of 4 per cent. from the date of the completion of the sale (*m*); but he is not otherwise a trustee in the general case (*n*),—*e.g.*, as regards his exercise of the power of sale (*o*). However, if notice to the mortgagor is required to be given before exercising the power of sale, the mortgagee who should sell without giving such notice would be liable in damages to the mortgagor or to his assignee of the equity of redemption (*p*),—even although by the express language of the power a *bonâ fide* purchaser from the selling mortgagee would not be affected by such notice not having been given, or in general by any other default in the selling mortgagee (*q*); but if the purchaser has express notice that the selling mortgagee has not given the required notice to the mortgagor, the purchaser would not in such a case be safe (*r*); and the purchaser should also be particularly cautious in the case of mortgages made by a client to his or her own solicitor, the mortgagee

Effect, where notice required to be given, before exercising power of sale.

(*i*) *Newman* v. *Selfe*, 33 Beav. 522.
(*k*) *West London Commercial Bank* v. *Reliance Building Society*, 29 Ch. Div. 954.
(*l*) *Thorne* v. *Heard*, 1894, 1 Ch. 599; 1895, A. C. 495.
(*m*) *Charles* v. *Jones*, 35 Ch. Div. 544.
(*n*) *Cholmeley* v. *Clinton*, 2 Jac. & W. 1, at p. 182.
(*o*) *Warner* v. *Jacob*, 20 Ch. Div. 220; *Hickson* v. *Darlow*, 23 Ch. Div. 690.
(*p*) *Hoole* v. *Smith*, 17 Ch. Div. 434.
(*q*) *Dicker* v. *Angerstein*, 3 Ch. Div. 600.
(*r*) *Selwyn* v. *Garfitt*, 38 Ch. Div. 273.

being, in such a case, under a duty to his client to protect him or her (*s*). And here it is convenient to observe, that the mortgagor may lawfully purchase from a mortgagee who sells in *bonâ fide* exercise of his power of sale (*t*),—just as any puisne mortgagee may do (*u*). But the mortgagee who is exercising the power of sale may not become the purchaser himself; but if he have done so, and then afterwards sells to a *bonâ fide* purchaser, the title of the latter will be good,—as if under a *bonâ fide* exercise of the power of sale; and this is so, although his vendor should purport to sell as beneficial owner, and not in exercise of his power at all; but in such a case, the selling mortgagee will remain accountable to the mortgagor for the purchase-moneys paid by the purchaser from him (*v*). All which latter observations apply also to the exercise of the power of sale, which, unless where it is expressly excluded by the mortgage deed, has by the Conveyancing Act, 1881, ss. 19, 20, 21, and 22, been rendered incident to every mortgage or charge by *deed* affecting any hereditaments of any tenure; but the power given by this statute is not to be exercised, unless and until either (1.) Notice requiring payment of the mortgage money has been given and been followed by three months' default; or (2.) Interest is in arrear for two months after becoming due; or (3.) There has been a breach of some provision (other than the covenant to repay) contained in the mortgage deed or in the Act; and at any time before selling under the Act, the mortgagee may appoint a receiver of the rents and profits, the mortgage deed itself also usually containing an

Or, (3.) Under statutory power of sale conferred by Conveyancing Act, 1881, ss. 19–22.

(*s*) *Cockburn* v. *Edwards*, 18 Ch. Div. 449; *Macleod* v. *Jones*, 42 Ch. Div. 289.
(*t*) *Kennedy* v. *De Trafford*, 1896, 1 Ch. 762; 1897, A. C. 180.
(*u*) *Shaw* v. *Bunney*, 33 Beav. 494.
(*v*) *Bailey* v. *Barnes*, 1894, 1 Ch. 25; *Astwood* v. *Cobbold*, 1894, A. C. 150.

express power to appoint such receiver (*x*). And note, that when mortgaged property is taken by compulsory purchase, the compensation-moneys go to the mortgagee, including the proportion paid for the good-will (if any) attaching to the premises (*y*).

Compensation on compulsory purchase.

Where the mortgage deed contains an attornment clause, the mortgagee may also (like a landlord for his rent) distrain upon the mortgaged premises (the distrainable articles thereon, whether belonging to the mortgagor or to any third person) (*z*),—for the arrears of his interest, and sometimes even for a large part of the principal money lent,—provided the attornment clause is not fraudulent (*a*); and provided that, as against a company which is in course of being wound up (voluntarily or otherwise), the leave of the court for the distress shall first have been obtained (*b*),—which leave may, of course, be refused (*c*); moreover, an attornment clause must, in general, be registered as a bill of sale (*d*), except in so far as regards the land mortgaged and the creation of the tenancy thereof between the parties (*e*),—which tenancy will determine with the death of the mortgagor, and any distress thereafter would be illegal (*f*).

(c.) Distress,—for interest, and even for principal.

If the mortgage debt be secured on real estate, and also collaterally by covenant or bond, the mortgagee may pursue all his remedies at the same time

Mortgagee may pursue all his remedies concurrently.

(*x*) *Mason* v. *Westoby*, 32 Ch. Div. 206.
(*y*) *Pile* v. *Pile, ex parte Lambton*, 3 Ch. Div. 36.
(*z*) *Kearsley* v. *Phillips*, 11 Q. B. D. 621.
(*a*) *Ex parte Jackson, in re Bowes*, 14 Ch. Div. 725; *Stanley* v. *Grundy*, 22 Ch. Div. 478.
(*b*) *Lee* v. *Roundwood Colliery Co.*, infra.
(*c*) *In re Higginshaw Spinning Co.*, 1896, 2 Ch. 544.
(*d*) *In re Willis, ex parte Kennedy*, 21 Q. B. D. 384; *Green* v. *March*, 1892, 2 Q. B. D. 330.
(*e*) *Mumford* v. *Collier*, 25 Q. B. D. 279; *Lee* v. *Roundwood Colliery Co.*, 1897, 1 Ch. 373.
(*f*) *Scobie* v. *Collins*, 1895, 1 Q. B. 375.

(*g*); but it does not follow, that whatever the mortgagee can add to his principal moneys as against the land, *e.g.*, his costs, charges, and expenses properly incurred, he can also sue for as a debt in an action of debt or of covenant (*h*). And if the mortgagee obtain full payment on the bond or covenant, the mortgagor is by the fact of payment entitled to a reconveyance of the estate, and foreclosure is rendered unnecessary; but if the mortgagee obtains only part payment on the bond or on the covenant, he may institute or go on with his foreclosure action; and giving credit in account for what he has received on the bond or covenant, he may foreclose for non-payment of the remainder; however, the action of foreclosure and (when it is available) the action on the personal covenant or bond should now in all cases be joined in one action (*i*). On the other hand, if the mortgagee obtains a foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant; but it is held, that (by doing so) he gives to the mortgagor a renewed right to redeem the estate and get it back, —or, in other words, he thereby *opens the foreclosure;* and consequently, if the mortgagee commence an action against the mortgagor on the bond after foreclosure, the mortgagor may commence an action against him for redemption; for upon payment of the whole debt secured by the mortgage, the mortgagor is entitled to have the estate back again and the securities given up; and if, therefore, after foreclosure, the mortgagee has so dealt with the mortgaged estate as to be unable to restore it to the

"Opening the foreclosure," —what it is, and when it happens.

(*g*) *Lockhart* v. *Hardy*, 9 Beav. 349; *Marshal* v. *Shrewsbury*, L. R. 10 Ch. App. 250.
(*h*) *Ex parte Fewings, in re Sneyd*, 25 Ch. Div. 338.
(*i*) *Powlett* v. *Hill*, 1893, 1 Ch. 277.

mortgagor on full payment (*k*), the court will prevent his suing on the bond or covenant (*l*). And we may here observe, that a foreclosure decree is almost always liable to be opened, even after a long interval of time and other intermediate dealings with the property; in other words, a mortgagor may (for good cause shown) redeem even after foreclosure absolute, but only upon terms of the strictest equity (*m*).

Mortgagor's continuing liability on covenant;

The original mortgagor remains liable to the original mortgagee on the covenant to pay the mortgage debt; and this is so, even after the mortgagor has conveyed away his equity of redemption in the mortgaged hereditaments to a purchaser; and the purchaser is not personally liable to the mortgagee on such covenant, although he may be (and usually is) liable to the mortgagor on his covenant with him to pay same and to indemnify the mortgagor therefrom. And in such a case, if the purchaser should make a second mortgage on the estate, and the first mortgagee should thereafter sue the original mortgagor, the latter, on payment of the original mortgage debt, will be entitled to a reconveyance of the mortgaged hereditaments,—and will in that way obtain a security on the mortgaged hereditaments in aid of the purchaser's covenant of indemnity, and will in fact acquire all the rights of the first mortgagee (*n*).

and his indemnity from purchaser, effectuated even as against mortgagee.

The equity of redemption follows the limitations of the original estate.

The question sometimes arises, whether, upon the true construction and effect of the mortgage deed, the equity of redemption is limited in a manner

(*k*) *Lockhart* v. *Hardy*, 9 Beav. 349.

(*l*) *Palmer* v. *Hendrie*, 27 Beav. 349; and see *Pearce* v. *Morris*, L. R. 5 Ch. App. 277; *Teevan* v. *Smith*, 20 Ch. Div. 724; *Davis* v. *Reilly*, 1898, 1 Q. B. 1.

(*m*) *Campbell* v. *Holyland*, 7 Ch. Div. 166.

(*n*) *Kinnaird* v. *Trollope*, 39 Ch. Div. 636.

different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses; and this question has generally arisen in mortgages by husband and wife of the wife's estate. Now the governing principle of equity in such cases is, that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption may by the mortgage deed have been reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a *resulting* trust for the benefit of the wife and her heirs; and the wife or her heirs shall redeem, and not the heirs of the husband, her estate being in equity deemed only a security for his debt (*o*). At the same time, the intention to alter the previous title may, in particular cases, be manifested by the language of the proviso itself; and there is no necessity for any express declaration or recital to that effect (*p*). Also, in every case, the terms of the proviso for reconveyance must be literally complied with, whether a *resulting* trust does or does not thereupon arise; for there is great danger in the mortgagee reconveying otherwise than according to the express terms of the proviso (*q*).

Equity of redemption results to wife, where the mortgage is of her estate;

unless a different intention manifested.

Proviso for redemption to be strictly pursued.

(*o*) *Huntingdon* v. *Huntingdon*, 2 Bro. P. C. 1; *Jackson* v. *Innes*, 1 Bligh. 104; *Plomley* v. *Felton*, 14 App. Ca. 61; *Williams* v. *Mitchell*, 1891, 3 Ch. 474; *Davies* v. *Whitehead*, 1894, 2 Ch. 133.

(*p*) *Atkinson* v. *Smith*, 3 De G. & Jo. 186; *Jones* v. *Davies*, 8 Ch. Div. 205.

(*q*) *Magnus* v. *Queensland National Bank*, 37 Ch. Div. 466.

CHAPTER XVII.

OF EQUITABLE MORTGAGES OF REALTY BY DEPOSIT OF TITLE-DEEDS.

Statute of Frauds requires contracts concerning lands to be in writing.

Deposit of title-deeds, *being an agreement executed*, is not within the statute.

NOTWITHSTANDING anything to the contrary in the Statute of Frauds (*a*), if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of his creditor (*b*), or of some third person on his behalf (*c*), such deposit amounts to a mortgage, and is a valid mortgage of the estate,—for it is of itself evidence of *an agreement executed* for a mortgage (*d*); and the creditor may avail himself of this agreement as of an agreement in writing, and may sue thereon for the completion of his security by a legal conveyance from the debtor (*e*),—for, as Lord Abinger points out in *Keys* v. *Williams* (*f*), these equitable mortgages by deposit of title-deeds are not an invasion of the Statute of Frauds, which applies to *executory* agreements only, and not to agreements which instantly by the deposit become *executed* agreements; and besides, the depositor could not, in such a case, even at law recover back his title-deeds in trover or detinue, for the answer to such an action would be that the title-deeds were pledged for a sum of money still remaining unpaid; and in equity, the depositor seek-

(*a*) 29 Car. II. c. 3, s. 4.
(*b*) *Russel* v. *Russel*, 1 L. C. 726.
(*c*) *Ex parte Coming*, 9 Ves. 115.
(*d*) *Ex parte Wright*, 19 Ves. 258.
(*e*) *Price* v. *Bury*, 2 Drew. 42; *Ex parte Moss*, 3 De G. & Sm. 599.
(*f*) 3 Y. & C. Exch. Ca. 55, 61.

ing equity must of course do equity by repaying the money lent. And it appears, that there may be an equitable mortgage by deposit, even where the deposit is of a mere receipt for the purchase-money of an estate,—*scil.* where the estate has not yet been conveyed, and the receipt specifically refers to the estate, and the depositor has no other documents evidencing his title to the estate (*g*); also, *semble*, by the deposit of the receipt-books held by the members of a Building Society, provided they refer to the specific real estate, and the title-deeds are in the possession of the Building Society as first mortgagees (*h*). Also, when land has been registered under the Land Transfer Acts, 1875, 1897, the land certificate (and not the title-deeds) is the proper document to deposit,—like as the certificates of railway shares would be deposited. Also, the office copy of a registered lease and (for the purpose of any sub-mortgage) the certificate of charge would in like manner be the proper document to deposit (*i*); but where the property is a church benefice, and the incumbent is the registered proprietor of the benefice, he is expressly disabled from effecting any mortgage by deposit of the land certificate (*k*).

Deposit of receipt for purchase-money,—effect of.

Certificate, or office copy, deposit of, in case of registered land.

A mortgagee by deposit is entitled to the remedy by foreclosure (*l*); and he is also entitled to have an order for sale (*m*),—and that whether there is or is not a written memorandum accompanying the deposit (*n*); but where there is a mere equitable

Equitable mortgagee by deposit,—his remedy is either: (*a.*) Foreclosure; or (*b.*) Sale,—but in either case.

(*g*) *Goodwin* v. *Waghorn*, 4 L. J., N. S., Ch. 162.
(*h*) *Re Yates, Noehmer* v. *Yates*, 1896, unreported.
(*i*) *Ex parte Moss*, 3 De G. & Sm. 599; 38 & 39 Vict. c. 87, s. 81 (now repealed); 60 & 61 Vict. c. 65, s. 8.
(*k*) 60 & 61 Vict. c. 65, s. 15 (ii.).
(*l*) *Price* v. *Bury*, L. R. 16 Eq. 153 *n.*; *James* v. *James*, ibid.; *Backhouse* v. *Charlton*, 8 Ch. Div. 444.
(*m*) *York Union Banking Co.* v. *Artley*, 11 Ch. Div. 205.
(*n*) *Oldham* v. *Stringer*, W. N. 1884, p. 235.

charge created by will (and not by deed or memorandum *inter vivos*), the remedy of the chargee is sale only, and not foreclosure (*o*). The sale will in general be authorised one month after the certificate showing the amount of what is due (*p*); but a period of three months after certificate will occasionally be given (*q*). The form of the foreclosure judgment in the case of equitable mortgages will be found in *Lees* v. *Fisher* (*r*); and the form of the order for a sale in the like case will be found in *Wade* v. *Wilson* (*s*); and although, after foreclosure absolute, whether in the case of a legal or in the case of an equitable mortgage, the mortgagee was not formerly entitled in the same action to recover the possession (*t*),—unless possibly when the judgment contained an order upon the mortgagor to convey (*u*),—yet now, under Order xviii. Rule 2 (December 1885), a plaintiff in any action for foreclosure or redemption (which action also may now, under Order lv. Rule 5, be commenced by originating summons) may claim and obtain an order against the defendant for delivery of the possession on or after the order absolute for foreclosure or redemption. Also, when the plaintiff in a redemption action fails to redeem, and is accordingly foreclosed, the defendant in whose favour the foreclosure has taken place may, on motion or summons in the action, obtain an order for delivery of the possession of the mortgaged property (*v*),—but for this purpose the writ or originating summons must contain a

only under an order of the court.

Possession, how obtained after foreclosure.

(*o*) *Tennant* v. *Trenchard*, L. R. 4 Ch. App. 537; *In re Owen*, 1894, 3 Ch. 220.
(*p*) *Wade* v. *Wilson*, 22 Ch. Div. 235.
(*q*) *Green* v. *Biggs*, W. N. 1885, p. 128
(*r*) 22 Ch. Div. 283.
(*s*) 22 Ch. Div. 235.
(*t*) *Lees* v. *Fisher*, 22 Ch. Div. 283.
(*u*) *Wood* v. *Wheater*, 22 Ch. Div. 281.
(*v*) *Best* v. *Applegate*, 37 Ch. Div. 42.

specific description of the mortgaged hereditaments (*x*).

Deposit of deeds covers further advances,

A mortgage by deposit will cover future advances, if such was the agreement when the first advance was made,—or if it can be proved that a subsequent advance was made on an agreement, express or implied, that the deeds were to remain a security for it as well (*y*); and the mortgage carries interest at the rate of £4 per cent. (*z*), failing any other agreed rate. The deposit of the title-deeds may be made by any one who is in that behalf duly authorised (*a*). And where there has been a deposit of title-deeds for the purpose of preparing a legal mortgage, the balance of authority is in favour of the proposition, that such deposit, although for such specific purpose, constitutes a valid interim equitable mortgage,—that interim effect being not inconsistent with the expressed purpose of the deposit of the title-deeds. And note, that although a verbal agreement to deposit title-deeds for a sum of money advanced does not, without an actual deposit or other sufficient act of part performance, constitute a good equitable mortgage (*b*), yet such an agreement (if in writing) would be good without an actual deposit. Also, it is now clearly settled, that in order to create an equitable mortgage by deposit, it is not necessary that all the title-deeds, or even all the material title-deeds, should be deposited,—it being sufficient if the deeds deposited are material to the title, and

and interest.

Deposit of deeds for purpose of preparing a legal mortgage.

Parol agreement to deposit deeds for money advanced.

All title-deeds need not be deposited.

(*x*) *Thynne* v. *Sarl*, 1891, 2 Ch. 79.

(*y*) *Ex parte Kensington*, 2 V. & B. 83; *James* v. *Rice*, 5 De G. M. & G. 461.

(*z*) *Re Kerr's Policy*, L. R. 8 Eq. 331.

(*a*) *Brocklesby's Case*, 1893, 3 Ch. 130; 1895, A. C. 173; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192.

(*b*) *Ex parte Farley*, 1 M. D. & De G. 683; *Daw* v. *Terrell*, 33 Beav. 218; *Ex parte Broderick*, 18 Q. B. D. 766.

are proved to have been deposited with the intention of creating a mortgage (*c*).

Equitable mortgagee parting with the title-deeds to mortgagor.

An equitable mortgagee who parts with the title-deeds, and so enables the depositor to make another equitable mortgage, may be postponed to such second equitable mortgagee by reason of his laches in not getting back the deeds—on the principle that, as between two innocent parties, that one must suffer who has so acted as to conduce to the fraud being committed (*d*); but it is necessary in the case of a prior equitable mortgagee, equally as with a prior legal mortgagee, to show some *positive* act on his part in order to postpone him, and yet long and inexcusable neglect may amount to a positive act within the meaning of this rule (*e*). However, an equitable mortgagee by deposit of title-deeds will be entitled to priority over a subsequent legal mortgagee who advances his money *with notice* of the deposit (*f*); and constructive notice will for this purpose suffice; mere incaution, however, on the part of the subsequent legal mortgagee will not subject him to the prior equitable mortgage of which he had, in fact, no notice,—for a legal mortgagee is not to be postponed, unless the so-called want of caution on his part amounts in fact to fraud or gross and wilful negligence; and the court will not impute fraud or gross and wilful negligence to the mortgagee if he has *bonâ fide* inquired for the deeds, and a reasonable excuse has been given for the non-delivery of them (*g*).

Equitable mortgagee has priority to subsequent legal mortgagee with notice.

Legal mortgagee not postponed to prior equitable mortgagee, if former has made *bonâ fide* inquiry after the deeds.

(*c*) *Lacon* v. *Allen*, 3 Drew. 579; *Roberts* v. *Croft*, 2 De G. & Jo. 1.
(*d*) *Keats* v. *Phillips* (the Dimsdale Fraud Case), 18 Ch. Div. 560.
(*e*) *Farrand* v. *Yorkshire Bank*, 40 Ch. Div. 182; *In re Castell and Brown*, 1898, W. N. 7.
(*f*) *Hiern* v. *Mill*, 13 Ves. 114; *Jones* v. *Williams*, 5 W. R. 540.
(*g*) *Hewitt* v. *Loosemore*, 9 Hare, 458; *Clarke* v. *Palmer*, 21 Ch. Div. 124; *Northern Counties Fire Assurance* v. *Whipp*, 26 Ch. Div. 482; *Manners* v. *Mew*, 29 Ch. Div. 725; *In re Vernon, Ewens & Co.*, 32 Ch. Div. 165.

CHAPTER XVIII.

OF MORTGAGES AND PLEDGES OF PERSONALTY.

Differences between a *mortgage* and a *pledge* of personalty. (*a.*) In their own nature.

A MORTGAGE of personal property differs from a pledge,—for a mortgage is a conditional transfer or conveyance of the very property itself, the interim possession only remaining with the mortgagor; while a pledge passes the possession immediately to the pledgee, but he acquires only a special property in the article pledged (*a*). And in the case of a pledge, if a time for the redemption be fixed by the contract, still the pledgor may redeem afterwards, if he applies within a reasonable time; and if no time is fixed for the payment, the pledgor, unless he is sooner called upon by the pledgee, has his whole life to redeem,—and in case of his death, his personal representatives may redeem (*b*). Also, in general, the remedy of the pledgor is at law; and it is only when any special reason exists for his so doing that he proceeds in equity (*c*). Moreover, the pledgee, although he may (in a proper case) take proceedings in equity to sell the pledge (*d*), still, after the time for redemption has passed, he may, upon due notice given to the pledgor, sell the pledge without any order for sale (*e*),—and he may sell through the pledgor as his agent (*f*); but note that, in general, the pledgee ought neither to sell nor to

(*b.*) As regards remedies. (*aa.*) Pledgor's right of redemption.

(*bb.*) Pledgee's right to sell.

(*a*) *Jones* v. *Smith*, 2 Ves. Jr. 378.
(*b*) *Kemp* v. *Westbrook*, 1 Ves. Sr. 278.
(*c*) *Jones* v. *Smith*, 2 Ves. Jr. 378.
(*d*) *Ex parte Mountford*, 14 Ves. 606; *Carter* v. *Wake*, 4 Ch. Div. 605;
(*e*) *Pothonier* v. *Dawson*, Holt's N. P. 385; *Jones* v. *Marshall*, 24 Q. B. D. 269; *Fraser* v. *Byas*, W. N. 1895, p. 112.
(*f*) *North-Western Bank* v. *Poynter*, 1895, A. C. 56.

sub-pledge *without first demanding repayment of the money lent* (*g*). On the other hand, in the case of mortgages of personal property, as in mortgages of land, there exists after default,—*i.e.*, after the legal right of redemption is lost,—an equity of redemption, which may be asserted by the mortgagor, if he brings his action to redeem within a reasonable time (*h*); but there is not, in general, in the case of mortgages of personalty (as there usually is in the case of mortgages of realty) any necessity to bring an action of foreclosure; but the mortgagee may, in general, upon due notice, sell the personal property mortgaged (*i*); and this is so, because, as a general rule, personal property (unlike land) has no especial value to the mortgagor over and beyond its value in the market.

(*aa.*) Mortgagor's right of redemption.

(*bb.*) Mortgagee's right to sell.

Where the personal property comprised in the mortgage is a reversionary sum of stock, and the reversion falls into possession before the mortgagee has exercised his power of sale of the reversion, the trustees are not bound to,—nor ought they to,—pay over the entire reversion to the mortgagee, when it is in excess of the amount due on the mortgage,—and more especially if there have been any subsequent mortgage or mortgages of the reversion of which they (the trustees) have received notice; but the proper course of the trustees, in such a case, is, to pay to the first mortgagee only the amount of his mortgage deed, retaining (and eventually paying over to the mortgagor or to and among the subsequent mortgagees) the surplus which shall thereafter remain (*k*).

Reversionary personal estate successively mortgaged,—application of, when the reversion falls in, before the first mortgagee has sold.

In case a pledgee should, *before condition broken*,

(*g*) *France* v. *Clark*, 26 Ch. Div. 257.
(*h*) *Kemp* v. *Westbrook*, 1 Ves. Sr. 278.
(*i*) *In re Morritt*, 18 Q. B. D. 222; *Watkins* v. *Evans*, ib. 386.
(*k*) *Jeffery* v. *Sayles*, 1896, 1 Ch. 1.

Effect of transferring a pledge.

deliver over the pledge to a purchaser or to a sub-pledgee, if the pledge is of a negotiable instrument, the pledgor will be bound; but if the pledge is of a non-negotiable instrument, the pledgor is bound only to the extent of the pledgee's own right (*l*),—therefore in the case of a non-negotiable instrument, if the purchaser or sub-pledgee, upon tender to him by the pledgor of the amount due to the original pledgee, should refuse to deliver up the pledge to the original pledgor, the original pledgor may have an action of detinue against the party so refusing (*m*). But as regards pledges of personalty, the presumption as against the pledgor is, that if the pledgee or pawnee advance any further sum of money to the pledgor or pawnor, the pledge is to be held until the subsequent debt or advance is paid, as well as the original debt,—and this without any distinct proof of any contract for that purpose (*n*). Also, it may occasionally happen that, under special circumstances, *e.g.*, under the "*mutual credit*" or "*mutual dealings*" clause (*o*), applicable in the case of the mortgagor's bankruptcy, the mortgagee would have the right, as against other creditors, of applying the surplus after discharging his mortgage debt in or towards satisfaction of a subsequent judgment debt (*p*), and even of a subsequent simple contract or specialty debt (*q*); but this right is not a right of tacking in any proper sense of that phrase (*r*). And here we will refer to the provisions of the Factors Act, 1889 (52 & 53 Vict. c. 45), by which (as aided by section 25 of the Sale of Goods Act,

The pledge will cover future advances, in general.

Application of surplus.

Factors and trade-vendees, —sales and pledges by.

(*l*) *France* v. *Clark*, supra; *Fox* v. *Martin*, W. N. 1895, p. 36.
(*m*) *Nyberg* v. *Handelaar*, 1892, 2 Q. B. 202.
(*n*) *Demainbray* v. *Metcalfe*, 2 Vern. 691.
(*o*) *Eberle's Hotel Co.* v. *Jonas*, 18 Q. B. D. 459; *Palmer* v. *Day*, 1895, 2 Q. B. 618; *In re Mid-Kent Fruit Factory*, 1896, 1 Ch. 567.
(*p*) *Spalding* v. *Thompson*, 26 Beav. 637.
(*q*) *In re Haselfoot's Estate*, L. R. 13 Eq. 327.
(*r*) *Talbot* v. *Frere*, 9 Ch. Div. 568; *Christison* v. *Bolam*, 36 Ch. Div. 223.

1893) (56 & 57 Vict. c. 71), persons who are intrusted with the possession of goods and merchandise as factors may, although they are not the owners of such goods, make valid pledges of such goods and merchandise to *bonâ fide* lenders; and likewise persons who are not factors for sale, *but who are themselves buyers with a view to sale in the ordinary course of trade*, may make pledges or sales of goods and merchandise which shall be valid against the unpaid vendors of the same goods and merchandise; but these last-mentioned provisions, of course, do not apply to the case of any mere private individual buying (as it is called) any specific article for his own use under a hire and purchase agreement (*s*),—for the Acts referred to have relation to traders only, and to dealings in the course of trade only.

Mortgages of personal chattels,—being bills of sale within the Bills of Sale Acts, 1878 and 1882.

Very stringent statutory provisions have recently been made regarding mortgages of personal chattels (consisting of furniture, and such-like other goods that are capable of transfer by mere delivery), the primary object of these provisions having been the protection of the general creditors of the mortgagor, who is commonly called the grantor of the bill of sale; but latterly (*scil.* since 1882) the object thereof has been extended so as to include the protection of the grantor himself. The Bills of Sale Acts at present in force are the Act of 1878 (*t*) and the Act of 1882 (*u*). The provisions of the former of these two Acts are general, extending not only to bills of sale given by way of security for money lent, but also to bills of sale which are (in effect) deeds of gift or of absolute assignment for value,—including, *e.g.*,

(*s*) *Wood* v. *Rowcliffe*, 6 Hare, 183; 35 & 36 Vict. c. 93, s. 25; *Singer Co.* v. *Clark*, 5 Exch. Div. 37; *Helby* v. *Matthews*, 1895, A. C. 471,—*Lee* v. *Butler*, 1893, 2 Q. B. 318, unless explainable, being bad law.

(*t*) 41 & 42 Vict. c. 31, which repealed the earlier Acts, 17 & 18 Vict. c. 36, and 29 & 30 Vict. c. 96.

(*u*) 45 & 46 Vict. c. 43.

post-nuptial marriage settlements (*v*); the provisions of the latter Act, on the other hand, are confined to bills of sale given as security for money lent (*x*); but neither Act extends to the debentures of a company (*y*),—*scil.* being a company which keeps its own register of mortgages, and not otherwise (*z*). And under the provisions of the two Acts in question, the bill of sale (whether it be a security for money lent or not) must be registered within seven days of its execution, and an affidavit,—which affidavit must not be sworn before the solicitor of the grantee (*a*),—must be registered with it, stating the execution and the true date thereof, the residence and occupation of the grantor, and the residences and occupations of the attesting witnesses (*b*); and the execution of the bill of sale by the grantor must be attested by a solicitor, when the bill is by way of absolute gift or assignment, but not when it is by way of security; and the bill of sale must be re-registered every five years (*c*). If the bill of sale is given by way of security for money lent, it must contain a schedule specifically enumerating the personal chattels comprised therein, and it must also otherwise be substantially in accordance with the form prescribed by the Act of 1882, and a model form is given in the schedule to that Act (*d*); also, the consideration for which the bill of sale is given must be truly stated therein (*e*), however complicated (or difficult to state) the consideration may

Requisite of registration.

Schedule, when required, and when not.

(*v*) *Ashton* v. *Blackshaw*, L. R. 9 Eq. 510.
(*x*) *Swift* v. *Pannell*, 24 Ch. Div. 210.
(*y*) *In re Standard Manfacturing Co.*, 1891, 1 Ch. 627; *In re Opera Limited*, 1891, 3 Ch. 260; *Richards* v. *Kidderminster Overseers*, 1896, 2 Ch. 212.
(*z*) *Great Northern R. C.* v. *Coal Co-operative Society*, 1896, 1 Ch. 187.
(*a*) *Baker* v. *Ambrose*, 1896, 2 Q. B. 372.
(*b*) *Grindell* v. *Brendon*, 6 C. B., N. S., 698.
(*c*) *Ex parte Furber*, 1893, 2 Q. B. D. 122.
(*d*) *Simmons* v. *Woodward*, 1892, A. C. 100, reversing S. C. (*Woodward* v. *Heseltine*), 1891, 1 Ch. 464.
(*e*) *Ex parte Rolph*, 19 Ch. Div. 98; *Ex parte Firth*, ib. 419; *Hamilton* v. *Chaine*, 7 Q. B. D. 1, 317; *Ex parte Johnson*, 26 Ch. Div. 338.

be (*f*). Failing compliance with any of these specified requisites, the bill of sale as a security is void as against other duly registered bills of sale (*g*), and as against the trustee in bankruptcy of the grantor and the execution creditors; and it is void also (being by way of security, and not of absolute gift or assignment) even as between the grantor and the grantee themselves of the bill (*h*); and if (being by way of security), it is (for any of the reasons aforesaid) void as a security, it is also void even as regards the covenant therein contained for the repayment of the money lent (*i*),—nevertheless, any collateral security, which was otherwise good in itself, would not be made void thereby (*k*); nor would any assurance of freehold lands, although comprised in the same document as the bill of sale (*l*); nor, in fact, any other operative part of the bill of sale which was of a nature to be distinctly severable (*m*). By the interpretation clause contained in the Act of 1878, bills of sale extend to include (besides assignments properly so called) licences to take possession of personal chattels (not being rights to distrain in mining leases) (*n*); also, attornments and agreements under which any such right of taking possession could or might arise; but the courts have held that a document, in order to be a bill of sale, must amount to an "assurance" of some sort (*o*); *e.g.*, a receipt given for the price of goods which were

Non-compliance with prescribed form, effect of.

(*f*) *Sharp* v. *Brown*, 38 Ch. Div. 427; *Darlow* v. *Bland*, 1897, 1 Q. B. 125.

(*g*) *Conelly* v. *Steer*, 7 Q. B. D. 520; *Lyons* v. *Tucker*, 7 Q. B. D. 523.

(*h*) *Davies* v. *Burton*, 11 Q. B. D. 537; *In re Burdett, ex parte Byrne*, 20 Q. B. D. 310.

(*i*) *Davies* v. *Rees*, 17 Q. B. D. 408; *Ex parte Fourdrinier*, 21 Ch. Div. 510.

(*k*) *Monetary Advance Co.* v. *Carter*, 20 Q. B. D. 785.

(*l*) *In re Yates, Batcheldor* v. *Yates*, 38 Ch. Div. 112; *Small* v. *N. P. Bank*, 1894, 1 Ch. 686; *Brooke* v. *Brooke*, 1894, 2 Ch. 600.

(*m*) *In re Isaacson*, W. N. 1894, p. 216.

(*n*) *Lee* v. *Roundwood Colliery Co.*, 1897, 1 Ch. 373.

(*o*) *North Central Waggon Co.* v. *Manchester and Sheffield R. C.*, 35 Ch. Div. 191; *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41.

Realisation of security.

bonâ fide sold and delivered prior to such receipt being given, would not be a bill of sale of the goods referred to therein (*p*). And it is expressly provided, by the Act of 1882, that possession is not now to be taken (under any bill of sale), unless for one of the causes specified in section 7 of that Act; and after possession is so taken, the personal chattels are not to be removed or sold until five clear days have expired; and, apparently, the power of sale which the grantee may exercise is the common law power of sale, and not the power of sale given by the Conveyancing Act, 1881 (*q*). A bill of sale, even when completely valid, is no protection of the goods comprised therein against the landlord's right of distress for rent in arrear (*r*); or, under the specific provisions of particular statutes, against certain other distresses (*e.g.*, for poor-rates) (*s*).

Possession taken at once, dispenses with registration.

Where the bill of sale is of such a character that possession can be and is taken thereunder immediately on the execution thereof, and such possession is retained thereafter, no registration of the bill is required at all (*t*); and this might be the case with post-nuptial marriage settlements; but even in that case registration might be desirable, as under section 20 of the Act of 1878, the registration being once made and afterwards maintained, the personal chattels comprised in the bill would not be deemed to be in the possession, order, or disposition of the grantor of the bill, within the meaning of the Bankruptcy Act, 1883; but section 20 of the Act of 1878 has been repealed by section 15 of the Act of 1882 as regards bills of sale given by way of security for money lent.

(*p*) *Charlesworth* v. *Mills*, 1892, A. C. 231; *Ramsay* v. *Margrett*, 1894, 2 Q. B. 18.
(*q*) *Calvert* v. *Thomas*, 19 Q. B. D. 204.
(*r*) *Lee* v. *Roundwood Colliery Co.*, 1897, 1 Ch. 373.
(*s*) *In re Marriage, Neave & Co.*, 1896, 2 Ch. 693.
(*t*) *Charlesworth* v. *Mills*, supra; *Morris* v. *Delobbel*, 1892, 2 Ch. 352.

After-acquired property.

What documents require no registration, as not being bills of sale.

There can be no valid bill of sale of after-acquired property under the Bills of Sale Act, 1882 (*u*); but goods replacing others in ordinary course may be validly included in the bill of sale (*v*). Also, no registration is required of a wharfinger's warrant deposited by way of pledge, or even of the memorandum (if any) accompanying such deposit (*x*); or of a delivery order for goods at a warehouse (*y*); also, hiring agreements are not bills of sale requiring registration, provided they are *bonâ fide* (*z*),—*secus*, if they are in substance bills of sale and only colourably hiring agreements (*a*). A pledge is, of course, not a bill of sale at all (*b*); and certain hypothecations have been, by statute, exempted from registration as bills of sale (*c*).

Mortgages of ships.

Mortgages of British ships are to be in the form prescribed by the Merchant Shipping Act, 1894 (*d*), s. 31,—a re-enactment of the like provision contained in the 17 & 18 Vict. c. 120,—and are to be registered by the Registrar of Shipping; and successive registered mortgages rank, as between themselves, according to the dates of their registration, and not of their own dates; and if registered, and even, *semble*, although unregistered, they are not affected by the order and disposition clause, in the event of the bankruptcy of the mortgagor. Such mortgages are also transferred in the prescribed

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(*u*) *Thomas* v. *Kelly*, 13 App. Ca. 506.
(*v*) *Furber* v. *Cobb*, 18 Q. B. D. 494; *Seed* v. *Bradley*, 1894, 1 Q. B. 319.
(*x*) *Attenborough's Case*, 28 Ch. Div. 682.
(*y*) *Grigg* v. *National Bank Assurance Co.*, 1891, 3 Ch. 206.
(*z*) *Crawcour* v. *Salter*, 18 Ch. Div. 30; *Ex parte Turquand, in re Parker*, 14 Q. B. D. 636; *McEntire* v. *Crossley Brothers*, 1895, A. C. 457.
(*a*) *Ex parte Odell*, 10 Ch. Div. 76; *Beckett* v. *Tower Assets Co.*, 1891, 1 Q. B. 638.
(*b*) *Hilton* v. *Tucker*, 39 Ch. Div. 669.
(*c*) 53 & 54 Vict. c. 53.
(*d*) 57 & 58 Vict. c. 60.

manner, and discharged in the prescribed manner. When the mortgagee's interest is transmitted by death, marriage, or the like, a declaration of such transmission signed by the transmittee is to be registered. The registered mortgagee has an absolute power of sale, and may take possession of, and also use (*e*), the ship at any time after default: but until he takes possession, the mortgagor remains the owner, and the costs of all necessary repairs (for which the vessel is subject to a lien) take precedence of the mortgage (*f*). An unregistered mortgage of a ship is good as between the mortgagor and the mortgagee, and against the trustee in bankruptcy of the mortgagor (*g*); and, generally, against all persons other than a subsequent mortgagee duly registered (*h*). And, by section 57 of the Act, re-enacting in this particular the like provision contained in the Merchant Shipping Act, 1862 (*i*), equities (including liens) (*k*) may be enforced against mortgagees (and owners) of ships, just as against the mortgagees (and owners) of other personal chattels (*l*); but that provision does not, *e.g.*, give to an unregistered equitable mortgage priority over a subsequent duly registered legal mortgage of the ship (*m*). The mortgage of a ship does not require registration under the Bills of Sale Acts, 1878 and 1882, or under either of these Acts.

Powers of registered mortgagee.

Unregistered mortgages,—validity of.

Unregistered equities,—enforcement of.

(*e*) *De Mattos* v. *Gibson*, 1 Jo. & H. 79.
(*f*) *The Orchis*, 15 P. D. 38.
(*g*) *Stapleton* v. *Haymen*, 2 H. &. C. 718.
(*h*) *Keith* v. *Burrows*, 2 App. Ca. 636; *Park* v. *Applebee*, 7 De G. M. & G. 585.
(*i*) 25 & 26 Vict. c. 63.
(*k*) *The Ripon City*, 1897, P. 226; 57 & 58 Vict. c. 60, s. 167.
(*l*) See *Ward* v. *Beck*, 13 C. B., N. S., 668.
(*m*) *Black* v. *Williams*, 1895, 1 Ch. 408.

CHAPTER XIX.

OF LIENS.

THERE are many varieties of liens,—*e.g.*, the lien which exists in favour of artisans and others, who have bestowed their labour and services on the property in respect of which the lien is claimed; the lien which exists in many cases, by custom,—as in the case of innkeepers (*a*); or by the usage of trade or of commerce,—as in the case of packers (*b*), warehousemen (*c*), auctioneers (*d*), and the like; also, the lien which exists by statute, upon or against a ship (and the true owners and mortgagees thereof), in respect of the expenses incurred for the ship's necessaries (*e*), and the like. Moreover, a lien is often created and sustained in equity where it is unknown at law,—as in the case of the sale of lands, where a lien exists for the unpaid purchase-money. Moreover, a lien even at law is not always confined to the very property upon which the labour or services have been bestowed, but it often is, by the usage of trade, extended to cases of a general balance of accounts,—*e.g.*, in favour of factors (*f*) and others; and in order to ascertain the amount of the account in such cases, resort has been had to a court of equity.

Varieties of lien,—at law and in equity.

(*a*) *Robins* v. *Gray*, 1895, 2 Q. B. 501.
(*b*) *In re Witt, ex parte Shubrook*, 2 Ch. Div. 489.
(*c*) *Ex parte Deeze*, 1 Atk. 228.
(*d*) *Webb* v. *Smith*, 38 Ch. Div. 192.
(*e*) *The Ripon City*, 1897, P. 226.
(*f*) *Green* v. *Farmer*, 4 Burr. 2214; *Walker* v. *Birch*, 6 T. R. 258.

Diversities among liens.

The principal diversities among liens appear to be the following:—(*a.*) A *particular* lien on goods,—which is confined to the particular charge; and a *general* lien on goods,—which extends not only to the particular account, but also to the general balance of the accounts (*g*). (*b.*) A lien on *lands*,—which commences only when the possession of the lands is parted with to the purchaser; and a lien on *goods*,—which lasts only while the possession is retained by the vendor, and which ceases when it is parted with to the purchaser (*h*),—the maker of an article having also, in general, a lien upon it while it remains in an uncomplete state (*i*) and undelivered. And lastly, there is (*c.*) The lien of a solicitor on the *deeds and documents* of his client,—which arises *proprio vigore*, but which at the most is only a passive protection; and the lien of a solicitor on a *fund recovered*,—which arises only upon the court's declaring the solicitor entitled to it, and which is in all cases (when once declared) both an active and (comparatively speaking) an immediate remedy and redress; and it is with these two last-mentioned liens that we are now principally concerned.

The lien of a solicitor: (1.) On deeds, books, &c.

And, Firstly, as regards the lien which a solicitor has on the deeds, books, and papers of his client for his costs,—That is an instance of a lien originating by custom, and afterwards sanctioned by decisions at law and in equity; and it is a right not depending upon contract,—wanting the character of a mortgage or pledge, and being merely an equitable right to withhold from his client until his bill is paid (*k*) such things as have been intrusted to the solicitor as such, and with reference to which he has given his

(*g*) *In re Witt. ex parte Shubrook*, supra.
(*h*) *Grice* v. *Richardson*, 3 App. Ca. 319.
(*i*) *Bellamy* v. *Davey*, 1891, 3 Ch. 540.
(*k*) *In re Hanbury*, W. N. 1896, p. 172.

skill and labour; and (as already suggested) it is not a right to enforce any active claim against his client (*l*); and, *nota bene*, the deeds, &c., must have come to the solicitor's hands in his character of solicitor, and not otherwise (*m*); and his lien on them is for his costs only, and not for any debts (*n*); also, he may by his conduct (*e.g.*, by taking an express mortgage) be held to have abandoned his lien (*o*). On the other hand, Secondly, the solicitor's lien upon a fund realised in a suit for his costs of the suit,—This is a lien which he may actively enforce (*p*); and it is the creation of the statute law, the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, having enacted, that it shall be lawful for the court or judge before whom any suit or matter has been heard (*q*) to declare (if the court in its discretion thinks fit, but not otherwise) (*r*), that the solicitor employed therein is entitled to a charge upon the property recovered or preserved by his instrumentality in such suit or matter; and the executor (*s*) or assignee (*t*) of the solicitor is also entitled to this lien; and the word "*property*" in the statute has been held to include "costs ordered to be paid" (*u*); but where there is a counter-claim in the action, and the plaintiff succeeds on the claim and the defendant on the counter-claim, the balance only of such costs is

(2.) On fund realised in a suit.

(2a.) On costs recovered.

(*l*) *Bozon* v. *Bolland*, 4 My. & Cr. 358; *Curwen* v. *Milburn*, 42 Ch. Div. 424.
(*m*) *Ex parte Fuller*, 16 Ch. Div. 617.
(*n*) *In re Galland*, 31 Ch. Div. 296.
(*o*) *In re Taylor, Stileman & Co.*, 1891, 1 Ch. 590; *In re Douglas, Norman & Co.*, 1898, 1 Ch. 199.
(*p*) *Verity* v. *Wylde*, 4 Drew. 427; *Haymes* v. *Cooper*, 33 Beav. 431.
(*q*) *Brown* v. *Trotman*, 12 Ch. Div. 880; *Clover* v. *Adams*, 6 Q. B. D. 622; *In re Graydon*, 1896, 1 Q. B. 417; *In re Wood*, W. N. 1896, p. 163; *Waterland* v. *Serle*, 1897, W. N. 163.
(*r*) *Harrison* v. *Harrison*, 13 P. D. 180.
(*s*) *Baile* v. *Baile*, L. R. 13 Eq. 497.
(*t*) *Briscoe* v. *Briscoe*, 1892, 3 Ch. 543.
(*u*) *Guy* v. *Churchill*, 35 Ch. Div. 489.

deemed to have been "recovered" in the action (*v*); and in all cases this charging order is necessary to intercept the fund in the solicitor's favour (*x*). A solicitor may be entitled to both liens at once,—that is to say, to his lien on the papers and also to his lien on the fund recovered (*y*),—but not to a lien on the fund, if he has taken a specific mortgage for his costs (*z*); also, the lien on the fund recovered extends usually to the entire fund, not merely to the particular share of his own client therein (*a*); and although the solicitor has been discharged by his client, he may be declared entitled to this lien,—but subject to the like lien in the new solicitor (*b*), the lien of the later solicitor always having priority over the lien and liens of the prior solicitor or solicitors (*c*). Also, the town agent of a country solicitor having a lien against such country solicitor, who in turn has a lien against the country client, upon a fund recovered, may exercise against the country client,—to the extent of the country solicitor's lien against such client, but not further,—his, the town agent's, own lien against the country solicitor (*d*),—but save in that indirect way, the town agent of the solicitor is not entitled to any lien under the Act (*e*). Moreover, the lien is only for the costs of litigation, properly so called (*e*), and therefore will not extend to, *e.g.*, the costs of an arbitration. When the court declares the fund or property to be charged with the solicitor's lien thereon, liberty is usually given by the same order to apply to have the costs

Cumulative liens.

Derivative lien of town agent.

Realisation of lien.

(*v*) *Westacott* v. *Bevan*, 1891, 1 Q. B. 774.
(*x*) *Baker* v. *Abbott*, W. N. 1897, p. 38.
(*y*) *Pilcher* v. *Arden*, 7 Ch. Div. 318.
(*z*) *Groom* v. *Cheesewright*, 1895, 1 Ch. 730.
(*a*) *Lawrence* v. *Fletcher*, 12 Ch. Div. 858; *Greer* v. *Young*, 24 Ch. Div. 544; *Scholey* v. *Peck*, 1893, 1 Ch. 709.
(*b*) *Rhodes* v. *Sugden*, 34 Ch. Div. 155.
(*c*) *Knight* v. *Gardner*, 1892, 2 Ch. 368.
(*d*) *Ex parte Edwards*, 7 Q. B. D. 262.
(*e*) *Macfarlane* v. *Lister*, 37 Ch. Div. 88.

raised by sale or otherwise; but in the case of an administration action, no application under the liberty so reserved ought to be made until after, or along with, the further consideration of the action (*f*).

Lien on papers, only commensurate with client's right at the time of the deposit.

It is quite settled, that the solicitor's lien on papers exists only as against the client and the representatives of the client; also, that such lien is only commensurate with the right which the client had at the time of the deposit, and is, therefore, subject to the prior (then existing) rights of third persons,—so that, *e.g.*, a prior incumbrancer is not prejudiced by it (*g*). And just as the solicitor's lien will not prejudice any prior existing equity, so the solicitor's lien will not be prejudiced by an equity arising subsequently to the inchoation of the lien (*h*); and the like rule has been held to extend also to a lien on a fund recovered (*i*); but whereas it had been decided, that the lien of a solicitor on a sum due or payable to his client prevented a set-off against a sum due from the client (*k*), it has now been expressly provided, and in fact enacted, that a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought (*l*); but the solicitor's lien will not be prejudiced if the costs are incurred in different actions (*m*), or in proceedings in different divisions of the

Set-off, or other equity, intervening, effect of.

(*f*) *Green* v. *Green*, 26 Ch. Div. 16.

(*g*) *Blunden* v. *Desart*, 2 Dr. & War. 405; *Turner* v. *Letts*, 7 De G. M. & G. 243; *Ex parte Harper*, *in re Pooley*, 20 Ch. Div. 685; *In re Capital Insurance Co.*, 24 Ch. Div. 408; *Boden* v. *Hensby*, 1892, 1 Ch. 101.

(*h*) *Faithful* v. *Ewen*, 7 Ch. Div. 495; *Cole* v. *Eley*, 1894, 2 Q. B. 350.

(*i*) *Dallow* v. *Garrold*, 14 Q. B. D. 543; *Rhodes* v. *Sugden*, supra; *The Paris*, 1896, P. 77.

(*k*) *Hamer* v. *Giles*, 11 Ch. Div. 942.

(*l*) Order lxv. Rule 14 (1883); *Westacott* v. *Bevan*, 1891, 1 Q. B. 774.

(*m*) *Blakey* v. *Latham*, 41 Ch. Div. 518.

Compromises, may (but don't usually) defeat the lien.

court (*n*). Also note, that a compromise of the action, if it be fairly entered into, may have the effect of defeating the solicitor's lien (*o*); but it will not usually have that effect (*p*); and it will not have that effect, if the compromise is purposely designed to defeat that lien, or is otherwise an attempted fraud on the solicitor (*q*). A solicitor has no lien for his general costs on a fund placed in his hands by the client for a specific purpose, although such purpose should have failed; and such fund may therefore be garnisheed (*r*). And where a solicitor, having moneys of his client in hand, retains thereout his costs, such retention (unless after a proper bill of costs delivered) is not considered a payment of the bill (*s*),—so as to prevent taxation; and the common order for taxation directing the solicitor to give credit "*for all sums of money received by him*" on account of the client, is confined to moneys which the solicitor in his character of solicitor has received, or which he is legally or equitably liable to pay over to the client, and against which, if the solicitor were sued by the client for such moneys, a set-off for his costs would be available (*t*).

Retention of costs, &c., out of fund.

Banker's lien.

A banker also has a lien on the securities deposited by a customer for the customer's general balance of account, and this right subsists where not inconsistent with the terms of a special contract for a specific security (*u*). And rights in equity which

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(*n*) *In re Bassett*, 1896, 1 Q. B. 219; and see *Hassell* v. *Stanley*, 1896, 1 Ch. 607.

(*o*) *Brunsdon* v. *Allard*, 2 E. & E. 19; *The Hope*, 8 P. D. 144.

(*p*) *The Paris*, 1896, P. 77.

(*q*) *Ross* v. *Buxton*, 42 Ch. Div. 190; *Moxon* v. *Sheppard*, 24 Q. B. D. 627; *The Paris*, supra; *In re Margetson and Jones*, 1897, 2 Ch. 314.

(*r*) *Stumore* v. *Campbell*, 1892, 1 Q. B. 314; *In re Mid-Kent Fruit Factory*, 1896. 1 Ch. 567.

(*s*) *In re Baylis*, 1896, 2 Ch. 107.

(*t*) *In re Le Brasseur and Oakley*, 1896, 2 Ch. 487.

(*u*) *In re European Bank*, L. R. 8 Ch. App. 41.

are equivalent to liens may also arise under various circumstances,—*e.g.*, real or personal estate may be charged by an agreement, express or implied, creating a trust which equity will enforce, just as in the case of legacies or portions charged on land; and where a man agrees to sell his estate, and to lend money to the purchaser for improving the estate, he will have a lien for the advances so made, as well as for the purchase-money remaining unpaid (*v*). Also, when there has been a breach of trust, and any *cestui que trust* is implicated therein and liable therefor, his beneficial interest in other parts of the trust fund is subject to a lien to the extent of the loss to the trust estate, which loss may accordingly be made good thereout by impounding same (*x*). Also, if one of two joint-tenants of a lease renew for the benefit of both, he will have a lien on the moiety of the other joint-tenant for a moiety of the fines and expenses (*y*); but it seems that where two or more purchase an estate, and one pays the money, and the estate is conveyed to them both, the one who pays the money gains neither a lien nor a mortgage,—because there is no contract for either; he has a right of action only; but upon a subsequent *partition* of the purchased property,—and even upon a subsequent division of the sale-proceeds thereof, where the property is sold by a mortgagee of the entirety, and to whose mortgage the title of the co-tenants was subject (*z*),—the debt would be provided for, without the necessity of bringing any independent action for it. Also, if one of two joint-lessees or occupiers of a house redecorates it at his own expense in the first instance, he has no lien in

Quasi-liens.

(1.) Vendor's lien for advances for improvements.

(2.) Lien on interests of *cestuis que trustent*, for their breaches of trust.

(3.) Joint-tenant's lien for costs of renewing lease.

No lien where two purchase and one pays the money;

or where one redecorates at his own expense.

(*v*) *Ex parte Linden*, 1 Mont. D. & D. 435.
(*x*) *Hallett* v. *Hallett*, 13 Ch. Div. 232.
(*y*) *Ex parte Grace*, 1 B. & P. 376.
(*z*) *In re Cook's Mortgage, Lawledge* v. *Tyndale*, 1896, 1 Ch. 923.

respect thereof (*a*); and in such a case, he may have no action or remedy at all,—save and except that upon a subsequent *partition* of the property, compensation would perhaps be made him for what he had properly expended (*b*),—*scil.* for the increase of selling value given to the property by reason of such expenditure.

(*a*) *Saunders* v. *Dunman*, 7 Ch. Div. 825.
(*b*) *Leigh* v. *Dickenson*, 15 Q. B. D. 60; *In re Jones*, *Farrington* v. *Forrester*, 1893, 2 Ch. 461; *Lawledge* v. *Tyndall*, supra.

CHAPTER XX.

PENALTIES AND FORFEITURES.

THE doctrine of equity with regard to penalties and forfeitures is this,—that wherever a penalty or forfeiture is inserted merely to secure the performance of some act or the enjoyment of some right or benefit, the performance of such act or the enjoyment of such right or benefit is the substantial and principal intent of the instrument, and the penalty or forfeiture is only accessory; and the court therefore relieves against the penalty or forfeiture (*a*). Thus, in the case of bonds to secure a mere debt, as the penal sum is usually double the amount of the debt, the obligee never recovers, on account of principal, interest, and costs or damages, more than the amount of the penalty, and usually much less; and accordingly, he cannot issue a specially indorsed writ for the recovery of such penalty (*b*),—for, generally, if the penalty is to secure the mere payment of money, courts of equity will relieve the party upon his paying the principal and interest (*c*); also, if the penalty is to secure the performance of some act or undertaking, the court will ascertain (if it is possible to ascertain) the amount of damages, and will grant relief on payment thereof. But the court will not permit the party to escape from his contract by paying the damages, or even the stipulated penalty;

Penalty deemed accessory, and compensation decreed.

Party cannot avoid the contract by paying the penalty.

(*a*) *Sloman* v. *Walter*, 2 L. C. 1112.
(*b*) *Tuther* v. *Caralampi*, 21 Q. B. D. 414.
(*c*) *Elliott* v. *Turner*, 13 Sim. 477.

for, as observed by Lord St. Leonards in *French* v. *Macale* (*d*), "If a thing be agreed to be done, though "there is a penalty annexed to its non-performance, "yet, in general, the very thing itself must be "done" (*e*).

French v. *Macale*,—where covenantor may do either of two things, paying higher for one alternative than the other, that is not a case of penalty.

Where a contract is alternative, and the real intent is that the party bound thereby should have either of two alternative modes of performance at his option,—and that if he elect to adopt the one mode, he shall pay a certain sum of money, and if he elect to adopt the other mode, he shall pay an additional sum of money,—in such a case, equity will look upon the additional payment as in no sense a penalty, and accordingly will not relieve against the additional sum agreed upon; *e.g.*, if a man lets meadow-land for two guineas an acre, and the contract is, that if the tenant chooses to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, the breaking-up of the land is an act permitted by the contract, which in that case provides that the landlord is to receive the increased rent (*f*); and that is a different contract altogether from an agreement not to do a thing, with a penalty for doing it (*g*). But where, in the lease of a farm, the lessee covenanted not to sell the hay or straw off the premises, but to consume it thereon, during the last year of the term,—and to pay an additional rent of £20 for every acre of meadow-land converted into tillage, and an additional rent of £3 (*by way of penalty*) for every ton of hay or straw which during the last year of the term should

Penalty and alternative payment,—distinguished.

(*d*) 2 Drew. & War. 274; *Weston* v. *Metropolitan Asylum District*, 9 Q. B. D. 404.

(*e*) *Howard* v. *Hopkyns*, 2 Atk. 370; and see *National Provincial Bank* v. *Marshall*, 40 Ch. Div. 112.

(*f*) *French* v. *Macale*, 2 Drew. & War. 274; *Parfitt* v. *Chambre*, L. R. 15 Eq. 36; *G. N. Rail. Co.* v. *Winder*, 1892, 2 Q. B. 595.

(*g*) *Hardy* v. *Martin*, 1 Cox, 27; *Rolfe* v. *Paterson*, 2 Bro. P. C. 436.

be sold off the premises,—and it appeared that there was a substantial difference between the value (for manurial purposes) of hay and of straw,—The court held the £3 to be a penalty, and not an additional rent (*h*).

It is necessary, therefore, in all cases to distinguish between a penalty strictly so called and what is not a penalty at all; and for the purpose of this distinction, the following rules have been laid down:— 1. Where the payment of a smaller sum is secured by a larger, the larger sum is in all cases a penalty (*i*). 2. Where the agreement stipulates for the performance of several acts, and a sum is stated at the end to be paid upon the breach of *any* or *all* of such stipulations, that sum is in general to be considered as a penalty. Thus, in *Kemble* v. *Farren* (*k*), where the defendant had engaged to act as principal comedian at Covent Garden for four seasons, conforming in all things to the rules of the theatre, and the plaintiff was to pay her £3; 6s. 8d. every night the theatre was open; and the agreement contained a clause, that if either of the parties should neglect or refuse to fulfil the said agreement, *or any part thereof*, such party should pay to the other the sum of £1000,—which sum it was thereby declared and agreed should *be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof;* and the defendant refused to act during the second season,—The court decided that, notwithstanding these sweeping words, the £1000 was a penalty,—Tindal, C.J., observing, that it was a contradiction in terms to say that a very large sum, which was to become immediately payable in consequence

Rules as to distinction between a penalty and liquidated damages.

1. Smaller sum secured by larger.

2. Covenant to do several things, and one sum for breach of *any* or *all*.

Kemble v. *Farren*,—a case in which penal sum was expressed to be not penal, but liquidated, and yet court relieved.

(*h*) *Willson* v. *Love*, 1896, 1 Q. B. 626.
(*i*) *Aylett* v. *Dodd*, 2 Atk. 239; *Protector Endowment Co.* v. *Grice*, 5 Q. B. D. 592.
(*k*) 6 Bing. 141.

3. Where sum payable for breach is proportionate to the breach.

of the non-payment of a very small sum, was not a penalty (*l*). 3. On the other hand, where the payment stipulated to be made on the occurrence of a specified event is exactly proportioned to the extent of the particular breach,—and especially if it is expressed in the contract that the payment is to bear interest from the date of the breach,—in such a case, the payment would not be in the nature of a penalty at all. Therefore, when the defendants (who were mining lessees) had the liberty of placing slag from their blast-furnaces on the land demised, and covenanted (*inter alia*) to pay the lessor £100 per imperial acre for all land not restored to its original agricultural condition at a particular date,—the court held that the £100 was not a penalty, but the agreed value of the surface damage (*m*).

4. If only one event on which money is to be payable, and no means of ascertaining damage.

4. If there be only one event upon which the money is to become payable, and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from the breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation in order to avoid the difficulty (*n*). Also, if there be a contract consisting of one or more stipulations, the damages from the breach of which cannot be measured, then the contract must be taken to have meant that the sum agreed on was to be liquidated damages in the case of any breach, and not a penalty (*o*).

5. The mere use of term "penalty" or "liquidated damages," not conclusive.

5. The mere use of the term "penalty" or "liquidated damages," does not conclusively determine the intention of the parties; but, like any other question of construction, that intention is to be determined by the nature of

(*l*) *Davies* v. *Penton*, 6 B. & C. 223; *Horner* v. *Flintoff*, 9 M. & W. 681; *Dimech* v. *Corlett*, 12 Moo. P. C. C. 199.

(*m*) *Elphinstone* v. *Monkland Iron and Coal Co.*, 11 App. Ca. 332.

(*n*) *Sainter* v. *Ferguson*, 7 C. B. 730; *Law* v. *Local Board of Redditch*, 1892, 1 Q. B. 127.

(*o*) *Galsworthy* v. *Strutt*, 1 Exch. 659; *Wallis* v. *Smith*, 21 Ch. Div. 243; *Ward* v. *Monaghan*, W. N. 1895, p. 123.

the provisions, having regard to the whole instrument (*p*). 6. When the expressions are doubtful, the court will lean in favour of the construction which treats the sum as a penalty, such construction being the more consonant with justice (*q*); but at the same time, the mere largeness of the sum will not *per se* be any reason for holding it to be a penalty (*r*).

6. Court leans towards construing sum as a penalty.

The same general principles which apply to equitable relief against penalties govern the courts of equity in relieving also against forfeitures,—at least, in cases other than those arising under the forfeiture clauses in wills and in settlements (*s*), or arising out of tenures or under leases and other strict contracts (*t*); and even in the case of leases, equity would interfere to a limited extent to relieve against a forfeiture; *e.g.*, against a forfeiture for non-payment of rent, on the lessee paying the rent (*u*),—for the rent in arrear was considered to be a mere money demand, the purpose of the clause of re-entry for non-payment being only to secure the payment (*v*); and latterly, the courts of law were enabled to grant the like relief, when the forfeiture was for the non-payment of rent, this power being given to them by the Common Law Procedure Act, 1852 (*x*), s. 212. And although it was not quite settled, whether equity could (but the better opinion was that equity could not) relieve against a forfeiture arising from a breach of cove-

Forfeitures governed by same principles as penalties,—excepting as between landlords and tenants, and as regards legacies or devises.

Forfeiture for breach of covenant to repair;

(*p*) *Green* v. *Price*, 16 M. & W. 346; *Jones* v. *Green*, 3 You. & J. 304.
(*q*) *Davies* v. *Penton*, 6 B. & C. 216.
(*r*) *Astley* v. *Weldon*, 2 B. & P. 351.
(*s*) *In re Parnham's Trusts*, L. R. 13 Eq. 413; and 46 L. J., N. S., Ch. 80; *Samuel* v. *Samuel*, 12 Ch. Div. 152; *Otway* v. *Otway*, 1895, 2 Ch. 235; and disting. *White* v. *Chitty*, L. R. 1 Eq. 372; and *Carew* v. *Carew*, 1896, 1 Ch. 527.
(*t*) *Warner* v. *Moir*, 25 Ch. Div. 605.
(*u*) Freem. Ch. Rep. 114; *Bowser* v. *Colby*, 1 Hare, 126.
(*v*) *Wadman* v. *Calcraft*, 10 Ves. 67.
(*x*) 15 & 16 Vict. c. 76; and see 4 Geo. II. c. 28, s. 2.

nant to repair, or any breach of covenant other than the breach of covenant to pay rent,—unless under very special circumstances (*y*),—still equity would have required the covenantee to be satisfied with a *substantial* performance of the covenant,—unless of course when it was of the very essence of the contract that it should be strictly performed (in which case the strict performance was matter of substance and not of form merely) (*z*). And courts of equity could not have relieved a tenant from forfeiture for breach of a covenant to insure (*a*),—unless perhaps in some special cases where a money payment would have been a complete compensation; but this rule being found to operate very hardly on those few lessees who inadvertently, and not wilfully, neglected to insure, the Legislature stepped in and remedied it,—but in the case of such inadvertent neglects only, and only where no damage from fire had happened, and the inadvertence had been purged by the effecting of a proper fire insurance before coming for relief (*b*). However, now, by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14 (as between lessor and lessee, or under-lessor and under-lessee) (*c*), and by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 2 (as between lessor and lessee or under-lessee), the High Court is enabled to give relief upon equitable terms (to be prescribed by the court), and upon the terms of paying to the lessor the costs and expenses (*d*) incurred by the latter of and incidental to the breach of covenant, against every forfeiture

and for breach of covenant to insure.

Relief under the Conveyancing Acts, 1881 and 1892.

(*y*) *Hill* v. *Barclay*, 18 Ves. 62.

(*z*) *Hill* v. *Barclay*, supra; *Gregory* v. *Wilson*, 9 Hare, 683; *Croft* v. *Goldsmid*, 24 Beav. 312.

(*a*) *Green* v. *Bridges*, 4 Sim. 96.

(*b*) 22 & 23 Vict. c. 35, s. 4; 23 & 24 Vict. c. 126, ss. 2, 3; *Page* v. *Bennett*, 2 Giff. 117.

(*c*) *Burt* v. *Gray*, 1891, 2 Q. B. 98; *Fletcher* v. *Nokes*, 1897, 1 Ch. 271.

(*d*) *Nind's Case*, 1894, 2 Q. B. 226; *Quilter* v. *Mapleson*, 9 Q. B. D. 672; *Hare* v. *Elms*, 1893, 1 Q. B. 604.

for breach of any covenant whatsoever contained in a lease or under-lease or fee-farm grant, or in any agreement for a lease or under-lease (such agreement being specifically enforceable), other than and except only the following covenants and conditions, namely, —(1.) The covenant not to assign or underlet (*e*); (2.) The condition of forfeiture upon a bankruptcy or execution; and (3.) The covenant in a mining lease for permitting inspection, &c., by the lessor. And even the forfeiture upon a bankruptcy or execution will now be relieved against,—in certain cases and under certain restrictions (*f*); and also, *semble*, in favour of an innocent and blameless under-lessee, the forfeiture resulting from a breach of the covenant not to underlet may be relieved against (*g*); also, the relief provided by these Conveyancing Acts, when it is obtainable at all, may be obtained either in an action or on a counter-claim (*h*); but no relief is obtainable, under these Acts, after actual entry by the lessor for the forfeiture (*i*); and in that respect, as well as in the nature of the breach of covenant which is relieved against, the relief under the Conveyancing Acts differs from the relief under the Common Law Procedure Act, 1852, above referred to,—the latter relief being obtainable even after actual entry by the lessor (*k*).

Lessee becoming purchaser, before entry for forfeiture, —effect of.

Where the lease or agreement contains an option of purchase in the lessee, and the option is exercised by the lessee before the lessor proceeds to exercise his power to forfeit the lessee's interest, the position of the lessee is transmuted into that of purchaser,

(*e*) *Barrow* v. *Isaacs*, 1891, 1 Q. B. 417.
(*f*) 55 & 56 Vict. c. 13, s. 2, sub-sec. 2.
(*g*) Ibid., s. 4; *Imray* v. *Oakshette*, 1897, 2 Q. B. 218.
(*h*) *Roger Cholmeley's School* v. *Sewell*, 1893, 2 Q. B. 254.
(*i*) *Rogers* v. *Rice*, 1892, 2 Ch. 170.
(*k*) *Howard* v. *Fanshawe*, 1895, 2 Ch. 581.

and is no longer liable to be forfeited (*l*),—*scil.* when the option is unconditional; but it would, *semble*, be otherwise if the option was conditional on the lessee's due prior fulfilment of the covenants and conditions of the lease.

(*l*) *Raffety* v. *Schofield*, 1897, 1 Ch. 937.

CHAPTER XXI.

MARRIED WOMEN.

SECT. I.—SEPARATE ESTATE.
Sub-sect. 1—*Apart from Legislation.*
Sub-sect. 2—*The Effects of Legislation.*
SECT. II.—PIN-MONEY AND PARAPHERNALIA.
SECT. III.—EQUITY TO A SETTLEMENT, AND RIGHT OF SURVIVORSHIP.
SECT. IV.—SETTLEMENTS IN DEROGATION OF MARITAL RIGHTS.

Rights of husband at common law.

BY the old common law the husband on marrying became entitled to the rents and profits of the wife's real estates during the joint lives (*a*) (*scil.* during the coverture); and he became entitled absolutely to all her chattels personal in possession (*b*), and to her choses in action upon reducing them into possession during the coverture (*c*); or, if he did not, *but survived her*, he (*d*), and after his death his administrator (*e*), was entitled, *on taking out administration to the wife*, to recover these choses in action of the wife; and the husband became entitled *jure mariti* to chattels real of the wife, that is to say, to her leaseholds, with full power to aliene them *inter vivos*, even though reversionary (*f*),—provided only that by any possibility such chattels real were capable of falling into possession during the coverture, and not otherwise (*g*). But if the husband died

(*a*) *Polyblank* v. *Hawkins*, Doug. 329; *Moore* v. *Minten*, 12 Sim. 161.
(*b*) Co. Litt. 300 *a*.
(*c*) *Scawen* v. *Blunt*, 7 Ves. 294; Co. Litt. 351.
(*d*) *Proudley* v. *Fielder*, 2 My. & K. 57; *Smart* v. *Tranter*, 43 Ch. Div. 587.
(*e*) *Fleet* v. *Perrins*, L. R. 3 Q. B. D. 536; *Re Wensley*, 7 P. D. 13.
(*f*) *Donne* v. *Hart*, 2 Russ. & My. 363.
(*g*) *Duberley* v. *Day*, 16 Beav. 33; *Elder* v. *Pearson*, 25 Ch. Div. 620.

before his wife, without having reduced into possession her choses in action (*h*), or without having aliened *inter vivos* her chattels real (*i*), they survived to her. And the husband acquired these extensive interests in the property of his wife, in consideration of the obligation which upon marriage he contracted of maintaining her; but the old common law gave the wife no remedy whatever in case of the husband's refusing or neglecting to maintain her, or even in the case of his bankruptcy,—so that a married woman might have been left utterly destitute, no matter how large a fortune she had on the marriage brought to her husband; and it was for this reason that equity raised up, with reference to married women, a system founded in justice and right, although utterly in contravention of the old common law; and so beneficial was the equitable jurisdiction found by experience to be, and so much in harmony with the requirements of modern society, that it received at length legislative sanction by the Married Women's Property Act, 1870, amended by the Married Women's Property Act, 1874, both which Acts were afterwards consolidated and amended in and by the Married Women's Property Act, 1882, and the last-mentioned Act has been recently amended by the Married Women's Property Act, 1893,—the provisions of all which Acts are hereinafter more particularly stated.

Interference of equity.

Section I.—The Wife's Separate Estate.

Sub-Sect. 1.—*Apart from Legislation.*

Feme covert could not at common law

At common law, the existence of the wife as an entity, or *persona* separate and distinct from her

(*h*) Co. Litt. 351 *b*. (*i*) Ibid.

husband, was not recognised, being considered as merged (by the coverture) in the entity or *persona* of her husband (*k*); but in equity the case was different,—for there a married woman was considered capable of owning and holding property independently of her husband for her own separate use (*l*); and once having been permitted to take and hold property to her separate use, she took and held it, with all the privileges and incidents of property, including the *jus disponendi* (*m*).

hold property apart from her husband; but she might do so in equity.

Now the separate estate may be created in any species of property, and in many ways, *e.g.*, the following:—1. By an ante-nuptial written agreement with the intended husband,—such agreement being made with reference either to the wife's own property, or to the property of her husband, or of third parties (*n*). 2. By special agreement with the husband after marriage (*o*), or where the husband deserts her, and this independently of and long prior to the statute 20 & 21 Vict. c. 85 (*p*); and the separate estate may arise even under a private Act of Parliament (*q*). 3. The wife may also become entitled to separate estate by virtue of a separation deed between herself and her husband; and for such a deed, no trustee is necessary (*r*), although (for the husband's indemnity and protection) very desirable; but this species of separate estate comes, in general, to an end with the

Separate estate, how created,—

1. By ante-nuptial agreement.

2. By special post-nuptial agreement.

3. By virtue of a separation deed.

(*k*) *Murray* v. *Barlee*, 3 My. & K. 220.
(*l*) *Brandon* v. *Robinson*, 18 Ves. 434.
(*m*) *Fettiplace* v. *Gorges*, 1 Ves. Jr. 48.
(*n*) *Tullett* v. *Armstrong*, 1 Beav. 21.
(*o*) *Haddon* v. *Fladgate*, 1 Swab. & Tr. 48; *Pride* v. *Bubb*, L. R. 7 Ch. App. 64; *Pye* v. *Pye*, 13 Q. B. D. 147.
(*p*) *Cecil* v. *Juxon*, 1 Atk. 278; *Rudge* v. *Weedon*, 4 De G. & Jo. 216, 223; *Nicholson* v. *Drury Buildings*, 7 Ch. Div. 48.
(*q*) *In re Peacock's Trusts*, 10 Ch. Div. 490.
(*r*) *M'Gregor* v. *M'Gregor*, 21 Q. B. D. 424; *Sweet* v. *Sweet*, 1895, 1 Q. B. 12.

resumption of cohabitation (*s*),—unless the separation deed otherwise provides, and excepting as regards any savings of income made by the wife before such resumption (*t*), and excepting in cases where the cohabitation originally was (and, as resumed, is) a mere cohabitation in concubinage (*u*). 4. Gifts also from the husband to the wife may be made to her separate use,—where they are made to her absolutely (*v*), and not merely to be worn as ornaments of her person (*w*); and it seems, that a gift from a stranger, by delivery merely, to the wife during her coverture, even though not expressed to be for her separate use, would be for her separate use (*x*). 5. A wife trading separately is entitled to the trade property as her separate estate (*y*). 6. The wife will, of course, hold all such property to her separate use as has been expressly limited to her by devise or otherwise for that purpose, whether before or after coverture; and this is probably the most frequent source of the separate estate of married women, apart of course from recent legislation; and although it was formerly supposed, that the interposition of trustees in all arrangements of this sort, whether made before or after marriage, was indispensable for the protection of the wife's interests, yet it was afterwards established, that the intervention of trustees was not indispensable,—for that whenever real or personal property was devised to, or otherwise given to or settled upon, a married woman, either before or after marriage, for her separate use, without the intervention of trustees, the intention of the parties would be effec-

4. By gifts to wife absolutely from husband or from a stranger.

5. Wife trading separately.

6. By express limitation for that purpose.

Interposition of trustees not necessary; since (failing any other trustee) husband is trustee for wife.

(*s*) *Nicol* v. *Nicol*, 31 Ch. Div. 524; *Haddon* v. *Haddon*, 18 Q. B. D. 778.
(*t*) *Crouch* v. *Waller*, 4 De G. & J. 302.
(*u*) *Rabbeth* v. *Donaldson*, 1895, 1 Ch. 455.
(*v*) *Tasker* v. *Tasker*, 1895, P. 1.
(*w*) *Graham* v. *Londonderry*, 3 Atk. 393; *Baddeley* v. *Baddeley*, 9 Ch. Div. 113.
(*x*) *Graham* v. *Londonderry*, supra.
(*y*) *Ex parte Shepherd*, 10 Ch. Div. 573.

tuated in equity (*z*), the husband, as having the legal estate, being held a trustee for the wife (*a*); and now, under the Married Women's Property Act, 1882 (*b*), it is expressly declared, that the intervention of a trustee or trustees shall not be necessary.

What words held sufficient to create a separate use.

No particular form of words was or is necessary in order to vest property in a married woman for her separate use; therefore, if there is a gift of property to the wife for her "sole and separate use" (*c*), "for her own use, and at her disposal" (*d*), "for her own use, independent of her husband" (*e*), "for her own use and benefit, independent of any other person" (*f*), or "so as that she should receive and enjoy the issues and profits" (*g*), the separate use will be created; on the other hand, no separate use would be created, where there was, *e.g.*, a mere direction "to pay to a married woman and her assigns" (*h*), or where there was a gift "to her own use and benefit" (*i*), or to her "absolute use" (*k*), or where payment was directed to be made "into her own proper hands, to and for her own use and benefit" (*l*), or when property was given "to be under her sole control" (*m*).

What words held not sufficient for that purpose.

The rule was laid down in *Peacock* v. *Monk* (*n*),

(*z*) *Newlands* v. *Paynter*, 4 My. & Cr. 408; *Ex parte Sibeth*, 14 Q. B. D. 417; *Ex parte Whitehead*, 14 Q. B. D. 419.
(*a*) *Rich* v. *Cockell*, 9 Ves. 375; *Ex parte Whitehead*, supra; *Wassell* v. *Leggatt*, 1896, 1 Ch. 554.
(*b*) 45 & 46 Vict. c. 75, s. 1, sub-sect. 1.
(*c*) *Parker* v. *Brooke*, 9 Ves. 583.
(*d*) *Inglefield* v. *Coghlan*, 2 Coll. 247.
(*e*) *Wagstaff* v. *Smith*, 9 Ves. 520.
(*f*) *Glover* v. *Hall*, 16 Sim. 568.
(*g*) *Tyrrell* v. *Hope*, 2 Atk. 558; *Gilbert* v. *Lewis*, 1 De G. Jo. & Sm. 38; *In re Tarsey's Trusts*, L. R. 1 Eq. 561.
(*h*) *Lumb* v. *Milnes*, 5 Ves. 517.
(*i*) *Kensington* v. *Dolland*, 2 My. & K. 184.
(*k*) *Ex parte Abbot*, 1 Deacon, 338.
(*l*) *Tyler* v. *Lake*, 2 Russ. & My. 183.
(*m*) *Massey* v. *Parker*, 2 My. & K. 174.
(*n*) 2 Ves. 190; *Hulme* v. *Tenant*, 1 L. C. 521.

The wife's power of disposition over separate estate.

"that a *feme covert* acting with respect to her separate "property (not being subject to the restraint on "anticipation which is hereinafter considered) was "competent to act in all respects as if she were a *feme sole*;" and in accordance with this rule, it was decided,—(*a.*) That the personal property settled upon a *feme covert* for her separate use, having all the incidents of property vested in persons *sui juris*, might be alienated by her, and without her husband's consent, and either by act *inter vivos* (*o*), or by will (*p*); and this power extended to interests in reversion, as well as to interests in possession (*q*); also,—(*b.*) That, as to real estate settled to the separate use of a married woman, she had the same power over her *life-interest* therein as she would have had as a *feme sole*, and a contract to sell or mortgage that interest would have been specifically enforced against her (*r*); and as regards her absolute *fee-simple* estates, although she could not of course dispose of the *legal* estate without the concurrence of the person or persons in whom that estate was vested (viz., of her husband or of other her trustee, as the case might be), yet she might dispose of the *equitable* fee-simple estate either by will or by an instrument *inter vivos*, and without the concurrence of her husband (*s*); but whether such disposition of her fee-simple estates by deed or by will would deprive the husband surviving her of his curtesy estate, assuming that he would otherwise be entitled thereto, the rule of the court, which was at first very undecided, is now fully settled as follows, namely,—that although, in the

(*a.*) As to personalty.

(*b.*) As to realty.

1. Life estate.

2. Fee-simple estate.

Husband's curtesy,—question as to.

(*o*) *Wagstaff* v. *Smith*, 9 Ves. 520.
(*p*) *Fettiplace* v. *Gorges*, 3 Bro. C. C. 8.
(*q*) *Sturgis* v. *Corp*, 13 Ves. 190; *Lechmere* v. *Brotheridge*, 32 Beav. 353.
(*r*) *Stead* v. *Nelson*, 2 Beav. 245; *Major* v. *Lansley*, 2 Russ. & My. 357.
(*s*) *Taylor* v. *Meads*, 34 L. J. Ch. 203; *Pride* v. *Bubb*, L. R. 7 Ch. App. 64; *Hodgson* v. *Hodgson*, 2 Kee. 704.

absence of, or subject to, any such disposition by the wife, the husband is entitled to his curtesy, even out of statutory separate property (*t*),—yet, in case the wife disposes of the whole estate by deed *inter vivos*, or even by her will, the husband is (by such disposition) wholly barred and excluded from his estate by the curtesy (*u*); and, *semble*, the husband's rights in the copyholds of his wife,—although such rights, as existing by the custom of the manor, may extend (*e.g.*, in the manor of Taunton Deane) beyond a mere curtesy estate,—are now also barred by any like disposition of the wife; but otherwise they remain unaffected, *semble*.

The savings of income of separate estate are also separate estate.

If a married woman effect savings out of property settled to her separate use, she has the same power and control over those savings as she has over the separate estate itself (*v*),—for if the wife has a power over the capital, she has also a power over the income and accumulations (*x*); and the same rule applies to savings out of the income allowed to a married woman under her husband's lunacy (*y*); and even the investments made with such savings, or with the accumulations thereof, belong to the married woman for her separate use (*z*),—a result which, however, did not formerly hold good for the investments of the *capital* moneys of the separate estate (*a*); but now, under the Married Women's Property Act, 1882 (*b*), the investments of capital moneys, being the woman's separate property under that Act, would also be, and remain, in all cases separate estate.

(*t*) *Hope* v. *Hope*, 1892, 2 Ch. 336.
(*u*) *Roberts* v. *Dixwell*, 1 Atk. 607; *Cooper* v. *M'Donald*, 7 Ch. Div. 288.
(*v*) *Gore* v. *Knight*, 2 Vern. 535.
(*x*) *Newlands* v. *Paynter*, 4 My. & Cr. 408.
(*y*) *Re Sharp*, 3 P. D. 76.
(*z*) *Barrack* v. *M'Culloch*, 3 K. & J. 110
(*a*) *Wright* v. *Wright*, 2 J. & H. 647.
(*b*) 45 & 46 Vict. c. 75, ss. 6, 7, 8.

Wife may permit her husband to receive the income of her separate estate;

But the wife may, of course, give her separate income to her husband, or permit him to receive it; and if the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband, to be used by him (of course, for their joint purposes), that is evidence of a gift by her to him of the separate income (*c*); and even where she is entitled to an account against him of such receipts, the general rule is, that he shall be obliged to account for one year's receipts only (*d*),—but, of course, if she have made a gift of her separate income to her husband, she is entitled to no account whatever of it (*e*); the onus of proving such a gift is, however, on the husband (*f*). Also, if a *feme covert*, having personal estate settled to her separate use, dies without disposing of it, the husband is entitled to it; and all those parts thereof that consist of cash, furniture, or other personal chattels, or of chattels real (*g*), he takes in his marital right (*h*); and all such parts thereof as consist of "choses in action," he is entitled to take as her administrator (*i*), —but in either case, for his (the husband's) own benefit, although subject to his wife's debts (*k*); and this is the law also under the Married Women's Property Act, 1882, as regards the wife's separate property under that Act (*l*).

and she is entitled to only one year's account, if to any account at all.

Husband, on wife's death, takes separate personal estate undisposed of.

Although a man who has a general power of

(*c*) *Rowley* v. *Unwin*, 2 K. & J. 138; *Dixon* v. *Dixon*, 9 Ch. Div. 587.
(*d*) *Darkin* v. *Darkin*, 17 Beav. 578.
(*e*) *Edwards* v. *Cheyne*, 13 App. Ca. 385.
(*f*) *Wood* v. *Cock*, 40 Ch. Div. 461.
(*g*) Co. Litt. 46 *b*; Dyer, 251.
(*h*) *Johnstone* v. *Lumb*, 15 Sim. 308; *Elder* v. *Pearson*, 25 Ch. Div. 620.
(*i*) *Proudley* v. *Fielder*, 2 My. & K. 57.
(*k*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.
(*l*) *Staunton* v. *Lambert*, 39 Ch. Div. 626.

Property subject to a general power of appointment in wife.

appointment over property which (in default of appointment) is given to others, by exercising the power makes the appointed property assets for the payment of his debts, in an administration of his estate after his death (*m*), yet if a married woman had such a power and exercised it, the appointed property would not have been applicable to the payment of her debts in such an administration of her estate,—it having been a settled doctrine of equity that a *feme covert* having separate estate, although she might contract by express agreement a debt payable out of that estate, yet she could not by any mere contract incur a debt payable out of property over which she had a mere power of appointment (*n*). However, where property was given to a married woman for her separate use for life, with remainder as she should by deed or will appoint, *with remainder to her executors or administrators*,—such a gift was latterly held to be (as in common sense it was) an absolute gift for the feme's sole and separate use, and the entire corpus was therefore held liable for her debts (*o*). And now, under the Married Women's Property Act, 1882, the appointed property will be assets for the payment of the married woman's debts, wherever her separate estate would be assets (*p*),—and even when her power to appoint is exercisable by will only, and not by deed (*q*).

A *feme covert* could not originally

Courts of equity were very slow to admit that a married woman having separate property could bind

(*m*) *Jenny* v. *Andrews*, 6 Mad. 264; *Thurston* v. *Evans*, 32 Ch. Div. 508.

(*n*) *Shattock* v. *Shattock*, L. R. 2 Eq. 186; *Vaughan* v. *Vanderstegen*, 2 Drew. 165.

(*o*) *London Chartered Bank* v. *Lempriere*, L. R. 4 P. C. 572; *Godfrey* v. *Harben*, 13 Ch. Div. 216; *Plowden* v. *Gayford*, 39 Ch. Div. 622; *Turner* v. *King*, 1895, 1 Ch. 361.

(*p*) *Roper* v. *Doncaster*, 39 Ch. Div. 482; *Wilson* v. *Ann*, 1894, 1 Ch. 549.

(*q*) *Turner* v. *King*, supra.

bind her separate estate with debts.

even that property with her debts; but after a time, being pressed by the injustice of allowing her to continue in the enjoyment of her separate property without paying her creditors, the courts at first ventured so far as to hold, that if she made a contract for the payment of money by a *written* instrument, with a certain degree of formality and solemnity,—as by a bond under her hand and seal (*r*),—in that case, the property settled to her separate use should be made liable to the payment of the bond; and this principle was subsequently extended to instruments of a less formal character, such as bills of exchange (*s*) or promissory-notes (*t*), and ultimately to any written agreement whatsoever (*u*); but the courts still for a long time refused to extend the principle to a *verbal* agreement or other common assumpsit,—for (it was said) the married woman's disposition of her separate estate was in the nature of the execution of a power of appointment, and only an instrument in writing would operate as an execution of the power, and a mere assumpsit would not do (*v*); or if the married woman's disposition was not like the execution of a power of appointment, at all events, in order specifically to *charge* her separate estate, the execution by her of a written instrument was indispensable (it was said) to show her intention to create the charge (*x*),—it being only by means of a *charge* (*y*), that the married woman's property could be rendered liable to satisfy her debts (*z*).

Successive relaxations of this rule: (1.) Her separate estate was bound by an instrument under seal.

(2.) By bill or note.

(3.) By ordinary written agreement.

(4.) And last of all, by her ordinary parol or simple contract.

(*r*) *Heatly* v. *Thomas*, 15 Ves. 596.

(*s*) *Owen* v. *Homan*, 4 H. L. Cas. 997; *M'Henry* v. *Davies*, L. R. 10 Eq. 88.

(*t*) *Bullpin* v. *Clarke*, 17 Ves. 365; *Field* v. *Sowle*, 4 Russ. 112.

(*u*) *Murray* v. *Barlee*, 3 My. & K. 209; *Picard* v. *Hine*, L. R. 5 Ch. App. 274.

(*v*) *Owens* v. *Dickenson*, 1 Cr. & Ph. 53.

(*x*) *Murray* v. *Barlee*, 3 My. & K. 223.

(*y*) *Hodgson* v. *Williamson*, 15 Ch. Div. 87; *Hallett* v. *Hastings*, 35 Ch. Div. 94.

(*z*) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 1, 13, 15.

Courts now hold that to the same extent that she is regarded as a *feme sole* she may contract debts; and accordingly,—

However, latterly the courts felt themselves pressed with the inconsistency of drawing this distinction between the written and the verbal engagements of a married woman, and a growing tendency was manifested to adopt a more consistent course by holding:—1st, That to the same extent to which a married woman was by courts of equity constituted a *feme sole* with respect to her property, she ought also to be regarded as a *feme sole* with respect to her debts, or engagements in the nature of debts; and, 2nd, That all such debts should stand on the same footing, in whatever form contracted (*a*); and at last, the liability of the separate estate on merely verbal contracts was decided in *Matthewman's Case* (*b*), where Kindersley, V.C., after observing on the piecemeal growth of the liability of the separate estate (*c*), where not restrained from anticipation (*d*), says:—

Her verbal engagements now binding on her separate estate.

"*If the circumstances are such as to lead to the conclu-*
"*sion that she was contracting not for her husband, but*
"*for herself, in respect of her separate estate,* that sepa-
"rate estate will be liable to satisfy the obligation."

What separate estate was originally bound by contract of wife;

But the courts, even after the decision in *Matthewman's Case*, still evinced the greatest aversion to extending the liability of the separate estate; and they held, in fact, that her general engagements, entered into during the coverture, could be enforced *only against so much of her separate estate as she was entitled to at the date of entering into the engagement*, and as remained at the date of entering up judgment and suing out execution against it, *and not against separate estate to which she became entitled after the date of entering into the engagement* (*e*). However, by

(*a*) *Vaughan* v. *Vanderstegen*, 2 Drew. 182.
(*b*) L. R. 3 Eq. 787.
(*c*) *Johnson* v. *Gallagher*, 3 De G. F. & Jo. 494.
(*d*) *Atwood* v. *Chichester*, 3 Q. B. D. 722.
(*e*) *Pike* v. *Fitzgibbon*, 17 Ch. Div. 454; *Smith* v. *Lucas*, 18 Ch. Div. 531; *King* v. *Lucas*, 23 Ch. Div. 712; *In re Pease and Waller*, 24 Ch. Div. 405; *Hood-Barrs* v. *Catheart*, 1894, 2 Q. B. 559.

the Married Women's Property Act, 1882, s. 1, subsect. 4, the liability of the separate estate was extended to the after-acquired separate estate, as will presently be mentioned.

or by her fraud or breach of trust;

It was also only at a very late period in the growth of the doctrines of equity, that the separate estate of a married woman committing a *fraud* was held liable to make good the fraud (*f*); and when she had concurred with her trustee in a breach of trust (*g*), or had herself committed a breach of trust (*h*), her separate estate was indeed held liable,—unless where it was restrained from anticipation (*i*),—but only where she had been an "*actual actor*" in the breach (*k*); but now, under the Married Women's Property Act, 1882, s. 24, a married woman is made liable (as regards her separate property under that Act) for any breach of trust or devastavit committed by her, either before or after her marriage; and for this purpose, her liability is to be deemed to arise upon a contract by her binding her separate estate.

and what separate estate is now bound under Act of 1882;

and under Act of 1893.

It is to be observed, however, that in order to bind a married woman under that Act by contract, her contract must have been made on or after the 1st January 1883 (*l*), and she must have had some separate property at the date of entering into the contract (*m*); but if that much was shown, then, as regards a married woman's contracts made during

(*f*) *Savage* v. *Foster*, 9 Mod. 35; *Vaughan* v. *Vanderstegen*, 2 Drew. 165, 363.
(*g*) *Brewer* v. *Swirles*, 2 Sm. & Giff. 219; *Jones* v. *Higgins*, L. R. 2 Eq. 538.
(*h*) *Clive* v. *Carew*, 1 J. & H. 199.
(*i*) *Stanley* v. *Stanley*, 7 Ch. Div. 589.
(*k*) *Sawyer* v. *Sawyer*, 28 Ch. Div. 595.
(*l*) *Turnbull* v. *Forman*, 15 Q. B. D. 234.
(*m*) *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, 1891, 1 Q. B. 661.

the coverture, equally as regards her contracts made before the coverture, and for which judgment was entered up during the coverture, it was not necessary to show, that the wife had separate estate also at the date of entering up the judgment (*n*); and, by the same Act, sect. 1, sub-sect. 4, her contract was made binding not only upon her then present separate estate, but also upon all her future accruing separate estate (*o*),—a provision repealed indeed, but re-enacted and extended, by the Married Women's Property Act, 1893 (*p*),—under which Act every contract which on or after the 5th December 1893 is entered into by a married woman (otherwise than as agent for her husband or another) *is to be deemed to have been entered into with reference to* (*and so as to bind*) *her separate estate*, which she is not restrained from anticipating, *and that whether she is possessed of separate estate at the time or not*, such contract binding not only her then present, but also all her future accruing, separate estate, and also all property which she may thereafter while discovert become entitled to; and (as we shall presently see) every such contract is also now binding on all her general powers of appointment exercised by her.

No personal decree against a *feme covert*.

It was not the practice of the court to make any personal decree against a married woman (*q*); therefore, no bankruptcy decree or order for her imprisonment under the Bankruptcy Act, 1869 (now 1883), or the Debtors Act, 1869, could be made against her (*r*),—even although she was engaged in trade and

(*n*) *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Beck* v. *Pierce*, 23 Q. B. D. 316.
(*o*) *Ellis* v. *Johnson*, 31 Ch. Div. 532; *Cox* v. *Bennet*, 1891, 1 Ch. 617.
(*p*) 56 & 57 Vict. c. 63, s. 1.
(*q*) *Francis* v. *Wigzell*, 1 Mad. 264.
(*r*) *Ex parte Holland*, L. R. 9 Ch. App. 307; *Ex parte Shepherd*, 10 Ch. Div. 573; *Ex parte Jones*, 12 Ch. Div. 484.

was trading separately from her husband. However, now, under the Married Women's Property Act, 1882 (*s*), a married woman carrying on a trade separately from her husband is, in respect of her separate property,—*scil.* being property which is made separate estate by the Act,—made subject to the bankruptcy laws in the same way as if she were a *feme sole;* but even yet, if she is not carrying on such a separate trade, she is not liable to be made a bankrupt (*t*),—not even when she is afterwards left a widow, at least upon a judgment against her husband and herself obtained during the coverture (*u*). And even if she is carrying on such a separate trade, she is not liable to a commitment order under section 5 of the Debtors Act, 1869 (*v*), —the principle underlying all which decisions seems to be this, that the wife's person is (in law) the property of her husband; and his property is not (for another person's debts) to be either taken from him by imprisonment of the wife or otherwise slandered by the bankruptcy of the wife (not being engaged in a separate trade). Still, the liability which a married woman now incurs under her contract is not merely a *proprietary* liability (*x*), but is (for at least certain purposes) a *personal* liability,—*e.g.*, for the purpose of judgment on a specially indorsed writ (*y*), and for the purpose of a set-off of costs recovered by her against costs recovered against her (*z*).

Married woman, trading separately, may now be made bankrupt;

but cannot, even yet, be committed for debt.

General engagements bind the

The limit to the relief afforded by equity against the separate estate of a *feme covert* was stated by

(*s*) 45 & 46 Vict. c. 75, s. 1, sub-sect. 5.
(*t*) *Ex parte Coulson*, 20 Q. B. D. 249.
(*u*) *In re Hewett, ex parte Levene*, 1895, 1 Q. B. 328.
(*v*) *Scott* v. *Morley*, 20 Q. B. D. 120; *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.
(*x*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103.
(*y*) *Scott* v. *Morley*, supra; *Robinson* v. *Lynes*, supra.
(*z*) *Pelton Brothers* v. *Harrison*, (No. 2), 1892, 1 Q. B. 118.

Lord Thurlow in *Hulme* v. *Tenant* (*a*) to be this, namely, that while her general engagement operated upon her *personal property*, and applied to the *rents and profits of her real estate*, yet in no case would her *general engagement* have been satisfied by decreeing the trustees of her real estate to make a *conveyance* of that real estate, or by *sale*, *mortgage*, or otherwise to raise the money to satisfy that general engagement (*b*); but it is more than doubtful, whether this statement of Lord Thurlow's adequately expressed the extent of the relief which was latterly afforded against the separate property of married women,—for when the charge or *quasi*-charge of debts against such property was declared, the courts might, *semble*, have proceeded to give directions as to the realisation of the charge, and might apparently, in a proper case, have directed a sale or mortgage thereof, together with the necessary incidental conveyance of the fee-simple or *corpus* of the estate. And although, even at the present day, it is only through such declaration of charge and the realisation thereof, in such manner as the court may direct, that the married woman's separate property can be got at by her creditors,—and they have no remedy otherwise by execution against either the real or the personal estate of the married woman during her life (*c*),—still the whole *corpus* of the estate would now be liable, the execution being simply and only limited to such separate estate (if any) as she is not effectively restrained from anticipating (*d*); and for ascertaining this, she may be examined as to what her separate estate consists of (*e*). And here observe, that upon the death of the

corpus of her personalty,—rents and profits of her realty;

and now, even the *corpus* of her realty.

(*a*) 1 L. C. 526.
(*b*) *Francis* v. *Wigzell*, 1 Mad. 258; *Aylett* v. *Ashton*, My. & Cr. 105, 112.
(*c*) *Bursill* v. *Tanner*, 13 Q. B. D. 691.
(*d*) *Bursill* v. *Tanner*, supra; *Scott* v. *Morley*, 20 Q. B. D. 120; *Downe* v. *Fletcher*, 21 Q. B. D. 11.
(*e*) *Aylesford* (*Countess*) v. *G. W. Rail. Co.*, 1892, 2 Q. B. 626.

Bill for administration of separate estate.

married woman, her creditors may commence an action against her representatives for the administration of her separate estate (*f*),—which will be treated as equitable assets (*g*); and her ante-nuptial debts will be provable, along with the debts contracted by her with reference to her separate estate (*h*); and if, being the donee of a general power of appointment, she exercises that power, she thereby renders the appointment property assets for the payment of her debts contracted after the 31st December 1882 (*i*); and even, *semble*, for the payment of her debts contracted before that date (*k*).

Restraint on anticipation,—origin of, and necessity for.

A married woman being, as regards property settled to her separate use, viewed in a court of equity as a *feme sole*,—and being, therefore, at liberty to dispose of such property,—was in danger of yielding to the persuasions of her husband to dispose of it; and to provide against that possible event, the court sanctioned a provision restraining her anticipation of the income (*l*). And inasmuch as the separate estate was purely a creature of equity, equity had (it was assumed) a perfect right to sanction such a restraint; for although a similar fetter imposed on the property of a man was void (*m*), as being repugnant to his full ownership, *the restraint on anticipation in the case of married women was* (it was pointed out) *consistent with, and in furtherance of, the very object of the separate estate.* Apparently, however, the restraint on anticipation is within the rule of Perpetuities, and therefore

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(*f*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.
(*g*) *Owens* v. *Dickenson*, 1 Cr. & Ph. 48; *Gregory* v. *Lockyer*, 6 Mad. 90.
(*h*) *Bell* v. *Stocker*, 10 Q. B. D. 129; *Robinson* v. *Lynes*, supra.
(*i*) *Willoughby-Osborne* v. *Holyoake*, 22 Ch. Div. 238; *Roper* v. *Doncaster*, 39 Ch. Div. 482.
(*k*) *Thurston* v. *Evans*, 32 Ch. Div. 508; *Cozen* v. *Rowland*, 1894, 1 Ch. 406.
(*l*) *Stewart* v. *Fletcher*, 38 Ch. Div. 627.
(*m*) *Brandon* v. *Robinson*, 18 Ves. 429.

cannot be imposed beyond a life or lives in being, and twenty-one years afterwards (*n*).

Restraint on anticipation,—operation of.

The legality in equity of the restraint on anticipation having been established, the question next arose as to whether the restraint was to be confined to an actually existing coverture, or might be extended to take effect upon a future marriage; and, after some wavering of opinion, it was eventually determined in *Tullet* v. *Armstrong* (*o*), that the restriction attached to a subsequent marriage, the Master of the Rolls in that case laying down the following general propositions on the nature and effect of the clause in restraint of anticipation, that is to say,—(1.) "If the "gift be made for the woman's sole and separate use, "without more, she has, during her coverture, an "alienable estate independent of her husband; (2.) If "the gift be made for her sole and separate use, "without power to alienate, she has, during the "coverture, the present enjoyment of an inalienable "estate independent of her husband; and (3.) In "either of these cases, she has, when discovert, a "power of alienation,—*for the restraint is annexed to "the separate estate only, and the separate estate has its "existence only during coverture; and whilst the woman "is discovert, the separate estate is suspended, though it "is capable of arising upon the happening of a marriage.* "The restriction cannot be considered apart from "the separate estate, of which it is only a modifica- "tion. . . . *If there be no separate estate, there can be "no such modification.* The separate estate may, and "often does, exist without the restriction, but the "restriction has no independent existence; when "found, it is a modification of the separate estate,

(1.) The married woman has a *jus disponendi* over her separate property.

(2.) If restrained, she is entitled to the present enjoyment exclusively.

(3.) Separate estate with or without restraint exists only during coverture.

(4.) Restraint on alienation depends on, and is a modification of, separate estate, and has no independent existence.

(*n*) *Herbert* v. *Webster*, 15 Ch. Div. 610; *Cooper* v. *Laroche*, 17 Ch. Div. 368.

(*o*) 1 Beav. 1; *Buckton* v. *Hay*, 10 Ch. Div. 645.

"and inseparable from it" (*p*). And to these observations it is now to be added, that where the gift, although not expressed to be for the separate use of the married woman, is nevertheless (by force of the Married Women's Property Acts) for her separate use, there the restraint on anticipation can validly be annexed (*q*). And it seems to result briefly from these propositions,—That while a spinster, the female, entitled to her separate estate without power of anticipation, may anticipate the entirety or any part of her estate; but that immediately upon her marriage (No. 1), the separate estate, and with it the restraint on anticipation, attach and endure during that coverture; and that upon her widowhood (No. 1), both the separate estate and the restraint dis-attach; and again, upon her subsequent marriage (No. 2), and subsequent widowhood (No. 2); and so on *toties quoties*, attaching and dis-attaching, and re-attaching and again dis-attaching, according as she is covert or not from time to time, and for the time being (*r*). And note, that when the fund which is given to a married woman for her separate use without power of anticipation is in court, and she applies for the payment out of that fund, the court has to inquire, whether the restraint is still a continuing restraint or not; and if such restraint is not a continuing one, the fund will be paid out to the woman on her separate receipt (*s*); but it will not be so paid out, if the restraint is intended to continue, as, *e.g.*, if the testator has said that his trustees are *to hold* the fund for the married woman (*t*);

Funds in court,—when and when not paid out, to married woman on her receipt.

(*p*) *Stogdon* v. *Lee*, 1891, 1 Q. B. 661.
(*q*) *In re Lumley, ex parte Hood-Barrs*, 1896, 2 Ch. 690.
(*r*) *Baggett* v. *Meux*, 1 Phil. 627.
(*s*) *In re Clarke's Trusts*, 21 Ch. Div. 748; *O'Halloran* v. *King*, 27 Ch. Div. 411; *Hotchkin* v. *Mayor*, W. N. 1896, p. 175.
(*t*) *Acason* v. *Greenwood*, 34 Ch. Div. 712; *In re Tippett and Newbould*, 37 Ch. Div. 444.

and this, *semble*, is the case whether the fund is an income-bearing one or not.

What words will restrain alienation.—*Field* v. *Evans.*

As in the case of the separate use, so in the case of the restraint on anticipation, no particular form of words is necessary to restrain alienation, if the intention be clear. Thus, when property was settled, and it was directed that the trustee should during the lady's life receive the income "when and as often as the same should become due," and pay it to such persons as she might from time to time appoint, or permit her to receive it for her separate use; and that her receipts, or the receipts of any person to whom she might appoint the same *after it should have become due*, should be valid discharges for it,—it was held, that she was restrained from anticipating the income (*u*). So also, where property was given to the separate use of a married woman, "not to be sold or mortgaged," she was held to take it with a restraint on alienation (*v*). On the other hand, where a testator bequeathed a sum of stock in trust for the separate use of his wife for her life, and directed that it "should remain during her life, "and be (under the order of the trustees) made a "duly administered provision for her, and the interest "given to her, *on her personal appearance and receipt*," by any banker the trustees might appoint,—it was held that the widow, who had married again, was not restrained from alienating her interest in the stock (*x*); and, generally, where expressions are used giving the wife a right to receive separate property "with her own hands from time to time," or so that her receipts "alone for what should be actually" paid into her own proper hands should "be good

What words will not restrain alienation,—*Parkes* v. *Whyte.*

(*u*) *Field* v. *Evans*, 15 Sim, 375; *Bland* v. *Dawes*, 17 Ch. Div. 794.
(*v*) *Steedman* v. *Poole*, 6 Ha. 193.
(*x*) *In re Ross's Trusts*, 1 Sim., N. S., 176.

discharges," these expressions are, to use the words of Lord Eldon, only an *unfolding* of what is implied in a gift to the woman for her separate use (*y*).

In what cases the trust would have been wholly destroyed, so as not to attach on marriage.

Inasmuch as a woman, when discovert, had and has full power of alienation over her separate estate, even though coupled with a restraint on anticipation, the question sometimes arose, whether she had not, by her intervening acts during discoverture, acquired the property unfettered by any restraint,—so that neither the separate estate nor the restraint on anticipation would attach or re-attach upon her marriage, as they would have done in the absence of such intervening acts; and in *Wright* v. *Wright* (*z*), where stock was bequeathed to a woman upon trust for her separate use, without power of anticipation; and she afterwards, being discovert, sold the stock, spent a portion of the proceeds, and invested the rest in shares of a joint-stock bank and in Canada bonds,—It was held, that by doing so she had determined the trust for her separate use, and with it the restraint on anticipation,—Wood, V.C., saying:—"Had "she allowed the property to remain *in statu quo*, "had she left it until her marriage in the form of "investment in which it was bequeathed to her by "her parents, then, according to *Newlands* v. *Paynter* "(*a*), the husband must have been considered as "adopting the property in the state in which they "left it, and subject to the trusts that, while in that "state, they had impressed upon it. But she did "not leave it in that form; for having the sole "ownership of the property, and being single and "*sui juris*, she sold it and received the purchase-"money; and when the property was in her hands "as money, it was as absolutely hers as if it had

(*y*) *Parkes* v. *Whyte*, 11 Ves. 222.
(*z*) 2 J. & H. 647.
(*a*) 4 My. & Cr. 408.

"never been fettered by any trust whatever" (*b*). But, apparently, if the married woman should now, during a period of discoverture, make any such disposition of the *corpus* or capital of her separate estate, and should re-marry after any such disposition, her property will become her separate estate again, by virtue of the Married Women's Property Act, 1882 (*c*), but the restraint on anticipation will not again, in such a case, attach to the property, *semble*.

Quaere,—the present law.

A married woman, although restrained from anticipation, might have barred an estate-tail (*d*), or accepted payment out of court (*e*),—neither of these acts involving any anticipation; but even a court of equity could not (apart from statute) dispense with the restraint on anticipation, not even where the highest apparent equity required that the married woman's estate should be rendered liable, *e.g.*, for the payment of costs unrighteously incurred by her (*f*); and therefore, where a testator gave a legacy to a married woman, upon this condition that she should within twelve months execute a certain conveyance of her separate estate which was subject to a restraint against anticipation, it was held, that the court had no power to release the property from that restraint, even though it would have been clearly for her benefit (*g*). The court might, however, under the specific provisions of an Act of Parliament, and for the purposes of the Act (*h*), have released the restraint; and now, under the

Court of equity could not dispense with the fetter on alienation; *secus*, now.

(*b*) *Buttanshaw* v. *Martin*, Johns. 89.
(*c*) 45 & 46 Vict. c. 75, ss. 6, 7, 8, 9.
(*d*) *Cooper* v. *Macdonald*, 7 Ch. Div. 288.
(*e*) *In re Crompton's Trusts*, 8 Ch. Div. 460.
(*f*) *Ellis* v. *Johnson*, 31 Ch. Div. 532; *Cox* v. *Bennett*, 1891, 1 Ch. 617.
(*g*) *Robinson* v. *Wheelwright*, 6 De G. M. & G. 535; *Smith* v. *Lucas*, 18 Ch. Div. 531; *In re Vardon's Trusts*, 31 Ch. Div. 275.
(*h*) Leases and Sales of Settled Estates Act, 1877, s. 50; Settled Land Act, 1882, s. 61, sub-sect. 6.

Under Conveyancing Act, 1881.

Conveyancing and Law of Property Act, 1881 (*i*), the court may,—if it thinks fit, but not otherwise (*k*),—and if it is made to appear to the court to be for the benefit of the married woman, and if she consent, lift off the restraint, either in whole or in part (*l*), or subject to any conditions it thinks fit (*m*), —*scil.* for the purpose of effecting some particular mortgage or other definite disposition of her property (*n*); and in such a case, if the money or fund so released of the restraint is applied in payment of the debts of the husband, the wife is not entitled to any indemnity from the husband (*o*). Also, by

Under Married Women's Property Act, 1893.

the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 2, the court may now order to be paid out of any separate estate, although subject to such restraint, the costs payable by a married woman of her vexatious litigation (*p*); and by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45, the court

Or under Trustee Act, 1893.

may also now impound her separate estate, although subject to such restraint, in order to make good a loss occasioned to the trust estate by her breach of trust (*q*),—but the court will not readily remove the restraint for either of such purposes (*r*). Also, any special Act enabling the court to interfere with the restraint on anticipation must apparently specially so provide; and the Matrimonial Causes Act, 1884 (*s*), which contains no such special provision, does not, by its mere general provision enabling the court to assign

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(*i*) 44 & 45 Vict. c. 41, s. 39.
(*k*) *In re Pollard's Settlement*, 1896, 1 Ch. 901; 2 Ch. 552.
(*l*) *Hodges* v. *Hodges*, 20 Ch. Div. 749; *Harrison* v. *Harrison*, 40 Ch. Div. 418.
(*m*) *In re Milner's Settlement*, 1891, 3 Ch. 547.
(*n*) *In re Warren's Settlement*, 52 L. J., N. S., Ch. 928.
(*o*) *Paget* v. *Paget*, 1898, 1 Ch. 47; and see *Tennant* v. *Welch*, 37 Ch. Div. 622.
(*p*) Vide *supra*, p. 191.
(*q*) Vide *supra*, p. 192.
(*r*) *Bolton* v. *Curre*, 1895, 1 Ch. 544.
(*s*) 47 & 48 Vict. c. 68.

an allowance in lieu of enforcing by attachment a decree for the restitution of conjugal rights, enable the court to interfere with any separate property of the wife which is subject to the restraint (*t*).

Arrears of separate estate,—liability of.

With regard to "*arrears*" of separate estate, where restrained from anticipation, it appears to be now settled (*u*), after considerable variation of decision (*v*), that a judgment obtained against the married woman may be enforced against all such arrears accrued due at or before the date of the judgment,—although such arrears may not yet have come into the hands or actual possession of the married woman: also, where there is no judgment against the married woman, but merely an attempted voluntary alienation by her of her separate estate restrained from anticipation, the voluntary alienation would, *semble*, be perfectly good, if it left to the married woman an option,—to be exercised by her from time to time as often as there were arrears in the hands of her trustees,—to either pay to the alienee a specified sum of money or to direct the trustees to pay over to the alienee the accrued arrears (*x*). But the arrears accruing due *after* the judgment (*y*) cannot be got at by the judgment creditor; nor, save possibly through such option as aforesaid, can they be got at by the voluntary alienee (*z*),—every prospective charge, equally with every prospective charging order, being equally void.

(*t*) *Mitchell* v. *Mitchell*, 1891, P. 208; *Hamilton* v. *Hamilton*, 1892, 1 Ch. Div. 396; and see *Cahill* v. *Cahill*, 8 App. Ca. 420; *Thomson* v. *Thomson*, 1896, P. 263.

(*u*) *Hood-Barrs* v. *Heriot*, 1896, A. C. 174.

(*v*) *Loftus* v. *Heriot*, 1895, 2 Q. B. 212; *Hood-Barrs* v. *Cathcart*, 1894, 2 Q. B. 559, 570.

(*x*) *Hood-Barrs* v. *Heriot*, 1896, A. C. 174, at pp. 182–184.

(*y*) *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48.

(*z*) *Stanley* v. *Stanley*, 7 Ch. Div. 589.

Sub-Section 2.—*The Effects of Recent Legislation.*

20 & 21 Vict. c. 85, s. 21,—separate estate under.

Under the statute 20 & 21 Vict. c. 85 (Divorce Act), s. 21, amended by the statute 21 & 22 Vict. c. 108, s. 8, if a wife is "*deserted*" by her husband, she may obtain an order of protection of her property against her husband and his creditors; and in case of their subsequent cohabitation, such property is to be held for her separate use (*a*); but, of course, she continues a married woman after the making of a protection order, and her separate estate, with or without the restraint on anticipation, will therefore also continue (*b*). Also, by the first-mentioned statute, s. 25, if she is "*judicially separated*," she is to be deemed a *feme sole* as regards her property,—*scil.* being property acquired *subsequently* to the judicial separation (*c*). The effect of an actual "divorce" is, of course, to make the woman a *feme sole* as regards all her unsettled property (*d*); and upon a divorce, her settled property may be dealt with, by variation of the settlement (*e*),—and that whether the husband (*f*) or she herself (*g*) is the guilty party,—but not, *semble*, after the death of either of them, at least where there are no children (*h*).

41 Vict. c. 19, s. 4,—separate estate under.

Under the statute 41 Vict. c. 19 (Matrimonial Causes Act, 1878), s. 4, if a husband was convicted, summarily or otherwise, of an aggravated assault within the meaning of the statute 24 & 25

(*a*) *In re Rainsdon's Trusts*, 4 Dr. 446; *Nicholson* v. *Drury Buildings*, 7 Ch. Div. 48.
(*b*) *Hill* v. *Cooper*, 1893, 2 Q. B. 85.
(*c*) *Dawes* v. *Creyke*, 30 Ch. Div. 500; *Waite* v. *Morland*, 38 Ch. Div. 135.
(*d*) *Thornley* v. *Thornley*, 1893, 2 Ch. 229.
(*e*) *Alleard* v. *Walker*, 1896, 2 Ch. 369.
(*f*) *Smith* v. *Smith*, 12 P. Div. 102.
(*g*) *Midwinter* v. *Midwinter*, 1893, P. 93.
(*h*) *Thomson* v. *Thomson*, 1896, P. 263.

Vict. c. 100, s. 43, on his wife, the court or magistrate before whom he was so convicted might, if satisfied that the future safety of the wife was in peril, order that the wife should be no longer bound to cohabit with her husband (*i*), and might (at the same time) (*k*) order the husband to pay his wife a weekly sum; and such order had the force and effect in all respects of a decree of judicial separation on the ground of cruelty (*i*); but the order would be discharged by a subsequent resumption of the cohabitation, and would not again become operative on a second separation (*l*). Also, under the statute 49 & 50 Vict. c. 52 (Married Women's Maintenance in Case of Desertion Act, 1886), from and after the 25th June 1886, a married woman, upon having been deserted by her husband, might summon him before the magistrate, who (if satisfied of his ability or partial ability to maintain her, and that he had failed to do so and had deserted her) would order him to pay to her a weekly sum (not exceeding two pounds) proportioned to his means and the destitution of the wife; and the magistrate's order was enforceable as an affiliation order,—that is to say, by commitment; but, of course, the "*desertion*" referred to in the statute did not include a "*voluntary separation*" (*m*).

49 & 50 Vict. c. 52,—separate maintenance under.

Both which Acts have now been repealed,—so far as their provisions are above stated,—by the Summary Jurisdiction (Married Women) Act, 1895 (*n*); and it has now been provided, by the repealing Act, as follows, that is to say:—That upon such conviction of the husband as aforesaid,—and also in case

58 & 59 Vict. c. 39,—separate maintenance under.

(*i*) *Wood* v. *Wood*, 10 P. D. 172; *Gillett* v. *Gillett*, 14 P. D. 158; *Powell* v. *Powell*, ib. 177; *Jones* v. *Jones*, 1895, P. 201.
(*k*) *Woodhead* v. *Woodhead*, 1895, P. 343.
(*l*) *Hadden* v. *Hadden*, 18 Q. B. D. 778.
(*m*) *Pape* v. *Pape*, 20 Q. B. D. 76; *Reg.* v. *Leresche*, 1891, 2 Q. B. 418.
(*n*) 58 & 59 Vict. c. 39.

the husband shall desert his wife,—and also in case of persistent cruelty by the husband or of wilful neglect by him to provide reasonable maintenance for her and the children, whereby she is driven into leaving and living apart from him,—the court of summary jurisdiction (or, in case of conviction on indictment, the High Court) may order, that the wife is no longer bound to cohabit with the husband, and that the husband do pay to the wife a weekly allowance not exceeding two pounds (enforceable as an affiliation order),—which weekly allowance may also afterwards be either increased or diminished, or wholly discharged, and will be, *ipso facto*, discharged in case the wife voluntarily resume cohabitation with the husband, or commit adultery. And on these provisions of this statute, it has been held, that the Act is retrospective in its character (*o*); that the cohabitation which is broken off need not have been continuous (*p*); that proof of means must be given before any allowance will be made (*q*); that the application for the order must be made within six months of the act entitling the wife to make it (*r*), —desertion being, however, deemed a *continuing* act (*s*), although cruelty or wilful neglect is not so (*t*); and that the order of the justices is appealable to the Divorce Division, but the justices may not (for that purpose) state a case (*u*).

Married Women's Property Act,

Under the Married Women's Property Act, 1870 (*v*), which came into force the 9th day of August

(*o*) *Lane* v. *Lane*, 1896, P. 133.
(*p*) *Bradshaw* v. *Bradshaw*, 1897, P. 24.
(*q*) *Earnshaw* v. *Earnshaw*, 1896, P. 160.
(*r*) 11 & 12 Vict. c. 43, s. 11; 58 & 59 Vict. c. 39, s. 8; *Ellis* v. *Ellis*, infra.
(*s*) *Heard* v. *Heard*, 1896, P. 188.
(*t*) *Ellis* v. *Ellis*, 1896, P. 251.
(*u*) *Manders* v. *Manders*, 1897, 1 Q. B. 474.
(*v*) 33 & 34 Vict. c. 93; *Sanger* v. *Sanger*, L. R. 11 Eq. 470; *In re Heneage*, L. R. 9 Ch. App. 307; and *Hancocks* v. *Lablache*, 3 C. P. Div. 196.

1870, but which by the Married Women's Property Act, 1882, hereinafter particularly stated, has been repealed as from the 1st day of January 1883, without prejudice nevertheless to any act done or right acquired or liability incurred under the repealed Act, it was enacted briefly as follows:—By section 1, that the wages and earnings of any married woman, acquired or gained by her after the passing of the Act, in any employment carried on separately from her husband, and also all gains made by her from the exercise of any literary, artistic, or scientific skill, and *all investments* of such wages, earnings, or gains, should be her separate and exclusive property (*x*); by section 7, that where any woman, *married after the passing of the Act*, should during her marriage become entitled to any personal property as next of kin, or one of the next of kin, of an intestate, or to any sum of money, not exceeding £200 (*y*), under any deed or will, such property should be her separate property; and, by section 8, that where any freehold, copyhold, or customary-hold property should *descend* upon any woman married after the passing of the Act, as heiress or co-heiress of an intestate, the rents and profits of such property should be her separate property (*z*),—*scil.* the life-estate only (*a*); also, by section 11, a married woman might, as against third parties, maintain an action *in her own name* for the recovery of *her separate property*, and generally might have *in her own name* the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such property, as if it belonged to her as an unmarried woman; and, by section 12, a husband was exempted from all liability for the debts of his wife contracted before marriage, and the

1870,—separate estate under.

Wages and earnings acquired after the passing of the Act, and *investments* thereof.

Personalty devolving on woman married on or after August 9, 1870, *ab intestato*; and sums of money under any deed or will not exceeding £200.

Rents and profits of real estate devolving *ab intestato* on woman so married.

Wife's right of action as against third parties.

Wife's liability for her debts contracted before marriage.

(*x*) *Lowell* v. *Newton*, 4 C. P. D. 7.
(*y*) *Harrison* v. *Davis*, 1897, 2 Ch. 204.
(*z*) *King* v. *Voss*, 13 Ch. Div. 504.
(*a*) *Johnson* v. *Johnson*, 35 Ch. Div. 345.

Extent of husband's liability for same debts, under Married Women's Property Amendment Act, 1874.

wife was made exclusively liable therefor, to the extent of her separate property. But by the Married Women's Property Act, 1874 (*b*), which came into force the 30th day of July 1874, but which has been repealed as from the 1st day of January 1883 by the Married Women's Property Act, 1882, without prejudice, nevertheless, to any act done, or right acquired, or liability incurred under the repealed Act, the husband and wife might again have been, and may now be, jointly sued for any such debts, and the husband was again, and is now, rendered liable therefor, but to the extent only of the assets in the Act specified,—that is to say, to the extent of the following assets:—

(1.) The value of the personal estate in possession of the wife which shall have been vested in the husband;

(2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession;

(3.) The value of the chattels real of the wife which shall have vested in the husband and wife;

(4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or which with reasonable diligence he might have received;

(5.) The value of the husband's estate or interest in any property, real or personal, which the wife, in contemplation of the marriage, may have transferred to him or any other person; and

(6.) The value of every property, real or personal, which the wife, in contemplation of her marriage with the husband, shall with his consent have trans-

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(*b*) 37 & 38 Vict. c. 50; and see *Sanger* v. *Sanger*, L. R. 11 Eq. 470; *Ex parte Hatcher*, 12 Ch. Div. 284; *Axford* v. *Reid*, 22 Q. B. D. 548.

ferred to any other person, with the view of defeating or delaying her existing creditors (*c*).

Married Women's Property Act, 1882, —separate estate under.

Under the Married Women's Property Act, 1882 (*d*), which received the royal assent on the 18th day of August 1882, but which did not come into operation until the 1st day of January 1883 (s. 25), and which repeals (as hereinbefore stated) the Married Women's Property Acts, 1870 and 1874, subject as hereinbefore expressed (s. 22),—but which has of course no operation out of the jurisdiction (*e*),—it is provided and enacted (in substance) as follows:—

What property is to be separate,—

(1.) In case of marriage on or after 1st January 1883.

By section 2, that every woman marrying on or after the 1st day of January 1883 shall hold as her separate property all real and personal estate which shall belong to her at the time of the marriage (*f*), or which shall come to her after the marriage, including the wages and earnings of any separate employment, and the gains of any literary, artistic, or scientific skill carried on or exercised by her separately from her husband; and, by section 5, that every woman married before the 1st day of January 1883 shall hold as her separate property all real and personal estate, "her *title* to which, whether vested "or contingent, and whether in possession, reversion, "or remainder (*g*), shall accrue" on or after the 1st day of January 1883, including such wages, earnings, and gains as aforesaid,—but a mere *spes successionis* is not considered as a title which has "*accrued*" within the meaning of this section (*h*);

(2.) In case of marriage before that date.

(*c*) *London and Provincial Bank* v. *Bogle*, 7 Ch. Div. 773; *Matthews* v. *Whittle*, 13 Ch. Div. 811.
(*d*) 45 & 46 Vict. c. 75.
(*e*) *Lee* v. *Abdy*, 17 Q. B. D. 309.
(*f*) *Plowden* v. *Gayford*, 39 Ch. Div. 622.
(*g*) *Reid* v. *Reid*, 31 Ch. Div. 402.
(*h*) *Stockley* v. *Parsons*, 45 Ch. Div. 51.

and, for the purposes of the Act, and generally, the title which accrues under the exercise of a power of appointment (whether general or special) is deemed in law to have accrued as from the date of the operation of the appointment, and not as from the date of the instrument giving the power (*i*). However, the title to the "*expectancy*" (*scil.* the possibility of becoming an appointee) accrues under the instrument which creates the power, and that title is not necessarily defeated (but may, on the contrary, be clothed with definiteness and certainty) by the exercise of the power (*k*), *semble*.

Deposits, consols, Government annuities, stocks, shares, &c. (1.) When to be separate property, and transferable by the married woman alone.

By section 6, that all deposits in post-office or other savings-banks, or in any other bank, and all consols or reduced or other Government annuities, and all public stocks and funds, and all stocks and funds of the Bank of England, or of any other bank, and also all shares and stocks of any corporate company or society, which on the 1st day of January 1883 are standing in the sole name of a married woman, or (by section 8) in her name jointly with any other person (other than her husband), shall be deemed her separate property,—until the contrary is shown; and, by section 7, that all such annuities, stocks, and shares as shall after the 1st day of January 1883 be allotted to or otherwise stand in the sole name of a married woman, or (by section 8) in her name jointly with any other person (other than her husband), shall be deemed her separate property,—until the contrary is shown; and the liability (if any) attaching to such annuities, stocks, or shares shall be incident to the married woman's separate estate only, and shall not attach to her husband, and

(*i*) *In re Vizard's Trusts*, L. R. 1 Ch. App. 588; *De Serre* v. *Clarke*, L. R. 18 Eq. 587; *Sweetapple* v. *Horlock*, 11 Ch. Div. 745; *Lovett* v. *Lovett*, 1898, 1 Ch. 82.

(*k*) *Re Frowd's Settlement*, 4 New Rep. 54; *In re Vizard's Trusts*, supra; *In re Jackson's Will*, 13 Ch. Div. 189, at p. 201.

he need not join in the receipt of the dividends thereon or in the transfer thereof (s. 9); but no corporation or company is, merely by the Act, obliged or authorised to accept or admit a married woman as a holder of its stock or shares (s. 7); and, by section 10, any of the aforesaid investments, if made with the husband's moneys without his consent, are to become or remain and be the husband's property; and if made with the husband's moneys in fraud of his creditors, or if remaining in the order and disposition of the husband, are made void as against his creditors.

(2.) When not to be separate property.

By section 1, sub-sect. 1, a married woman's separate estate is rendered wholly independent of the intervention of any trustee; and, by section 1, sub-sects. 2, 3, and 4,—provided only she had separate estate at the time (*l*), being property which she might reasonably be deemed to contract with reference to (*m*),—she was rendered capable of contracting, and of contracting even with her husband (*n*), so as to bind her separate estate, contracting thereby a proprietary, not a personal, liability (*o*); and every contract entered into by her was to be *primâ facie* considered a contract entered into by her in respect of her separate estate. And now, by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 1, every contract which after the 5th December 1893 is entered into by a married woman (otherwise than as an agent for her husband or for any stranger) is to be deemed to be a contract binding on her separate estate, whether she has or has not any such

Married woman having separate estate may hold it without a trustee; and may contract and incur liabilities like a man.

(*l*) *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Deakin* v. *Lakin*, 30 Ch. Div. 169; *Stogdon* v. *Lee*, 1891, 1 Q. B. D. 661.

(*m*) *Leek* v. *Driffield*, 24 Q. B. D. 98.

(*n*) *Butler* v. *Butler*, 16 Q. B. D. 374; *Conolon* v. *Leyland*, 27 Ch. Div. 632.

(*o*) *Scott* v. *Morley*, 20 Q. B. D. 120; *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Pelton Brothers* v. *Harrison*, 1892, 1 Q. B. D. 118.

estate at the date of the contract; and such contract binds all her separate estate, whether then present or future, not subject to the restraint on anticipation, and binds also all property which she thereafter while discovert is entitled to.

May make a will,—

By section 1, sub-sect. 1, of the Married Women's Property Act, 1882, a married woman might also make a will; but as regards her will, if that was made by her during coverture, it operated only on the separate estate which she then was or afterwards became possessed of or entitled to during the coverture (*p*); and unless it was re-executed by her when she became discovert, it was not effectual to dispose of property which she acquired after the coverture had come to an end (*q*); but now by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), s. 3, the will of a married woman made during coverture is to be construed with reference to the real and personal estate comprised in it, as speaking and taking effect from the death of the testatrix, equally as (under sect. 24 of the 1 Vict. c. 26) the will of a man would be construed; and the testatrix need not have any separate estate at the date of making her will, and she need not re-execute it after she is left a widow; and all these provisions apply to the wills of all married women who shall die after the 5th December 1893 (*r*). But as regards her will, the Act (being a general Act) is not intended to, and does not, override or discharge any specific disability imposed by any special statute on (or on the extent of) a married woman's power of devise or of bequest (*s*).

Which will now operates exactly like the will of a man.

(*p*) *Bilke* v. *Roper*, 45 Ch. Div. 632; *James* v. *James*, 1892, 2 Ch. 291.
(*q*) *In re Price*, 28 Ch. Div. 709; *Mansfield* v. *Mansfield*, 43 Ch. Div. 12.
(*r*) *In re Wylie*, *Wylie* v. *Moffat*, 1895, 2 Ch. 116.
(*s*) *Clements* v. *Ward*, 35 Ch. Div. 589.

By section 1, sub-sect. 2, of the Married Women's Property Act, 1882, a married woman may now sue or be sued either in contract or in tort (*t*), or otherwise as if she were a *feme sole*, and without her husband being joined either as a co-plaintiff or as a co-defendant with her; and the costs and damages recovered by or against her go to increase or diminish (as the case may be) her separate estate, and are accordingly liable to be attached under a garnishee order (*u*),—nevertheless, her husband remains liable for her torts (*v*); and by section 1, sub-sect. 5, if (but only if) (*x*) she carries on (or has carried on) (*y*) any trade separately from her husband, she is, in respect of her separate property and the debts incurred in such trade, liable to the bankruptcy laws (*z*); and her liabilities aforesaid,—*scil.* on contracts entered into subsequently to the Act (*a*),—extend as well to her separate estate (not being, of course, property which is subject to the restraint on anticipation) (*b*), as also (by sect. 4) to any property subject to a general power of appointment which the married woman may have exercised by her will (*c*),—but so nevertheless that her appointment property shall not be liable in the event of her bankruptcy (*d*); and a committal order cannot be made against her, even if she be proved to have had or to have the means to pay (*e*),—unless, *semble*, in respect of her antenuptial debts (*f*); or in respect of debts (*e.g.*, rates)

May sue and be sued alone;

and, being a trader, may be made a bankrupt.

Cannot be compelled to exercise, being bankrupt, her general powers,—

and cannot be committed.

(*t*) *Weldon* v. *De Bathe*, 14 Q. B. D. 339; *Lowe* v. *Fox*, 15 Q. B. D. 667.
(*u*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103.
(*v*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177.
(*x*) *Ex parte Coulson*, 20 Q. B. D. 249.
(*y*) *In re Dagnall, ex parte Soar*, 1896, 2 Q. B. 407.
(*z*) *Ex parte Lester*, 1893, Q. B. 113.
(*a*) *Turnbull* v. *Forman*, 15 Q. B. D. 234; and see *Roper* v. *Doncaster*, 39 Ch. Div. 482.
(*b*) *Pelton Brothers* v. *Harrison*, 1891, Q. B. 422.
(*c*) *Wilson* v. *Ann*, 1894, 1 Ch. 549.
(*d*) *Ex parte Gilchrist*, 17 Q. B. D. 521.
(*e*) *Draycott* v. *Harrison*, 17 Q. B. D. 147.
(*f*) *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.

the recovery of which is by statute made specifically enforceable by committal (*g*).

Her claim as a creditor of her own husband, being a bankrupt.

By section 3, if the married woman lends or intrusts any separate property to her husband, and he becomes bankrupt,—or even if he dies insolvent (*h*), —such separate property is to be treated as assets of the husband, the wife having only a right of proof against his estate as a creditor for the amount, and her right of proof being posterior to all claims of the other creditors for value of the husband (*i*); but this provision does not interfere with the wife's right of retainer, when she is entitled to such right (*k*); nor is it applicable to a loan made by a married woman to a firm in which her husband is a partner (*l*); nor would it invalidate any security the wife may take for a loan made by her to her husband (*m*).

Her position as an executrix or administratrix.

By section 24, the word "contract," as used in the Act, is to include, for the purposes of the Act, the acceptance of any trust or of the office of executrix or administratrix, so that the liability of the separate estate shall extend to any breach of trust or devastavit committed or permitted by such married woman, and whether before or after her marriage, and her husband (provided he have not intermeddled) is not to be liable for any such breach of trust or devastavit; and, by section 18, a married woman who is an executrix, administratrix, or trustee is to be regarded as a *feme sole*, so that her husband has (in the general case at least) no occasion for intermeddling in his wife's conduct as trustee, executrix,

(*g*) *In re Elizabeth Allen*, 1894, 2 Q. B. 924.
(*h*) *Tarn* v. *Emmerson*, 1895, 1 Ch. 652.
(*i*) *Ex parte District Bank*, 16 Q. B. D. 700; *Tarn* v. *Emmerson*, supra.
(*k*) *Crawford* v. *May*, 45 Ch. Div. 499.
(*l*) *Ex parte Nottingham*, 19 Q. B. D. 88.
(*m*) *Ex parte Shiel*, 4 Ch. Div. 789; *Ex parte Taylor*, 12 Ch. Div. 366.

or administratrix; and he need not therefore now be a party to the administration bond given by his wife (*n*); and it would have appeared to be the proper conclusion from all this, to have held,—that the wife's deed conveying the trust property (whether real estate or personal estate) was good without acknowledgment (*o*), and therefore without her husband's concurrence in such deed,—*scil.* because, if he concurred, he would be a co-conveying party, but (*ex hypothesi*) he has no estate or interest to convey; but the court has held,—being apparently constrained so to hold by the strict interpretation of the words of the Act,—that such conclusion is erroneous, so far as regards trust *real* state (*p*),—the provisions of section 18 specifically dispensing with the husband's concurrence as regards the stocks and shares of companies held by the married woman as trustee being (upon their language) applicable to such *stocks and shares* only, and all the provisions contained in the Act relative to the wife's *real* estate, and to her *other personal* estate referring to the wife's own *beneficial* real and personal estate only; so that a deed acknowledged (and in which the husband must concur), remains necessary for the wife's conveyance of her trust *real* estate, and for her assignment of her trust *personal* estate (other than the stocks and shares of companies specified in section 18). And section 16 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), enabling a married woman who is a bare trustee of lands to convey them as if she were a *feme sole* (*i.e.*, by an unacknowledged deed), does not extend to lands of which she is a trustee in the ordinary sense, that section being a mere re-enact-

Wife's acknowledged deed still required for trust real estate;

and for trust personal estate, not being stocks or shares.

When wife a bare trustee.

(*n*) *Re Harriet Ayres*, 8 P. Div. 168.
(*o*) *In re Drummond and Davis's Contract*, 1891, 1 Ch. 524; *In re Batt's Settled Estates*, 1897, 2 Ch. 65.
(*p*) *In re Harkness and Allsopp's Contract*, 1896, 2 Ch. 358.

ment of section 6 of the Vendor and Purchaser Act, 1874.

Ante-nuptial debts, &c., wife liable for, and husband liable concurrently, to what extent?

By section 13, as regards all debts contracted or liabilities incurred, and all contracts or torts entered into or committed respectively, by a married woman before her marriage, she is to continue liable in respect and to the extent of her separate property for all sums recovered against her, and also for all costs of suit; and, by section 14, as regards all the same several debts and liabilities, contracts, and torts, the husband is made liable, but not further or otherwise, than to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife,—after deducting any payments made by him, and any sum for which judgment may have been *bonâ fide* recovered against him in any proceeding at law in respect of any such debts, liabilities, contracts, or torts; and, as between the husband and wife, the separate estate is *primâ facie* to be deemed primarily liable therefor (s. 13); but as regards women married before the 1st January 1883, the provisions of sections 13 and 14 are neither to increase nor to diminish the respective liabilities of husbands and wives in respect of such ante-nuptial debts or liabilities, contracts, or torts of the wife. And, by section 15, a plaintiff may sue both husband and wife jointly if they are concurrently liable as aforesaid, or solely if either of them without the other is liable; and the judgment as against the husband is a personal one to the extent of his liability, and as against the wife is one as to her separate property (*q*).

Remedies (civil and criminal) of

By section 12, every married woman, in respect of her separate property, may in her own name

(*q*) *Beck* v. *Pierce*, 23 Q. B. D. 316; and see *Robinson* v. *Lynes*, supra.

pursue against her husband, and also against third parties (*r*), all civil and also all criminal remedies for the protection and security of such separate property; and she may (if required by the exigencies of the suit) give an undertaking in damages (*s*); but as regards criminal proceedings, these are not to lie by the wife against her husband while they are living together, nor in respect of any act done by the husband while they were living together, and he was not in the act or on the point of deserting her; but excepting as aforesaid, a wife may not sue her husband, or he her, for a tort,—*e.g.*, for a defamatory libel by either upon the other (*t*); but, by section 16, he may prosecute her, being the offender, wherever she might prosecute him, being the offender; and the wife may give evidence against the husband in all such criminal proceedings (s. 12); and now the husband also may, under the Married Women's Property Act, 1884 (*u*), give evidence against the wife in the like cases, although upon the Married Women's Property Act, 1882, s. 12, it was held that he could not do so (*v*).

married woman for security and protection of separate estate.

Also, by section 17, any question between husband and wife regarding the wife's separate property, or what she alleges to be such, may at the suit of either party, or (in the case of stocks and shares) of the bank, corporation, or company suing as a stakeholder only and not otherwise, be settled without suit, on an application by summons or otherwise to the High Court (*x*), or to the County Court (and, as regards the County Court, irrespectively of

Summary remedy, in case of disputes between husband and wife regarding alleged separate property.

(*r*) *Weldon* v. *Winslow*, 13 Q. B. D. 784; *Lowe* v. *Fox*, 15 Q. B. D. 667.
(*s*) *Pike* v. *Cave*, W. N. 1893, p. 91.
(*t*) *Reg.* v. *London* (*Lord Mayor*), 16 Q. B. D. 772.
(*u*) 47 & 48 Vict. c. 14.
(*v*) *The Queen* v. *Brittleton*, 12 Q. B. D. 266.
(*x*) *Phillips* v. *Phillips*, 13 P. Div. 220.

the amount or value of the property in question); and the court may make such order or direct such inquiry as it thinks fit; and an order of the High Court is appealable in the usual way, and so also is any order of the County Court; and, in addition, the proceedings (if in the County Court) may be removed from the County Court, when the value of the property in question is beyond the limit (irrespectively of the Act) of the County Court jurisdiction; also, in any proper case, the proceedings may take place *in camerâ*.

Wife's maintenance of pauper husband, and of her children and grandchildren.

By section 20, a married woman having separate estate is liable to the guardians of the poor to maintain her husband becoming chargeable to the parish; and, by section 21, is liable (but concurrently with her husband) to maintain her children and grandchildren (*y*).

Married woman's legal personal representative,—position of.

By section 23, the legal personal representative of a married woman having separate estate has, in respect of such estate, the same rights and liabilities as the married woman if living would have (*z*).

Policies of life assurance, effected by married woman (or by her husband), and trusts of policy moneys.

By section 11, a married woman having separate estate may effect a policy of assurance for her own separate use, and either on her own life or on that of her husband, and may also insure her own life (as may also a husband his own life) expressly for the benefit of her (or his) husband (or wife), with or without her (or his) child or children, or any of them; and in the case of such an insurance, a trust arises in favour of the objects in whose favour the insurance is expressed to be made, and for the estates

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(*y*) *Douglas* v. *Andrews*, 12 Beav. 310; *Bryant* v. *Hickley*, 1894, 1 Ch. 324.

(*z*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.

and interests therein expressed (*a*); and (if the estates and interests are not expressed) they take as joint-tenants (*b*); and the policy moneys are not (unless upon a total failure of the objects of the trust) to form any part of the estate or assets of the life insured; but, in the case of such total failure, *e.g.*, through the wife's felony in procuring her husband's death (*c*), these moneys would belong absolutely to the husband's estate, or (speaking more correctly) to the estate of the party, whether husband or wife, who had effected the insurance; and if to the estate of the wife, then to her legal personal representative, who may of course be the husband. But either in the policy itself, or by any memorandum under the hand of the party effecting the policy, a trustee may be appointed of the policy moneys; and failing such appointment, the legal personal representative of the life insured is made the trustee (*d*); or the court will appoint a trustee, if necessary or desirable.

The Act is not to affect the provisions of settlements, or of agreements for settlements; and, in particular, the restraint on anticipation.

By section 19, the Act (or anything therein) is not to interfere with or to affect any settlement (or agreement for a settlement) made (or to be made), whether before or after marriage, respecting the property of any married woman (*e*); and the Act (or anything therein) is not to interfere with or to render inoperative any restraint on anticipation attached (or to be attached) to any *corpus* or income (*f*); but any such restraint, created by the married woman herself on

(*a*) *Seyton* v. *Satterthwaite*, 34 Ch. Div. 511.
(*b*) *In re Davies' Policy*, 1892, 1 Ch. 90.
(*c*) *Cleaver* v. *Mutual Reserve Association*, 1892, 1 Q. B. 147.
(*d*) *Turnbull* v. *Turnbull*, 1897, 2 Ch 415, approving (as regards policies effected under the Married Women's Property Act, 1870) *In re Adam's Policy Trusts*, 23 Ch. Div. 525, 48 L. T., N. S., 727, and disapproving *In re Soutar's Policy Trust*, 26 Ch. Div. 236.
(*e*) *In re Stonor's Trusts*, 24 Ch. Div. 195; *Hancock* v. *Hancock*, 38 Ch. Div. 78; *Ex parte Boyd*, 22 Q. B. D. 264; *Moore* v. *Johnson*, 1891, 3 Ch. 48; *Stevens* v. *Trevor Garrick*, 1893, 2 Ch. 307.
(*f*) *Dixon* v. *Smith*, 35 Ch. Div. 4; *Beckett* v. *Tasker*, 19 Q. B. D. 7; *Pelton Brothers* v. *Harrison*, 1891, 2 Q. B. 422.

Certain causes invalidating settlements by married women, and restraints on anticipation created by themselves.

her own property, is to be invalid as against her creditors before marriage (*g*); and any settlement (or agreement for a settlement) made (or to be made) by a married woman of her property is to be subject to all (if any) the same causes of invalidity that the like settlement if made by a man of his property would be subject to,—at the suit of creditors impugning it as fraudulent (*h*).

Legislation,—general effect of.

The effect of the Married Women's Property Acts, 1882 and 1893, is to make a separate entity of the wife (*i*), so far as regards the *beneficial* real and personal estate of the wife; but such entity is not, even yet, a complete separate entity (*k*),—a gift to A. and B. and the wife of B. still giving A. one half, and B. and B'.s wife one half, although B. and his wife take such second half equally between them (*l*), and as joint-tenants (*m*); and as to whether the wife may have an injunction against her husband continuing to reside in her house (*n*), that question must be considered doubtful; also, although her deed is now good without being acknowledged, and of course therefore without the concurrence of her husband therein (*o*), yet that is true only as regards her own beneficial real and personal, estate, and does not hold good as regards her trust estates (*p*); but (as already stated) she may make a will notwithstanding her coverture (*q*); and may also contract loans (*r*), and

(*g*) *Jay* v. *Robinson*, 25 Ch. Div. 467.
(*h*) Ibid.
(*i*) *Turner* v. *King*, 1895, 1 Ch. 361.
(*k*) *Thornley* v. *Thornley*, 1893, 2 Ch. 227.
(*l*) *Jupp* v. *Buckwell*, 39 Ch. Div. 148; *Byram* v. *Tull*, 42 Ch. Div. 306.
(*m*) *Thornley* v. *Thornley*, supra.
(*n*) *Symonds* v. *Hallett*, 24 Ch. Div. 346.
(*o*) *Riddel* v. *Errington*, 26 Ch. Div. 220.
(*p*) *In re Harkness and Allsopp's Contract*, 1896, 2 Ch. 358.
(*q*) *In re Price*, 28 Ch. Div. 709.
(*r*) *Butler* v. *Butler*, 14 Q. B. D. 831; 16 Q. B. D. 374.

make all other contracts, from or with her husband or any third person.

Section II.—Pin-Money and Paraphernalia.

Pin-money, for wife's ornaments and personal expenditure.

I. Pin-money may be defined as a yearly allowance settled upon the wife before marriage,—for the purchase of clothes or ornaments, or otherwise for her separate expenditure, and in order to deck her person suitably to the rank and agreeably to the tastes of her husband; it is, in fact, a sum allowed for her personal expenses,—in order to save a constant recurrence by the wife to her husband upon every occasion of a milliner's bill or jeweller's account coming in, and for pocket-money and things of that sort (*s*); and gifts or gratuitous payments from time to time, made to the wife by her husband after marriage, for the same purposes, are also considered as pin-money (*t*).

To save the constant recurrence of wife to husband, for trifling expenses.

Not like her separate estate in some few respects, but like it in most respects.

Bearing in mind the objects for which pin-money is given, it follows, that it is, in some respects, very different from money set apart for the wife's sole and separate use during the coverture, excluding the *jus mariti;* but notwithstanding the difference of the objects, pin-money is, in many (and these the legally most important) respects, very similar indeed to separate estate; *e.g.*,—(1.) When the wife permits her pin-money to run into arrear for a considerable time, upon surviving her husband she will be permitted to claim arrears for only one year prior to his death (*u*),—for the very object of the provision excludes the supposition that she may accumulate her pin-money while the expenses of her person and the demands upon her pocket, for those things to

She can claim only one year's arrears.

(*s*) *Howard* v. *Digby*, 8 Bligh, N. S. 265.
(*t*) 2 Bright, H. & W. 288.
(*u*) *Townshend* v. *Windham*, 2 Ves. Sr. 7.

When she may claim all arrears.

which pin-money is applicable, have been otherwise defrayed by her husband (*v*). (2.) Where, however, it appears that the wife has complained of her pin-money being paid short, and the husband tells her she will have it at last, she will be held entitled to *all* arrears due at her husband's death (*x*).

She cannot claim arrears where he has provided her apparel, &c.

(3.) On the other hand, where the husband has paid for all the wife's apparel and provided for all her private expenses, she cannot claim for any arrears at the death of her husband,—for this will be considered a satisfaction by the husband (*y*).

Wife's executors cannot claim even one year's arrears.

(4.) Also, the wife's executors have no claim against the husband or his estate, even for one year's arrears (*z*).

Paraphernalia include gifts to be worn as ornaments;

II. PARAPHERNALIA (*a*).—The paraphernalia of the wife include such apparel and ornaments given to the wife as are suitable to her condition in life, and as are expressly given to be worn as ornaments of her person only (*b*); *e.g.*, jewels given to his wife by her husband after marriage will be considered her paraphernalia,—where they are given her expressly for the purpose of wearing them, as befitting her station in life (*c*). But such gifts from the husband to the wife may be made to her separate use, *e.g.*, where they are given to her absolutely, and not merely to be worn as ornaments for her person (*d*);

but not old family jewels;

and the Married Women's Property Acts above referred to have not altered the law in any way as regards such gifts (*e*). Old family jewels, which

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(*v*) *Howard* v. *Digby*, 8 Bligh, N. S. 265.
(*x*) *Ridout* v. *Lewis*, 1 Atk. 269.
(*y*) *Thomas* v. *Bennet*, 1 P. W. 341.
(*z*) *Howard* v. *Digby*, supra.
(*a*) The word paraphernalia is derived from the Greek word παραφέρνη, *i.e.*, property belonging to the wife over and above (παρα) the dowry (φέρνη) which she brought to her husband.
(*b*) *Graham* v. *Londonderry*, 3 Atk. 394.
(*c*) *Jervoise* v. *Jervoise*, 17 Beav. 571.
(*d*) *Graham* v. *Londonderry*, supra; *Grant* v. *Grant*, 13 W. R. 1057.
(*e*) *Tasker* v. *Tasker*, 1895, P. 1.

have been handed down from father to son, do not, however, constitute the paraphernalia of the wife; but she may, of course, acquire them by gift, purchase, or bequest,—in which case they would belong to her for her separate use (*f*). Also, the better opinion seems to be, that where articles such as ordinarily constitute paraphernalia are given to the wife, either before or after marriage, by a relative or friend, they will be considered as given to her for her separate use, and not as paraphernalia (*g*).

nor gifts by a stranger, before or after marriage.

The wife cannot dispose of her paraphernalia (properly so called) by gift or by will during her husband's lifetime; but the husband may, by act *inter vivos*, during her life, dispose of her paraphernalia by sale or gift, but not by his will (*h*),—although, if he purports to dispose of them by his will, and confers other benefits upon the wife by his will, she will be put to her election between her paraphernalia and any interest which she may take under the will (*i*). Also, the husband being able to dispose of his wife's paraphernalia in his lifetime, they will be liable for his debts (*k*); and where the husband dies indebted, and the wife's paraphernalia are taken by his creditors in satisfaction of their demands, the widow's claim to her paraphernalia will, under the doctrine of the marshalling of the assets, be preferred to general legacies; and it follows, that she is entitled to marshal assets in all those cases in which a general legatee would have that right (*l*); and, in fact, as already stated in the chapter on "Marshalling of Assets," the wife, as regards her paraphernalia, has the first claim after simple contract creditors

Wife cannot dispose of paraphernalia during husband's life.

Husband cannot dispose of them by *will*.

Paraphernalia liable to husband's debts.

Widow's claim to paraphernalia, preferred to general legacies.

(*f*) *Jervoise* v. *Jervoise*, 17 Beav. 570.
(*g*) *Lucas* v. *Lucas*, 1 Atk. 270; *Williams* v. *Mercier*, 10 App. Ca. 1.
(*h*) *Seymore* v. *Tresilian*, 3 Atk. 358.
(*i*) *Churchill* v. *Small*, 2 Keynon, pt. 2, p. 6.
(*k*) *Campion* v. *Cotton*, 17 Ves. 273.
(*l*) *Tipping* v. *Tipping*, 1 P. W. 729; see also p. 321, *supra*.

On partial alienation by husband, must be redeemed out of the personal assets, as against legatees.

It appears to follow, that if the alienation by the husband in his lifetime of the wife's paraphernalia be not absolute, but only by way of pledge or mortgage, his wife (surviving him) will be entitled to have them redeemed out of his personal estate, even to the prejudice of legatees, her right being anterior to theirs, and to be preferred to their claims, which are merely voluntary (*m*).

Section III.—The Wife's Equity to a Settlement, and her Right of Survivorship.

Marriage a gift of wife's personal property to husband, both at law and in equity.

Marriage used to be, and (subject to the various Married Women's Property Acts above explained) still is, a gift to the husband of all the personal property, other than separate property, to which the wife is entitled at the time of the marriage, or to which she may afterwards become entitled, subject only to the condition (as regards any chose in action) of his reducing it into possession during the coverture; and no distinction exists, in this respect, between property to which the wife is entitled in equity, and property to which she is entitled at law, or between property to which she is solely entitled and property to which she is entitled jointly with another or others (*n*). *Primâ facie*, then, the wife's property, whether at law or in equity, used to become and (subject as aforesaid) still becomes the husband's (*o*). On what grounds, therefore, it may be asked, was the interference of equity derogating from the husband's legal rights, and compelling him to make a settlement on his wife, to be supported?

(*m*) *Graham* v. *Londonderry*, supra.

(*n*) *Hughes* v. *Anderson*, 38 Ch. Div. 286 (as to *choses in action* of the wife),—citing Co. Litt. 185*b* and 351*a* (as to her *chattels real*), and Co. Litt. 351*b* (as to her *chattels personal in possession*).

(*o*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.

And it is safe to assert, that her equity to a settlement did not and does not depend on any right of property in her,—for if the wife insists upon her equity, she must claim it for herself and her children, and not for herself alone (*p*); and the wife's equity to a settlement was, in truth, a mere creature of equity, deduced originally from the maxim, "He who seeks equity must do equity,"—that is to say, the court of equity refused its aid to the plaintiff-husband seeking, in a court of equity, to acquire what the law entitled him to, but which no court of law had jurisdiction to give him; and as therefore he necessarily came into a court of equity to obtain his rights, that court said, that he was bound to fall in with its own ways (*q*); and as a father would not, in the general case, have given his daughter in marriage without insisting on some provision being made for her and her children, so a court of equity, standing (vaguely speaking) *in loco parentis* towards all married women, would not allow the husband, coming into a court of equity for the fortune of his wife, to obtain that fortune without his first making a provision for her thereout. And once the principle was recognised where the husband was plaintiff, it was easy to apply it also to cases where the assignees of a bankrupt or insolvent husband were plaintiffs,—for they claimed in right of the husband only, and upon the same conditions (*r*); and ultimately, the rule was held to apply even as against the particular assignee of the husband for valuable consideration, being plaintiff; "for it was considered whimsical, that the assignment "by the husband for valuable consideration should "put the assignee in equity in a better situation "than the husband himself was in" (*s*); and in

Her equity to a settlement does not depend on a right of property in her.

Her equity arises from the maxim, "He who seeks equity must do equity."

The court imposes conditions on the husband coming as plaintiff.

Principle extended to the husband's general assignees;

then to his particular assignees for value.

(*p*) *Osborne* v. *Morgan*, 9 Hare, 434.
(*q*) *Sturgis* v. *Champneys*, 5 My. & Cr. 102.
(*r*) *Oswell* v. *Probert*, 2 Ves. Jr. 682.
(*s*) *Scott* v. *Spashett*, 2 Mac. & G. 596.

Wife permitted to assert her right as plaintiff.

Elibank v. *Montolieu* (*t*) the wife herself even was held entitled to come into court as a plaintiff to assert her equity.

The general principle upon which the court acts in decreeing or not to married woman a settlement.

Before proceeding to enumerate the varieties of property out of or in respect of which the wife used to be and (subject as aforesaid) still is entitled to her equity, it will be convenient and serviceable to the student, to express in simple language the guiding principles which govern courts of equity in this matter; and this we will do as follows:—There being, first of all, a possibility of the husband getting hold of and keeping (by virtue of the right which the law gave to him as husband) the property in question of the wife, the court next inquired, whether the wife, if she survived her husband, would or would not take the entirety of the property by virtue of her right of survivorship hereinafter explained; and if (but only if) there was a possibility of the husband getting and keeping the property wholly, *and* the wife would not be entitled to the entirety thereof by survivorship, then, there being this danger to the wife and such danger being also reasonably imminent, the court assumed jurisdiction to inquire into the question of the wife's equity to a settlement out of the property that was so in danger: and upon this inquiry, the court inquired principally, whether the property in question was or was not legal, or was or was not equitable; and then generally, the court answered—(1.) If the property is *equitable*, that the wife was entitled to an equity out of it (there being no other sufficient reason for denying her the equity); and (2.) If the property was *legal*, that the wife was *not* entitled to any equity out of it (there being no other sufficient reason for decreeing to her the equity) (*u*). In brief, the court used to ask,—

(*t* 1 L. C. 464; *In re Bryan*, 14 Ch. Div. 516.
(*u*) *Fowke* v. *Draycott*, 29 Ch. Div. 996.

Firstly, Would the husband take *all?* and if the answer was "Yes;" then, secondly, Was the property *legal* or was it *equitable?* And we will now proceed to apply these principles.

The general principle illustrated,—

1. Wife's term, or leasehold interest.

(*a.*) Being equitable,—wife had an equity.

1. As to the husband's power over his wife's leaseholds, and her equity to a settlement out of them against him and his assignees, the rule varied according as the husband's title in her right was legal or was equitable. In *Hanson* v. *Keating* (*v*), where the husband and wife assigned, by way of mortgage, the *equitable* interest of the husband in right of his wife in a term of years, and the mortgagee filed his bill against the husband, the wife, and the trustee of the legal estate, for a foreclosure and assignment of the term,—it was held, that the wife was entitled to a provision for life by way of settlement out of the mortgaged premises. Where, however, a similar assignment took place of the wife's *legal* interest in leaseholds, it was held, that, on the mortgagee filing a bill for foreclosure, the wife had no equity to a settlement out of them, inasmuch as the mortgagee took a good legal title thereto from the husband alone (*x*). However, in *Boxall* v. *Boxall* (*y*), where the leaseholds were legal (and not equitable), and the husband had deserted his wife, and she had sold the leaseholds,—making title thereto through a fraud which purported to show that she was a widow and that the leaseholds had been her own separate estate,—and she had expended the whole purchase-money upon the maintenance of herself and her children, the court refused to recognise the husband's title at all,—*scil.* to give

(*b.*) Being legal,—wife had no equity, as a rule

(*v*) 4 Hare, 1.
(*x*) *Hill* v. *Edmonds*, 5 De G. & Sm. 603; *Piggott* v. *Piggott*, L. R. 4 Eq. 549.
(*y*) 27 Ch. Div. 220.

him any relief as against the purchaser claiming under the wife.

2. Wife's pure personal property. (*a.*) Being legal,—wife had no equity.

2. As regards the pure personal property of the wife, there was no doubt at all, that, if the property was *legal*, the wife had no equity; on the other hand, if that property was *equitable*, there was just as little doubt, that the wife had an equity out of it, provided she was entitled to the *absolute* interest in the property,—and this against the husband and everybody claiming under him (*z*). But an important distinction was made, between cases in which the wife took the *absolute* interest and those in which she took a *life*-interest only; for it was settled, as regards the wife's absolute interests, that a purchaser from the husband of the wife's *equitable* chose in action was in no better situation than the husband himself,—for where the interest sought to be recovered through the aid of the court was an absolute equitable interest, the court dealt with the interest (or trust fund) in analogy to what a prudent parent would probably have done in giving a portion to his daughter, *and the doctrine having been acted on for centuries, . . . no purchaser from the husband could be deceived or mistaken as to how his rights would be dealt with by the court;* for knowing that the fund was the fund of a married woman, that relation alone, without more, gave rise to her equity; and therefore he could not complain that he was in no better position than the husband to whose rights he had succeeded. But the case was not the same, where the court had to deal with a mere *life-interest;* for, in such a case, the question was one exclusively between the husband and the wife; and in directing a settlement of a wife's fortune, the court never, in the absence of misconduct on the part of the husband, deprived him of the income of

(*b.*) Being equitable,—(*aa.*) And interest being an absolute interest,—wife had an equity.

(*bb.*) But if interest was for life only,—then the wife had or had not an equity, inversely as the husband was or was not maintaining her;

(*z*) *Scott* v. *Spashett*, 3 Mac. & G. 603; *Burdon* v. *Dean*, 2 Ves. Jr. 608.

the fund,—for, it being the husband's duty to maintain his wife, equity followed the law, and gave him a right to what, but for the marriage, would have been the natural fund for supporting the wife; and although, where he failed in the discharge of that duty, equity would not help him to get at the fund, without securing for the wife a portion of the income, yet this was done simply because the husband had failed in the discharge of that duty; and to involve third persons in questions as to how far the husband had or had not duly maintained his wife being most inexpedient (*a*), therefore the court held, as regards the life-estate of the wife, that, even when her husband had deserted her (*b*), or did not maintain her (*c*), or had become bankrupt (*d*), she was not entitled to any equity to a settlement out of it, as against a purchaser for value from the husband *previous* to the desertion or bankruptcy (*e*). But a distinction was taken, between the position of a particular assignee for value of the husband and his general assignee or trustee in bankruptcy; for *when the title of the general assignee vested, the incapacity of the husband to maintain the wife had already raised an equity for the wife*, and she was therefore entitled in such a case to her equity to a settlement as against such general assignee or trustee (*f*),—but not so as to recover any arrears of income accrued due before she had claimed her equity (*g*).

that is to say,—
(1.) Husband took the fund, as long as he maintained the wife.

(2.) Her equity out of the fund arose, on his failure to maintain her.

(3.) Purchaser of life-estate not bound to inquire as to whether the husband was maintaining her.

(4.) Distinction between a particular and a general assignee.

3. As to the realty of a married woman, if that was realty of inheritance, either in fee-simple or in fee-tail, it was clear, that the question of the wife's

3. Wife's realty.
(*a*.) Of inheritance

(*a*) *Tidd* v. *Lister*, 3 De G. M. & G. 869, 870.
(*b*) *Wright* v. *Morley*, 11 Ves. 12.
(*c*) *Tidd* v. *Lister*, 10 Hare, 140.
(*d*) *Elliott* v. *Cordell*, 5 Mad. 149.
(*e*) *Vaughan* v. *Buck*, 13 Sim. 404.
(*f*) *Elliott* v. *Cordell*, 5 Mad. 149.
(*g*) *Re Carr's Trusts*, L. R. 12 Eq. 609.

(*aa.*) Being legal,—or (*bb.*) Being equitable,—the wife had no equity in either case.

equity to a settlement out of that realty (as regarded her fee-simple or fee-tail estate therein) did not arise,—because there was no possibility of the husband taking or keeping the inheritance adversely to his wife; and in that case, therefore, whether the estate was legal or equitable, the wife had no equity,—because she had something better, namely, the whole indefeasible inheritance; and, as observed by Turner, L.J., in the *Life Association of Scotland* v. *Siddal* (*h*), "Whatever may be the right of a married woman "to have a provision made for her out of *the income* "of an estate of which she is equitable tenant in "tail, it is not, as I apprehend, according to the "course of the court, *or indeed in its power*, to order "a settlement to be made of the *estate;* for the "equity to a settlement attaches on *what the husband* "*takes in right of the wife*, and *not on what the wife* "*takes in her own right* [and which she can keep in "spite of her husband]; and the estate-tail being in "the wife, I do not see * what power this court can "have to order a settlement of it to be made, or to "render such a settlement, if made, binding and "effectual against the wife." On the other hand,

(*b.*) Life-estate in realty,—(*aa.*) Being legal,—wife had no equity. (*bb.*) Being equitable,—wife had an equity, at least if husband not maintaining her;

in *Sturgis* v. *Champneys* (*i*), where the *provisional assignee* of an insolvent debtor, whose wife was entitled *for life* to real property, was obliged to come into equity to enforce his title to the rents during the joint lives of the husband and wife, in consequence of the legal estate being outstanding in mortgagees,—Lord Cottenham held the wife entitled to a settlement out of the rents of her life-estate, saying:—"*If the life-estate be attainable by the husband*

(*h*) 3 De G. F. & Jo. 271.

* The judge here spoke satirically:—Of course, if the wife could keep (and she could keep) the whole fee-tail at law, what occasion was there for the court of equity, or what power in that court, to take the whole away, and give her back a half or two-thirds, on the pretext of protecting her?

(*i*) 5 My. & Cr. 97; *Taunton* v. *Morris*, 8 Ch. Div. 453; 11 Ch. Div. 779; but see *Ex parte Rogers, in re Pyatt*, 26 Ch. Div. 31.

"(*or his assignee*) *at law, the severity of the law must* "*prevail;* but if it cannot be reached otherwise than "by the interposition of this court, equity, though "it follows the law, and therefore gives to the hus- "band or his assignee the life-estate of the wife, yet "withholds its assistance for that purpose until it "has secured to the wife the means of subsistence;" and in *Wortham* v. *Pemberton* (*k*), where Miss W. was a tenant-in-tail of an estate *subject to a jointure* payable to Mrs. H., *secured by a term of years*, there being a proviso for cesser of the term on the decease of Mrs. H.; and Miss W. married Mr. N., who had persuaded her to elope with him, and had been imprisoned for the abduction,—It was held, that she was entitled to her equity to a settlement out of her equitable life-estate in the estate-tail, *so long as the term lasted, or until the determination of the term.*

but so long only as the life-estate continued equitable.

A wife might, by alienation, defeat her equity to a settlement. And as regards her freehold estates, whether her interest was in possession or in reversion (*l*),—but not if her so-called interest was a mere *spes successionis* (*m*),—she might alienate these by a deed duly acknowledged by her, and executed with the concurrence of her husband in the manner provided by the 3 & 4 Will. IV. c. 74; and she might alienate her copyhold estates by surrender, being separately examined as to her free consent by the steward or his deputy (*n*); and in all such cases, there was no resulting trust for the wife (*o*). But as regards her personal estates,—a married

Wife's equity defeated by her alienation.

(1.) Interests in realty.

(2.) Interests in personalty.

(*k*) 1 De G. & Sm. 644; *Ex parte Rogers*, 26 Ch. Div. 31.
(*l*) *Tuer* v. *Turner*, 20 Beav. 560; *Briggs* v. *Chamberlain*, 11 Hare, 69; *Miller* v. *Collins*, 1896, 1 Ch. 573.
(*m*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*n*) 1 Watk. Cop. 63.
(*o*) *Tennent* v. *Welch*, 37 Ch. Div. 622.

woman's interests in personal estate, so far as they were estates in *possession*, vesting in her husband on marriage, her power of disposition over them was a question which did not arise,—for her husband might have solely disposed of them, subject only to her establishing, if she was able, her equity to a settlement out of them; and so far as they were estates in *reversion*, her power of disposition over them was in abeyance during the coverture,—as was (in effect) also her husband's power of disposition over them,—excepting only in certain cases in which, as falling under Malins's Act, 20 & 21 Vict. c. 57, she might, with the concurrence of her husband, and by deed acknowledged, have disposed of same.

Wife's choses in action belonged to husband, if he reduced them into possession.

For, as regards the wife's choses in action, the old common law said, that marriage was only a qualified gift to the husband of the wife's choses in action, viz., a gift to him only if (or upon condition that) he reduced them into possession during (in effect) his life,—so that if he died before his wife, and without having reduced such property into possession, the wife would, by right of her survivorship, have been entitled to the property; and this reduction into possession (so far as regarded the pure personal estate of the wife) was a necessary and indispensable preliminary to the husband's either having in himself or being able to convey to another any assured right of property in respect of such personal estate (*p*); although, as regards the chattels real of the wife, a previous actual reduction thereof into his possession was not a necessary preliminary to the husband's power of disposition over them (*q*).

Wife surviving her husband took her

And in accordance with these principles, in *Purdew* v. *Jackson* (*r*), where a husband and wife, by deed

(*p*) *Hughes* v. *Anderson*, 38 Ch. Div. 286.
(*q*) *Purdew* v. *Jackson*, 1 Russ. 66; *Donne* v. *Hart*, 2 Russ. & My. 363; *Duberley* v. *Day*, 16 Beav. 33.
(*r*) 1 Russ. 1.

executed by both, purported to assign to a purchaser for valuable consideration a fund in which the wife had a vested estate in remainder, expectant on the death of a tenant for life, *and both the wife and the tenant for life outlived the husband*,—it was decided, that the wife, notwithstanding her concurrence in the assignment, was entitled to claim the whole fund,—all such assignments, although made by the husband and wife jointly, operating to pass only the interest which the husband, had, *i.e.*, subject to the wife's legal right by survivorship (*s*). And the court had not even power to take the wife's consent to part with her legal title by survivorship (*t*); that is to say, the legal right of survivorship was never bound by a court of equity (*u*); and it was, in fact, for this precise reason, that a claim by the wife for a settlement out of her reversionary interest in property, *so long as it continued reversionary*, was not maintainable, the court only dealing with interests in possession; in other words, *the wife's equity arose upon the husband's legal right to present possession* (*v*); or, in the language of this present book, there was no danger of the husband getting at such property, and therefore no foundation for an equity to a settlement out of it, *so long as it was in its reversionary condition*. However, by Malins's Act (*x*), every married woman (unless she is restrained from anticipation) may now, with the concurrence of her husband, by deed acknowledged in the manner required by the Fines and Recoveries Act (*y*), dispose of *every future or reversionary interest*, vested or

reversionary interests, which he had not reduced into possession.

Assignee could take no more than the husband had to give.

Court had not power to take wife's consent to part with her reversionary interest.

She had no equity out of reversionary interest so long as reversionary.

Malins's Act, 20 & 21 Vict. c. 57.

Feme covert's interests in personalty,—(*a.*) Being in reversion;

(*s*) *Elliott* v. *Cordell*, 5 Mad. 149; *Re Duffy's Trusts*, 28 Beav. 386.
(*t*) *Pickard* v. *Roberts*, 3 Mad. 386; *Purdew* v. *Jackson*, 1 Russ. 56.
(*u*) *Buckmaster* v. *Buckmaster*, 34 Ch. Div. 21; and (sub nom. *Seaton* v. *Seaton*), 13 App. Ca. 61.
(*v*) *Osborn* v. *Morgan*, 9 Hare, 434; *In re Slater's Trusts*, 11 Ch. Div. 227.
(*x*) 20 & 21 Vict. c. 57.
(*y*) 3 & 4 Will. IV. c. 74.

contingent, belonging to such married woman, or her husband in her right (*z*), *in any pure personal estate* to which she is entitled under any instrument (except her own marriage settlement) (*a*), *made after the* 31*st December* 1857 (*b*); but a mere *spes successionis* by the wife is not a *future interest* within the meaning of the Act (*c*). And by the Act, she may also release or extinguish any power in regard to any such personal estate, and also release and extinguish her equity to a settlement out of *her personal property in possession* under any such instrument as aforesaid,—excepting always the settlement or agreement for a settlement made on the occasion of her own marriage.

(*b*.) Being in possession.

As to cases not within the Act,—operation of the assignment.

If the wife is entitled to a chose in action, whether legal or equitable, of a reversionary nature, and it is neither separate estate of the wife, nor within the provisions of Malins's Act, the effect of an assignment of it by the husband, or by the husband and wife jointly, will be different under different circumstances. For, putting aside any effect of the Married Women's Property Acts (*d*), it is certain, firstly, that the wife by herself cannot assign; and, secondly, the husband can only assign to another the interest to which he is himself entitled. Suppose, therefore, the wife entitled, on the death of A. a living person, *to a sum of stock standing in the names of trustees*, and that her husband purports to make an assignment of this reversionary interest to B., a purchaser; the benefit which accrues to B. by virtue of the assignment varies according as the husband, the wife, or A., the tenant for life, dies first; that is to say:—

Three possible ways in which the assignment might result,—

(*z*) *Tennent* v. *Welch*, 37 Ch. Div. 622.
(*a*) *Harle* v. *Jarman*, 1895, 2 Ch. 419.
(*b*) *Layborn* v. *Grover-Wright*, 1894, 1 Ch. 303.
(*c*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*d*) *Turner* v. *King*, 1895, 1 Ch. 361, as affecting the rule acted upon in *Whittle* v. *Henning*, 2 Ph. 731.

(1.) If the husband dies first, B. loses his purchase,—for the wife having survived her husband, will, on the death of A., be entitled to the stock (*e*); (2.) If A. dies first, B. will then become entitled to a transfer of the stock, if the trustees choose to transfer it to him (*f*), and if the wife has not meanwhile taken steps to enforce her equity to a settlement (*g*); but if the trustees refuse to transfer without the direction of the Court of Chancery, or if the wife has insisted upon her equity, B. only takes the fund subject to the wife's equity to a settlement; and (3.) If the wife dies first, the husband, on taking out administration to his wife (*h*), will be able to recover it at law, and B. (as the husband's assignee) will, in this single case, obtain the whole fund,—subject, however, to the wife's debts if any (*i*).

(1.) If husband died before reversion fell in, purchaser lost his purchase.

(2.) If reversion fell into possession, the husband and wife living, purchaser took it subject to her equity.

(3.) If wife died first, and then the reversion fell in, purchaser took all.

The question, as to what amounted to a reduction into possession by the husband of his wife's choses in action, was one that generally depended on the peculiar circumstances of each case; a mere assignment, however, of a reversionary chose in action by the husband was not an actual (*k*), or even a constructive, reduction into possession (*l*); and whether the husband died in the lifetime of the person having a prior interest,—whereby the chose in action *could not*, as against the wife, be reduced into possession,—or whether he survived and died before it was *actually* reduced into possession, the same result followed, viz., the chose in action survived to the wife (*m*); moreover, the transfer by a husband of title-deeds, of

What amounted to reduction into possession.

Mere assignment of a reversion not a reduction into possession.

(*e*) *Honner* v. *Morton*, 3 Russ. 65.
(*f*) *Wheeler* v. *Caryl*, Amb. 121, 122; *Moor* v. *Rycault*, Prec. Ch. 22.
(*g*) *Greedy* v. *Lavender*, 13 Beav. 62.
(*h*) *Betts* v. *Kimpton*, 2 B. & Ad. 273.
(*i*) 29 Car. II. c. 3, s. 25.
(*k*) *Hornsby* v. *Lee*, 2 Mad. 16.
(*l*) *Le Vasseur* v. *Scratton*, 14 Sim. 116.
(*m*) *Ellison* v. *Elwin*, 13 Sim. 309; *Widgery* v. *Tepper*, 5 Ch. Div. 516.

Husband's transfer of title-deeds, of which his wife was equitable mortgagee, not enough.

Order of court to pay wife's income into a receiver's hands, to be applied on husband's behalf, was a reduction into possession.

which his wife was equitable mortgagee, to secure a debt of his own, was not a reduction into possession, so as to defeat the wife's right of survivorship (*n*). On the other hand, if the husband was in a position to maintain an action at law for the amount, as money had and received to his use (*o*); or if, in a pending action, the income had been ordered to be received and applied (by the receiver in the suit) in payment of the husband's incumbrances (*p*),—in either of these cases, there was such a reduction into possession as disentitled the wife surviving to such arrears; and, of course, actual payment to an agent of the husband was a reduction into possession,—to the extent of that payment.

Settlement, if made, must have been on wife *and* children; though she might have waived it, and thus have deprived her children.

The wife's equity, as has already been observed, is not for herself only, but for herself and her children also; and though the wife may waive or abandon her equity, and thus prevent her children obtaining any benefit from it, yet, if she claim it for herself, the court requires the benefit to be extended to her children,—her equity and the equity of the children being treated as one equity, to be enforced or not at her option (*q*); and in no case were the children permitted to assert an independent equity; for in all cases the equity of the wife was personal, and the court acknowledged no original title in the children, who could claim only that provision which the wife thought fit to secure for herself and them; and if the wife consented that the husband should receive the whole property, the children were deprived of all provision out of it. The inquiry therefore arose,—What was sufficient to create a title in

(*n*) *Michelmore* v. *Mudge*, 2 Giff. 183.
(*o*) *Aitchison* v. *Dixon*, L. R. 10 Ep. 589, *Wollaston* v. *Berkeley*, 2 Ch. Div. 212; *Dardier* v. *Chapman*, 11 Ch. Div. 442.
(*p*) *Tidd* v. *Lister*, 2 W. R. 184.
(*q*) *De la Garde* v. *Lempriere*, 6 Beav. 344.

the children? And, Firstly, if the property was in the hands of trustees, it was not enough that the wife should have given them notice, in however formal and regular a manner, that she demanded a settlement; for, notwithstanding any such notice, the trustees might, with impunity, have handed over the property to the husband; and, Secondly, if she had gone further and commenced an action, she might, at any time before the *settlement was completed*, have waived and defeated her equity, not only as to her own interests, but also as to the interests of her children (*r*); and generally these points were well established, namely:—(1.) That if the wife died before the bill was filed giving to the court a jurisdiction over the fund, the children had no right to require a settlement (*s*); (2.) That if the wife died after she had filed a bill for a settlement, but before decree, her children could not sustain a bill to have a settlement made on them (*t*); But, (3.) If a decree or order had been made by the court, referring it to Chambers to approve a proper settlement, and the wife died before anything further was done, the children were entitled to the benefit of that decree or order, and might file a bill to enforce such a settlement as the wife, if still living, would have been entitled to (*u*); Also (4.) The children's right to have a settlement executed after the death of their mother, who had claimed her equity to a settlement, arose where there was during the marriage a contract by the father, independently of judicial decree, to make a settlement of his wife's property (*v*); and yet even after such a contract, just as after a judicial decree, the

When the right of the children became indefeasible.

(*a.*) Where wife lived,—upon complete execution of settlement.

(*b.*) Where wife died,—upon decree made, and not sooner.

If wife died before decree, children had no right.

Right of children as against husband, arose on decree.

Right of children might arise, out of contract by father.

(*r*) *Wallace* v. *Auldjo*, 2 Drew. & Sm. 222.
(*s*) *Scriven* v. *Tapley*, 2 Eden, 337.
(*t*) *De la Garde* v. *Lempriere*, 6 Beav. 344; *Fitzgerald* v. *Chapman*, 1 Ch. Div. 563; *Burton* v. *Sturgeon*, 2 Ch. Div. 318.
(*u*) *Wallace* v. *Auldjo*, 2 Drew. & Sm. 223.
(*v*) *Lloyd* v. *Williams*, 1 Mad. 450; *Wallace* v. *Auldjo*, 1 De G. Jo. & Sm. 643.

wife, if living, might, at any time before the *execution* of the settlement pursuant to the contract, have waived her equity, and so have altogether defeated her children (*x*); but, of course, a married women (being, and so long as she was, an infant) could not have waived her equity (*y*).

Infant wife, no waiver by.

What would defeat wife's right to a settlement.

(1.) By husband's receipt of the fund.

(2.) Where the debts of wife, or even of husband, exceeded the fund.

(3.) By an adequate settlement.

(4.) By her adultery, unless husband also living in adultery.

The wife's right to a settlement, besides being voluntarily waived by her, might also have been defeated, adversely to her, by various causes, viz.:—(1.) By the receipt by the husband or his assignees of the fund (*z*); (2.) Where the debts of the wife, contracted before marriage, for which her husband at one time became liable, exceeded in amount the fund to which he became entitled in her right (*a*); and similarly, where the husband's debts to the estate out of which the wife's interest arose exceeded the amount of such interest (*b*); but in this latter case, the wife's equity would not have been wholly defeated (*c*); (3.) Where an adequate settlement had been made upon her (*d*), but not by an inadequate settlement,—unless her right to a further settlement had been barred by an express stipulation before marriage (*e*); (4). Where she was living in adultery apart from her husband (*f*),—but even then her husband would not, it seems, *while he did not maintain her*, have been entitled to receive the whole of her property (*g*); but where both husband and wife were living in adultery, it was held,—that the wife

(*x*) *Baldwin* v. *Baldwin*, 5 De G. & Sm. 319; *Lloyd* v. *Mason*, 5 Ha. 153.
(*y*) *Shipway* v. *Ball*, 16 Ch. Div. 376.
(*z*) *Murray* v. *Elibank*, 1 L. C. 471.
(*a*) *Barnard* v. *Ford*, L. R. 4 Ch. App. 247.
(*b*) *Osborne* v. *Morgan*, 9 Ha. 432; *Ward* v. *Ward*, 14 Ch. Div. 506.
(*c*) *Poulter* v. *Shackell*, 39 Ch. Div. 471.
(*d*) *In re Erskine's Trusts*, 1 K. & J. 302; *Giacometti* v. *Prodgers*, L. R. 8 Ch. App. 338.
(*e*) *Selway* v. *Selway*, Amb. 692; *Bullman* v. *Wynter*, 22 Ch. Div. 619.
(*f*) *In re Lewin's Trust*, 20 Beav. 378.
(*g*) *Ball* v. *Montgomery*, 2 Ves. Jr. 191.

might claim a settlement, upon the principle of setting off the one wrong against the other, whereby the wife was again chaste (*h*); and (5.) By her fraudulent suppression of the fact of her coverture; for where a woman, by a document purporting to bear date before, but in reality signed after, her marriage, affected to assign certain property to her husband, which he afterwards sold, it was held, that she had precluded herself from claiming her equity to a settlement *as against the purchaser* (*i*).

(5.) By her fraud.

As regards the amount to be settled upon the wife and children, that was a matter which, if the husband was solvent, depended on arrangement between him and his wife; and if the husband, being solvent, refused to make a settlement upon his wife, the court would not, because it could not, *so long as he supported her*, prevent his taking the produce or interest of her property,—and what the court did in such a case was to retain the capital, so as to give the wife a chance of taking it by survivorship (*k*); in which case, if the husband survived, he might insist upon the court paying out the entire capital to himself. On the other hand, when the husband, had become bankrupt, or was notoriously insolvent, the amount to be settled was purely within the discretion of the court (*l*); and the court took into consideration, whether the wife had acquired any benefit out of the property of her husband (*m*), and generally the conduct of the husband (*n*), and the

Amount of settlement.

(*a.*) When husband was solvent.

(*b.*) When husband was insolvent.

(*h*) *Greedy* v. *Lavender*, 13 Beav. 62.
(*i*) *In re Lush's Trusts*, 1 L. R. 4 Ch. App. 591; and consider *Bateman* v. *Faber*, 1897, 2 Ch. 223; 1898, 1 Ch. 144.
(*k*) *Atcheson* v. *Atcheson*, 11 Beav. 485.
(*l*) *Carter* v. *Taggart*, 1 De G. M. & G. 289; *Aubrey* v. *Brown*, 4 W. R. 425.
(*m*) *In re Erskine's Trusts*, 1 K. & J. 302; *Green* v. *Otte*, 1 Sim. & Stu. 250.
(*n*) *Barrow* v. *Barrow*, 18 Beav. 529.

Generally, half was settled on her.

conduct and circumstances of the wife (*o*); but in the absence of special circumstances, one *half* of the wife's property would be settled upon herself and her children, the remaining moiety going to the husband or his assignees (*p*).

Sometimes, the whole fund was settled.

But in some cases, the *whole* fund was settled on the wife and children,—as where it was small and barely sufficient for her and their maintenance (*q*); and where the husband, having become bankrupt, was not able to maintain his wife (*r*),—or where the husband had deserted or behaved cruelly to his wife, and did not maintain her (*s*), or was a lunatic (*t*),—the whole was settled.

Form of settlement.

And note, that in the settlement, whether of the half or of the whole, the court did not interfere with the marital right further than was necessary to give effect to the wife's equity; and the ultimate limitation, therefore, in default of issue of the existing marriage, or of any future marriage or marriages of the wife, was to the husband absolutely (*u*), whether or not he survived the wife (*v*).

How far settlement binding as against creditors of husband.

Upon the question, how far settlements made in consideration of the wife's equity to a settlement were or are binding as against creditors, the following rules may be laid down:—(1.) Where the husband has once reduced into possession the equitable choses in action of his wife, and then makes a voluntary settlement on his wife out of them, the question of the validity or invalidity of such settlement against creditors will, apart from statute, depend

If husband reduce her property into possession and then make a settlement, it must conform to 13 Eliz. c. 5.

(*o*) *Barrow* v. *Barrow*, 5 De G. M. & G. 795.
(*p*) *In re Suggitt's Trusts*, L. R. 3 Ch. App. 215.
(*q*) *Roberts* v. *Cooper*, 1891, 2 Ch. 335.
(*r*) *Scott* v. *Splashett*, 3 Mac. & G. 599.
(*s*) *Dunkley* v. *Dunkley*, 2 De G. M. & G. 390; *Reid* v. *Reid*, 33 Ch. Div. 220.
(*t*) *In re Dixon's Trusts*, W. N. 1879, p. 57.
(*u*) *Croxton* v. *May*, 9 Ch. Div. 388; *Oliver* v. *Oliver*, 10 Ch. Div. 765.
(*v*) *Cogan* v. *Duffield*, 2 Ch. Div. 44; *Gale* v. *Gale*, 6 Ch. Div. 144.

upon the *bonâ fides* of the transaction; for although, if the husband, being largely indebted at the time, conveys property in trust for his wife and children, such a conveyance may be within, and void under, the statute 13 Eliz. c. 5, as against the husband's creditors (*x*); yet, as that statute only directs that no act whatsoever done to *defraud* a creditor shall be of any effect against that creditor, a *bonâ fide* settlement, where there is no fraud in point of actual fact, will, even though voluntary (*y*), be supported as against the husband's creditors (*z*); also, by the Bankruptcy Act, 1883, s. 47, "a settlement made "on or for the benefit of the wife or children of the "settlor, of property which has accrued to the settlor "after marriage in right of his wife," is good as against his trustee in bankruptcy. (2.) Where the court decrees the settlement upon the wife, "the "court supports it as a good settlement for valuable "consideration" (*a*); and (3.) Where the wife, after marriage, became entitled to property which the husband could not touch without the aid of the court, and the trustees would not pay it without the husband made a settlement, and the husband agreed to settle it, it was held to be a good settlement as against his creditors (*b*).

Valid if *bonâ fide*, though on a meritorious consideration.

Trader's or non-trader's settlement of wife's property under Bankruptcy Act, 1883.

If court decree the settlement, creditors are bound.

Settlement by husband, on trustees refusing to part with the wife's property, also good.

Section IV.—Settlements in Derogation of Marital Rights.

So long as it was a rule of law that a husband became entitled on marriage to the property of his wife, any alienation of property by her in fraudulent

Wife must not have committed a fraud on the marital right.

(*x*) *Goldsmith* v. *Russell*, 5 De G. M. & G. 547.
(*y*) *Sagitary* v. *Hide*, 1 Vern. 44; *In re Tetley*, W. N. 1896, p. 86.
(*z*) *Cadogan* v. *Kennett*, Cowp. 434.
(*a*) *Simson* v. *Jones*, 2 Russ. & My. 365.
(*b*) *Wheeler* v. *Caryl*, Amb. 121, 122.

derogation of his marital rights would, in equity, have been deemed null and void; or, as was stated by Lord Thurlow, L.C., in *Strathmore* v. *Bowes*:—"A conveyance by a wife, even the moment before "the marriage, is *primâ facie* good, and becomes bad "only upon the imputation of fraud; but if a woman, "*during the course of a treaty* of marriage with her, "makes, without notice to the intended husband, a "conveyance of any part of her property, I should "set it aside, though good *primâ facie*, because "affected with that fraud." And, accordingly, the decided cases supported the following conclusions:—(1.) If a woman entitled to property *represented to her intended husband during the marriage treaty* that she was so entitled, and that upon the marriage he would become entitled thereto *jure mariti;* and if, *during the same treaty*, she CLANDESTINELY conveyed away the same property to a volunteer (*c*), or settled the property upon herself in such a manner as to defeat the marital right, *and the concealment continued until the marriage took place*, there could be no doubt but that a fraud was practised in such a case on the husband, and he was entitled to relief (*d*). (2.) And not only was this principle applicable where the husband knew of the existence of her property, but it was extended much further; for, in *Goddard* v. *Snow* (*e*), where a woman ten months before marriage, but after the commencement of that intimate acquaintance with her future husband which ripened into marriage, made a settlement of a sum of money *which he did not know her even to be possessed of;* and the marriage took place, she concealing from him both her right to the money and the existence of the settlement,—ten years afterwards, on her death,

If during a treaty of marriage she aliened *without husband's knowledge* property to which she had represented herself entitled, it was fraudulent.

Same principle applicable, if he did not know her to be possessed of such property.

(*c*) *Lance* v. *Norman*, 2 Ch. Rep. 79.
(*d*) *England* v. *Downes*, 2 Beav. 528.
(*e*) 1 Russ. 485.

it was held, on a bill filed by the husband, that the settlement was void, as a fraud upon his marital rights (*f*). But (3.) When a woman about to marry sold or conveyed to a purchaser for valuable consideration, *without notice* of any intended derogation of the marital right, the sale or conveyance was held good (*g*); and even if the purchaser for value *had notice*, the sale or conveyance would in such a case, *semble*, have stood good as against the husband (*h*). (4.) A clandestine settlement made by a woman pending her marriage, even if meritorious in its nature,—as on the children of a former marriage, or on her illegitimate children,—would have been set aside as a fraud on the husband (*i*). (5.) If the intended husband was acquainted before his marriage with the fact of the assignment of property made by his intended wife, and nevertheless still thought fit to marry her, he was bound by it (*k*). (6.) In all cases the settlement must have been made *during the course of the treaty for marriage* with the particular husband challenging it; and accordingly, a settlement made by a widow upon herself and the children of a former marriage,—it being proved that the person she afterwards married was not at the time of the settlement "her THEN intended husband,"—was held to be no fraud on him (*l*); and in *Strathmore* (*Countess*) v. *Bowes* (*m*), where the plaintiff, pending a treaty of marriage with A., made a settlement with his approbation, and a few days afterwards married B., who had no notice of the settlement, the settlement was held good against B.,—for it could be no

Not fraudulent, if to a purchaser for valuable consideration without notice.

Void, even though meritorious, if secret.

Marriage with notice of settlement bound husband.

A husband could only set aside a conveyance when made pending the marriage with *him*.

(*f*) *Downes* v. *Jennings*, 32 Beav. 290.
(*g*) *Llewellin* v. *Cobbold*, 1 Sm. & Giff. 376.
(*h*) *Blanchet* v. *Foster*, 2 Ves. Sr. 264.
(*i*) *Taylor* v. *Pugh*, 1 Hare, 608.
(*k*) *Wrigley* v. *Swainson*, 3 De G. & Sm. 458; *Nelson* v. *Stocker*, 4 De G. & Jo. 458.
(*l*) *England* v. *Downs*, 2 Beav. 531.
(*m*) 1 L. C. 446.

If he had seduced his wife before marriage, her conveyance was good as against him.

fraud on HIM, his brief period of courtship not having commenced at date. Lastly, (7.) Where the husband has before marriage seduced the wife, and thus rendered retirement from the marriage on her part extremely inconvenient, a settlement of her property made by her before the marriage, although without her husband's knowledge, will be supported (*n*).

Married Women's Property Act, 1882,—how it affects frauds on marital rights.

Under the Married Women's Property Act, 1882, it is difficult to see how any conveyance by a woman about to marry can now be considered fraudulent as against her husband. whether it be secret or not; for he has now no prospective or inchoate or other indefeasible right whatever to his wife's property; and therefore, however gross the fraud upon him, it would not, in general, be a fraud producing damage, and fraud without damage is not any ground of action either at law or in equity. Still, if the wife should, before the marriage, contract with her husband to settle all her property in the usual way,

Under very special circumstances, such frauds may still exist.

and should clandestinely from her husband alienate, during the engagement which ripens in the marriage, a substantial portion of her property, and should alienate it otherwise than for its fair value, and thereby the property which she was entitled to at the date of the marriage was substantially diminished, that would be a fraud on the marital rights as established by the pre-nuptial contract; in other words, such express contract would have the effect of reviving the contract which, prior to the Married Women's Property Act, 1882, would in such a case have been implied by law.

(*n*) *Taylor* v. *Pugh*, 1 Hare, 608.

CHAPTER XXII.

INFANTS.

Guardian nature.

(1.) The father is the guardian by nature and nurture of his children (*scil.* his legitimate children) during their infancy (*a*); although, by the 36 Vict. c. 12, the court may grant the custody of infants under the age of sixteen years to the mother, *where that is for the benefit of the infant;* and the mother is also the natural guardian of her own illegitimate children (*b*); also, the mother, if she survive the father, is, by the Guardianship of Infants Act, 1886 (*c*), constituted the guardian of her children generally, being a joint guardian with the guardian (if any) appointed by the father; and in such latter case, the court may also associate one or more guardians with her (*d*).

Father.

Mother.

Testamentary guardian.

(2.) By the statute 12 Car. II. c. 24, the father, even though a minor, may by deed, and if not a minor, may by deed or will, appoint a guardian for his children; and guardians so appointed are usually called testamentary guardians; and such testamentary guardians are trustees,—so that the Statute of Limitations is inapplicable to accounts as between them and their ward (*e*). And by the Guardianship of

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(*a*) *Wellesley* v. *Beaufort*, 2 Russ. 21.
(*b*) *The Queen* v. *Nash*, 10 Q. B. D. 454; *Reg.* v. *Barnardo*, 1891, 1 Q. B. 194; S. C. (sub nom. *Barnardo* v. *M'Hugh*), 1891, A. C. 388.
(*c*) 49 & 50 Vict. c. 27, s. 2.
(*d*) *In re Scanlon*, 40 Ch. Div. 200.
(*e*) *Mathew* v. *Brise*, 14 Beav. 341.

Infants Act, 1886, the mother may by deed or will appoint a guardian of her children after her own death and the death of the father, such guardian to act jointly with the guardian (if any) appointed by the father (*f*).

Guardian appointed by stranger standing *in loco parentis*.

(3.) The father may waive his natural rights of guardianship in favour of a stranger, whom he has permitted to put himself *in loco parentis* towards his child; therefore, when, under these circumstances, the stranger *has provided* for the maintenance and education of the child, and has appointed guardians, the father will be restrained in equity from asserting his parental rights, *to the prejudice of his child's future interests* (*g*).

Guardian appointed by court.

(4.) The court may appoint a guardian; and the jurisdiction of the court to appoint a guardian over infants is founded on the prerogative of the Crown, which is under a general duty, as *parens patriæ*, to protect those who have no other lawful protector (*h*); and the jurisdiction is exercised in Chancery, and is a branch of the *general jurisdiction* originally confided in and delegated to that court, this jurisdiction not having belonged to the Lord Chancellor alone, as holder of the Great Seal and Keeper of the Royal conscience, but having been also exercisable by the Master of the Rolls; and from the decision of the Chancery an appeal lay and lies to the House of Lords, and not (as in the case of lunatics) to the Privy Council. And the Guardianship of Infants Act, 1886, in extension of the inherent and original jurisdiction of the court (*i*), has provided, that upon

Jurisdiction,—nature and origin of,—(*a.*) Chancery Division.

(*f*) *In re G*——, 1892, 1 Ch. 292.

(*g*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622; *In re Agar-Ellis*, 10 Ch. Div. 49; *In re Clark*, 21 Ch. Div. 817; *In re Newton Infants*, 1896, 1 Ch. 740.

(*h*) *In re Johnsons Infants*, 8 Ch. Div. 1.

(*i*) *In re Magraths*, 1893, 1 Ch. 143.

the removal by the court of any guardian from his office, whether such guardian be the testamentary guardian appointed by the father or the statutory guardian appointed by the mother, the court may (if for the welfare of the infant) appoint another guardian in the place of the guardian so removed. The Probate and Divorce Division of the court may also, under the Matrimonial Causes Acts, 1857–1859 (*k*), make an order as to the custody of children, during the whole peried of their minorities (*l*).

(*b.*) Probate Division.

If an action is commenced relative to an infant's estate or person, the infant, whether plaintiff or defendant, immediately thereupon becomes a ward of court (*m*); and where an order for maintenance has been made on summons at Chambers, the infant thereby also becomes a ward of court (*n*); and similarly, upon an order for his custody made on petition under the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12) (*o*); but if the child is an alien, none of these proceedings would suffice to constitute him or her a ward (*p*). Moreover, in all cases, the infant must (as an almost invariable rule) have property before he can be made a ward of court; and this is not from any want of jurisdiction in the court, but because the court can exercise the jurisdiction usefully, only where there is property which it can apply for the maintenance of the infant (*q*); and where there is no property available, the law has made other provisions, of an effective kind,

Infant becomes a ward of court, when action commenced relative to his estate; or an order is made without suit.

Infant must have property that court may exercise its jurisdiction usefully.

(*k*) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.
(*l*) *Thomasset* v. *Thomasset*, 1894, P. 295.
(*m*) *De Pereda* v. *De Mancha*, 19 Ch. Div. 451.
(*n*) *In re Hodge's Settlement*, 3 K. & J. 213.
(*o*) *In re Taylor*, 4 Ch. Div. 157.
(*p*) *Brown* v. *Collins*, 25 Ch. Div. 56; *In re Bourgeoise*, 41 Ch. Div. 310.
(*q*) *Wellesley* v. *Beaufort*, 2 Russ. 21; *In re Spence*, 2 Phil. 247; *In re Magraths*, 1892, 2 Ch. 496.

for the protection of children requiring to be protected (*r*).

Jurisdiction over guardians.

In general, parents are intrusted with the custody and education of their children, on the natural presumption that the parents will take due care of their education, morals, and religion; but the court, if reasonably satisfied that the children are not being properly treated, will interfere even with the parents, upon the principle that *preventing* injustice is preferable to *punishing* injustice (*s*). A strong case, however, must be made out before the court will interfere with a father's guardianship; *e.g.*, where the father is insolvent (*t*), or his character and conduct are such as are likely to contaminate the morals of his children (*u*), or where he is endangering their property or neglecting their education (*v*), or is guilty of ill-treatment and cruelty to them (*x*), it is not even in these cases a matter of course to take the father's guardianship away; but the danger to the children must be proximate and serious (*y*); but a divorced father may be declared unfit to continue guardian of his children (*z*); and under the Custody of Children Act, 1891 (*a*), the court may refuse to order the production of the child, or the delivery up of the child, even to the parent, on the ground of the parent's having deserted the child, or if he is otherwise unsuitable as a guardian of the child, or if it is for the benefit of the child that he should not be the guardian (*b*). Also, under the Guardian-

When father loses his guardianship, —(*a*.) Generally;

(*r*) 52 & 53 Vict. c. 44; 57 & 58 Vict. c. 41.
(*s*) *In re Besant*, 11 Ch. Div. 508; *In re Newton Infants*, supra.
(*t*) *Kiffin* v. *Kiffin*, 1 P. W. 705.
(*u*) *Shelley* v. *Westbrooke*, Jac. 266 *n.*
(*v*) *Crueze* v. *Hunter*, 2 Cox, 242.
(*x*) *Whitfield* v. *Hales*, 12 Ves. 492.
(*y*) *Ex parte Mountford*, 15 Ves. 445; *In re Agar-Ellis*, 24 Ch. Div. 317; *In re Elderton* (*Infants*), 25 Ch. Div. 220.
(*z*) *Skinner* v. *Skinner*, 13 P. Div. 90.
(*a*) 54 Vict. c. 3, ss. 1, 3.
(*b*) *Reg.* v. *Gyngall*, 1893, 2 Q. B. 232; *In re Newton Infants*, supra.

ship of Infants Act, 1886, the court, on being satisfied that it is for the welfare of the infant, may, in its discretion, remove any testamentary or other guardian; and the court has, in fact, under the last-mentioned Act, full power to override altogether, *in favour of the mother*, the common law rights of the father in relation to the custody of his children (*c*).

(*b*.) In favour of mother.

The guardian will be allowed to regulate the mode of, and to select the place for, the education of his ward; and the ward's obedience will be enforced by the court (*d*); and the court will, in general, aid guardians in obtaining possession of the persons of their wards when they are detained from them. And note, that the religious education of the ward must be according to the religion of the father (*e*), unless the father has in his liftetime indicated otherwise (*f*), or has abdicated his right in that respect (*g*).

Guardian selects mode and place of education of his ward.

If the guardian wishes to take his ward out of the jurisdiction of the court, and in some other cases where there is danger of injury to the ward's person or property, the court will require security from the guardian before sanctioning his removal out of the jurisdiction (*h*); and the guardian undertakes also in general to bring the ward back again within the jurisdiction, if and whenever the court may require him to do so.

When guardian gives security.

(*c*) *In re A. and B.* (*Infants*), 1897, 1 Ch. 786.

(*d*) *Hall* v. *Hall*, 3 Atk. 721; *G*—— v. *L*——, 1891, 3 Ch. 126. See *Tremain's Case*, 1 Str. 167, where, "being an infant, he went to Oxford, "contrary to the orders of his guardian, who would have him go to "Cambridge, and the court sent a messenger to carry him from "Oxford to Cambridge; and upon returning to Oxford, there went "another, *tam* to carry him to Cambridge, *quam* to keep him there."

(*e*) *In re Violet Nevin*, 1891, 2 Ch. 299.

(*f*) *Andrews* v. *Salt*, L. R. 8 Ch. App. 622.

(*g*) *In re Newton Infants*, 1896, 1 Ch. 740.

(*h*) *Biggs* v. *Terry*. 1 My. & Cr. 675.

Guardians must not change character of ward's property.

Guardians will not ordinarily be permitted to change the personal property of an infant into real property, or his real property into personalty; and this is, because such a conversion may affect not only the rights of the infant himself, but also, if he should die under age, the rights of his representatives; for it must be remembered that before the Wills Act (1 Vict. c. 26), an infant might have disposed of personal property before he attained the age of twenty-one, but could not have devised real property until he had attained that age (*i*); and such change, if it were permitted without restriction, might still, of course, affect the relative rights of the real and personal representatives of the infant. But guardians may, under peculiar circumstances, and where it is manifestly for the benefit of the infant (*k*), change the nature of his estate,—as for necessary expenses, such as repairs (*l*); or by payment of a certain sum out of the personal estate of the infant, in pursuance of a condition imposed on the devise of real estate to him (*m*); and the court will support their conduct if the act be such as the court would itself have done under the like circumstances by its own order (*n*). And although there is no equity in these cases of conversion between the representatives of the infant, nevertheless, it is the constant rule of courts of equity to hold lands purchased by the guardian with the infant's personal estate, or with the rents and profits of his real estate, to be personalty and distributable as such; and, on the other hand, to treat real property turned into money (as, for example, timber cut down on an infant's fee-simple estate) as still retaining its original character of real

Except where necessary for his benefit.

Representatives who would have taken before the change, still take after the change, *but only if infant dies under age.*

(*i*) *Sergeson* v. *Sealey*, 2 Atk. 413; *Ware* v. *Polhill*, 11 Ves. 278.
(*k*) *Camden* (*Marquis*) v. *Murray*, 16 Ch. Div. 161.
(*l*) *Ex parte Grimstone*, Amb. 708.
(*m*) *Vernon* v. *Vernon*, 1 Ves. Jr. 456.
(*n*) *Ex parte Phillips*, 19 Ves. 122.

estate,—but in each case, only *in the event of the death of the infant before he arrives of age;* and when the court directs any such change of property, it directs the new investment to be in trust (*but only in case the infant should die under twenty-one*) for the benefit of those who would be entitled to it if it had remained in its original state (*o*). On the other hand, *if the infant attains twenty-one*, although he should die the next day, his representatives must take his property according to its actual condition at the time of the death of the once infant. The more usual course, however, is to raise the necessary moneys (*e.g.*, for repairs) by mortgage, so as not to alter the character of the infant's property (*p*).

Marriage of ward of court must be with consent of court.

In the case of infants, whether male or female, who are wards of court, it is necessary to apply to obtain the permission of the court before their marriage can take place (*q*); and this is so, although they have guardians, and even though their parents are living; and if a man should marry a female ward, or a woman should marry a male ward, without the consent and approbation of the court, he or she, and all others concerned in aiding and abetting the act, will be guilty of contempt of court, and may be punished by imprisonment (*r*); and their ignorance of the fact that the infant is a ward will not be sufficient to acquit them of contempt of court, although it may weigh in determining the severity of their punishment (*s*). With a view also to prevent the improper marriages of wards, the guardian on his appointment is generally required by the court to give a recognisance that the infant shall not marry

Conniving at marriage of ward without consent of court, a contempt.

Guardian must give recognisance, that ward shall not marry without consent.

(*o*) *Foster* v. *Foster*, 1 Ch. Div. 588.
(*p*) *Jackson* v. *Talbot*, 21 Ch. Div. 786.
(*q*) *Smith* v. *Smith*, 3 Atk. 305.
(*r*) *Ex parte Mitchell*, 2 Atk. 173.
(*s*) *More* v. *More*, 2 Atk. 157; *Herbert's Case*, 3 P. W. 116.

without the leave of the court,—so that if an infant should marry, though without the privity, knowledge, or negligence of the guardian, yet the recognisance would in strictness be forfeited, whatever favour the court might, upon an application, think fit to extend to the guardian when he should appear to have been in no active fault (*t*). Also, and with the same view, the court will, where there is reason to suspect an improper marriage being contemplated, not only by an injunction interdict the marriage, but also interdict communications between the ward and his or her professing admirer (*u*); and if the guardian is suspected of any connivance, it will remove the infant from his care and custody, and commit the ward to the care of others (*v*).

Improper marriage of ward, restrained by injunction.

Settlement must be approved by court.

When a ward is about to marry, the court generally refers it to Chambers,—to ascertain and report whether the match is a suitable one, and also what settlement ought to be made, this reference being usually made upon petition (*x*). Where a marriage has been actually celebrated without the sanction of the court, the court will compel a settlement of a suitable character,—and will for that purpose commit the husband for his contempt, and refuse to discharge him until he has made such a settlement upon the female ward as shall, under all the circumstances, be deemed equitable and proper, the nature of the settlement depending, of course, in such a case, upon the fortune, position, and conduct of the husband, *e.g.*, according as the parties are of about equal rank and fortune, or the husband's position is such as leads to a suspicion of mercenary motives

(*t*) *Eyre* v. *Countess of Shaftesbury*, 2 L. C. 633.
(*u*) *Pearce* v. *Crutchfield*, 14 Ves. 206.
(*v*) *Tombes* v. *Elers*, Dick, 88.
(*x*) *Leeds* v. *Barnardiston*, 4 Sim. 538.

on his part (*y*). Also, under the Marriage Act, 4 Geo. IV. c. 76, the guardian of any minor who has married without his consent may, on information filed, obtain a declaration of forfeiture against either party who has procured a solemnisation of the marriage by falsely stating that such consent has been given, and the court will thereupon decree a settlement on the innocent party, and the issue of the marriage (*z*); and by the Infants' Settlement Act, 1855 (18 & 19 Vict. c. 43), an infant, not being under twenty years of age if a male, or seventeen years if a female, is enabled, with the approbation of the court, to be obtained on petition or summons, to make a binding settlement on marriage of his or her real and personal estate, whether in possession, reversion, remainder, or expectancy (*a*),—*scil.* as fully as if he or she were of full age, and not more fully (*b*); and note, that if the person who was once a ward should have since come of age, and should be ready to waive his or her settlement, the court (if it can find any remaining ground for continuing to exercise its jurisdiction) will protect the ward against his or her own indiscretion, and the undue influence of the other party (*c*).

Settlement under Marriage Act, 4 Geo. IV. c. 76.

Binding settlements by infants, under 18 & 19 Vict. c. 43.

Waiver by ward of her settlement.

A father, being bound to maintain his children, will not usually have any allowance out of their property for that purpose, not even out of a provision for their maintenance (*d*); but where the father is not able to give his child an education *suitable to the fortune which the child expects*, in that case mainte-

Father bound to maintain his children, though there is a provision for maintenance,—except when he is prevented by poverty.

(*y*) *Field* v. *Moore*, 7 De G. M. & G. 691.
(*z*) *In re Sampson and Wall*, 25 Ch. Div. 482; *In re Phillips*, 34 Ch. Div. 467.
(*a*) *Barrow* v. *Barrow*, 4 K. & J. 418; *Kingsman* v. *Kingsman*, 6 Q. B. D. 122; *Ex parte Jones*, 18 Ch. Div. 109.
(*b*) *Buckmaster* v. *Buckmaster*, 35 Ch. Div. 21; S. C. (sub nom. *Seaton* v. *Seaton*), 13 App. Ca. 61; *Leigh* v. *Leigh*, 40 Ch. Div. 290.
(*c*) *Long* v. *Long*, 2 Sim. & St. 119.
(*d*) *Meacher* v. *Young*, 2 My. & K. 490.

nance will be allowed (*e*). A wife was formerly under no legal obligation to maintain her children (*f*); but under the Married Women's Property Act, 1870 (*g*), and under the Married Women's Property Act, 1882 (*h*), if possessed of separate property, she was and is rendered liable to contribute to their maintenance to a limited extent,—but only in case the husband was and is unable to maintain them (*i*).

A wife liable under 33 & 34 Vict. c. 93, and under 45 & 46 Vict. c. 75.

When father is entitled to an allowance.

Also, if there is a *contract* on marriage amounting to a trust, that a particular property SHALL be applied for the maintenance and education of the children, that property must be applied accordingly, without reference to the ability or inability of the father to maintain and educate them (*k*). In case the father should apply the child's property towards its maintenance, under circumstances in which he would not have been allowed anything for maintenance, he may be ordered to refund (*l*); and on the other hand, when he has applied his own property for his child's maintenance under circumstances in which he would have been allowed something for that purpose, he will receive a sum in respect of such past maintenance (*m*). In allowing maintenance for an infant, regard will be had (as in the case of lunatics) to the state and condition of the infant's family; and where there are younger children,—especially if they are numerous and totally destitute,—the court will make a liberal allowance to the eldest son, that he may be the better able to maintain his brothers and sisters, and so derive a greater benefit himself from their

How allowance is regulated.

(*e*) *Havelock* v. *Havelock*, 17 Ch. Div. 807; *In re Colgate Infants*, 19 Ch. Div. 305; *Henderson-Roe* v. *Hitchins*, 42 Ch. Div. 306.
(*f*) *Hodgens* v. *Hodgens*, 4 C. & F. 323.
(*g*) 33 & 34 Vict. c. 93, s. 14.
(*h*) 45 & 46 Vict. c. 75.
(*i*) *Bryant* v. *Hickley*, 1894, 1 Ch. 324.
(*k*) *Thompson* v. *Griffin*, 1 Cr. & Ph. 320.
(*l*) *Wilson* v. *Turner*, 22 Ch. Div. 521.
(*m*) *Welch* v. *Channell*, 26 Ch. Div. 58.

society (*n*); and a liberal allowance will also sometimes be made for infants, in order to relieve or assist their parents when in distressed circumstances (*o*); and note, that, in all these cases, it is the infant's benefit which is considered, although the benefit he may derive is indirect (*p*). On an application by or on behalf of an infant for maintenance, the court has jurisdiction without suit to charge the expenses of his past maintenance (together with the cost of the application) on the *corpus* of a freehold estate to which he is entitled in fee-simple (*q*),—such charge being in the nature of a judgment for the necessaries supplied, followed up by execution against the infant's real estate; and, apparently, it is only where such judgment and execution would be obtainable, that such a charge can be made (*r*). When a testator leaves property of considerable value, to be accumulated for twenty-one years or any specified number of years, and directs the accumulations to be laid out in the purchase of land, to be held in trust for the father of certain infants for his life, and afterwards for the eldest son for life, and the first and other sons of such eldest son in tail, and so on, if the father of the infants is possessed of a moderate income only, which is insufficient for the maintenance and education of his sons to fit them for the prospective positions in life which by reason of the testator's deferred bounty they will fill, the court will (notwithstanding the express trust for accumulation) allow to the father an immediate present allowance for the maintenance and general

Past maintenance,—charge on real estate of infant for.

Maintenance, when and when not given, out of rents and profits directed to be accumulated.

(*n*) *Bradshaw* v. *Bradshaw*, 1 J. & W. 647.
(*o*) *Brown* v. *Smith*, 10 Ch. Div. 377; *In re Roper's Trusts*, 11 Ch. Div. 272.
(*p*) *Barnes* v. *Ross*, 1896, A. C. 625.
(*q*) *Fentiman* v. *Fentiman*, 13 Sim. 171; *In re Howarths*, L. R. 8 Ch. App. 415.
(*r*) *In re Hamilton*, 31 Ch. Div. 291; *Cadman* v. *Cadman*, 33 Ch. Div. 397.

benefit of the infants (*s*). Similarly, when a testator directed the income of his real and personal estate to be accumulated for twenty-one years, and gave the accumulated estates to his sister for life, with successive remainders to her three sons and their respective children, the court directed a present annual sum to be paid to the sister out of the income of the personal estate for the maintenance and education of her three sons (*t*). But in all cases, the court requires to be satisfied, that there are special circumstances justifying it in practically setting aside (*pro tanto*) the trust for accumulation; and in the absence of such special circumstances, it will not interfere with that trust, notwithstanding it may be capricious and apparently hurtful to the person entitled, subject thereto, to the estate and the accumulations (*u*).

Accumulation of income,—trust for, not readily interfered with.

(*s*) *Havelock* v. *Havelock*, 17 Ch. Div. 807.
(*t*) *Collins* v. *Collins*, 32 Ch. Div. 229.
(*u*) *Hunt* v. *Parry*, 32 Ch. Div. 383.

CHAPTER XXIII.

LUNATICS, IDIOTS, AND PERSONS OF UNSOUND MIND.

Unsoundness of mind, no ground for jurisdiction in equity.

UNSOUNDNESS of mind, of itself, gives the Court of Chancery no jurisdiction, not being like infancy in that respect. The Court of Chancery is by law the guardian of infants, whom (as we have seen) it makes its wards; but it is not the curator of the person or of the estate of a person *non compos mentis;* and if the Court of Chancery in any case entertains proceedings affecting a person *non compos mentis*, it assumes the jurisdiction upon some ground independent of the unsoundness of mind,—that is to say, upon such or the like grounds as it would think sufficient at the suit of the person himself if of sound mind, *e.g.*, upon the ground of a trust, or of a partnership, or such like (*a*). The Court of Chancery, as we saw in Part I., Chapter i., of this treatise, originated, as a permanent tribunal in 22 Edward III.; but long before that date, the jurisdiction in Lunacy was already in existence, the jurisdiction being vested in the Court of Exchequer (*b*), the court which had special care of the Crown's prerogative in the matter of revenue, of which lunacy and idiocy were sources. This prerogative of the Crown was subsequently defined in the Statute of Prerogatives (*c*), the 9th chapter of that statute relating to idiots,

The jurisdiction was in the Exchequer, upon inquisition;

because a matter of revenue.

(*a*) *Beall* v. *Smith*, L. R. 9 Ch. App. 85; *In re Edwards*, 10 Ch. Div. 605: *In re Bligh*, 12 Ch. Div. 364.
(*b*) Mem. Scacc. Trin. 19 Edw. I.
(*c*) 17 Edw. II.

and the 10th chapter relating to lunatics; and under these two chapters of that statute, the Crown acquired (in effect) the management of the estates of idiots and of lunatics,—subject to the duty of maintaining the idiot or lunatic, as the case might be, during all the period of the mental incapacity, and rendering up the same estates to the representatives of the idiot upon his death, and to the lunatic himself (upon his recovery), or to his representatives in like manner upon his death. The jurisdiction of the Court of Exchequer in Lunacy was, however, very early superseded; and the jurisdiction was subsequently vested in divers courts and in divers officials, not profitable to specify here; and eventually the practice became a constant one, for the Crown to delegate the care and custody of lunatics and of their estates to the Lord Chancellor, not as being the President of the Court of Chancery, but as being an executive officer of the highest standing in the realm, and enjoying the most intimate personal relations with the Crown; but the fact (although an accident), that he was also a great judicial officer and competent as an adviser in matters of law and equity, was a reason (not without weight) which helped to permanently fix the jurisdiction in Lunacy in the President of the Chancery Court; and the convenience of the conjunction is in many ways felt at the present day. Shortly after the appointment of the Lords Justices in 1851 (*d*), as a court of appeal in Chancery, with all the original and other jurisdiction of the Lord Chancellor in the Court of Chancery (s. 5), a warrant was made out to each of them under the Queen's sign-manual, intrusting them with the care and custody of lunatics; and under the Lunacy Regulation Act, 1853 (*e*), the jurisdiction

Exchequer jurisdiction in Lunacy, transferred to Lord Chancellor.

Lords Justices in Chancery, concurrently with, and in aid of, Lord Chancellor, acquired the jurisdiction, and now exercise it.

(*d*) 14 & 15 Vict. c. 83.
(*e*) 16 & 17 Vict. c. 70.

of the Lords Justices in Lunacy was continued,—concurrently with that of the Lord Chancellor; and upon the coming into operation of the Judicature Acts, 1873–75, when the Lords Justices became a mere limb of the new Court of Appeal, and were therefore indirectly deprived of all original jurisdiction in the Chancery Division of the High Court, they were appointed, by virtue of section 51 of the Judicature Act, 1873, additional judges of the High Court of Justice, for the purpose of more effectively exercising their jurisdiction in Lunacy (*f*),—so as to possess and be able to exercise all that original jurisdiction of Chancery that was ancillary to the jurisdiction in Lunacy (*g*); and this jurisdiction of the Lords Justices is continued under the Lunacy Act, 1890 (*h*), and their powers of management and administration are thereby extended; but the jurisdiction in Lunacy still remains a distinct and peculiar jurisdiction, from which therefore, as heretofore, the appeal lies, not to the House of Lords (as it would from Chancery proper), but to the Judicial Committee of Her Majesty's Privy Council (*i*).

Beall v. *Smith*, —what proceedings in Chancery would be a contempt on the Lunacy jurisdiction.

The recent case of *Beall* v. *Smith* (*k*) affords a striking illustration of the several jurisdictions in Chancery and in Lunacy. There the plaintiff having become of unsound mind, a bill in Chancery was filed in his name by a next friend for the purpose of winding up the business in which he had been engaged; and a receiver was appointed, and a decree made for accounts,—the plaintiff's family not being consulted either in the institution of the suit, or in

(*f*) *Re Lamotte*, 4 Ch. Div. 325; *In re Blake*, W. N. 1895, p. 51.
(*g*) *In re Tate*, 20 Ch. Div. 135; *In re Watson*, 19 Ch. Div. 384; *In re Platt*, 36 Ch. Div. 410.
(*h*) 53 Vict. c. 5, ss. 108–149.
(*i*) *Grosvenor* v. *Drax*, 2 Knapp. 82; *In re Cathcart*, 1893, 1 Ch. 466; and consider *In re Spurrier's Settlement*, 1897, 1 Ch. 453.
(*k*) L. R. 9 Ch. App. 85.

its subsequent prosecution. The accounts were duly taken; and, on further consideration, the costs were taxed and paid. Pending the suit, application was made in Lunacy; and a committee having been appointed of the lunatic's estate, the Lords Justices, on application of the committee, ordered that all the proceedings in the suit subsequent to the appointment of the receiver should be set aside, and that the costs thereof should be paid by the plaintiff's solicitor,—on the ground that the proceedings were a contempt of the Lunacy jurisdiction; and it was stated, that the committee appointed over the person and estate of a lunatic is only an officer of the Court of Lunacy, the delegate of the Crown's prerogative; and because the Crown, by its proper tribunal, had the lunatic and all his affairs under its exclusive care and protection, therefore the power of any other person, without first obtaining the leave of the Court in Lunacy, to commence or to prosecute any proceedings for the lunatic's protection, was taken away. And here we may observe, that a solicitor may lawfully enough commence an action on behalf of a person whom he believes to be sane, although an inquiry is pending regarding the plaintiff's state of mind (*l*); but once the lunacy is found, or once there is a *constat* that the intending plaintiff is insane, he may not do so; but application may at all times be made to the Court in Lunacy by the lunatic's committee for the court's sanction as to anything that may require to be done, and the Court in Lunacy may direct proceedings in the High Court (*m*); and for the better guidance of the committee, the Lunacy Act, 1890 (*n*), repealing and re-enacting with amendments the like provisions contained in the Lunacy Regulation Act,

Proceedings in the suit subsequent to the lunacy.

Lunacy Act, 1890,—directions and management under.

(*l*) *In re George Armstrong & Sons*, 1896, 1 Ch. 536.
(*m*) *In re Hinchliffe*, W. N. 1895, p. 147.
(*n*) 53 Vict. c. 5.

1853, before mentioned, in its 116th and following sections, contains various directions and authorities to the committee regarding the management and administration of the lunatic's estate (*o*); and when these directions and authorities do not suffice, the Court in Lunacy will make a special direction or confer a specific authority (*p*). Also, where the entire estate of the lunatic is under £2000 in value, or the income thereof does not exceed £100 per annum (*q*), the jurisdiction in Lunacy is summary (*r*); but a certificate of the fitness of the proposed committee must in all cases be produced (*s*).

Lunatic's maintenance, —allowance for, how regulated.

Regarding the maintenance and support of the lunatic, the court follows the law in holding the lunatic's estate to be liable for necessaries supplied to him, (*t*); and, in fact, charging orders against his estate may be obtained on judgments against the lunatic (*u*). But the court exercises also a very wide exclusive jurisdiction of its own; and in the exercise of its exclusive jurisdiction, the court acts very much according to its own discretion, having regard to the magnitude of the estate and to the position and necessities of the lunatic (*v*); and the rights of the lunatic's creditors are subordinated to the needs of the lunatic (*x*); and if the lunatic is, *e.g.*, a bankrupt, the title of the trustee in his bankruptcy is a title

Rights of his creditors,— subordinated.

(*o*) *In re Meares*, 10 Ch. Div. 552.
(*p*) *In re Ray*, 1896, 1 Ch. 468.
(*q*) Lunacy Regulation Act, 1882 (45 & 46 Vict. c. 82); *In re Lees*, 26 Ch. Div. 496.
(*r*) *Re Faircloth*, 13 Ch. Div. 307.
(*s*) *In re Bruére*, 17 Ch. Div. 775.
(*t*) *Rhodes* v. *Rhodes*, 44 Ch. Div. 94.
(*u*) *Horne* v. *Pountain*, 23 Q. B. D. 264; *In re Leavesley*, 1891, 2 Ch. 1; Lunacy Act, 1890 (53 Vict. c. 5), s. 117.
(*v*) *In re Tuer's Trusts*, 32 Ch. Div. 39; 53 Vict. c. 5, s. 116, subsect. 4. In one case (*In re Whitaker*, 42 Ch. Div. 119), the court sanctioned (with the consent of the lunatic's next of kin) the payment of the lunatic's *debt of honour*.
(*x*) *In re Plenderleith*, 1893, 3 Ch. 332; *In re Winkle*, 1894, 2 Ch. 519.

which is subject to the lunatic's maintenance, &c., being first duly provided for out of his property (*y*),—except as regards such (if any) portions of the property as have already come to the hands or into the actual possession of the bankruptcy trustee (*z*). Also, in the case of lunatics (as in the case of infants), the court will (and not unfrequently does) make an allowance designed to benefit directly the near relatives of the lunatic, and in that way indirectly (by their society and otherwise) benefiting the lunatic himself (*a*); but the court is very chary of increasing this allowance, and even of making it in the first instance (*b*); and in one case, where a lunatic advanced in years was tenant for life with the remainder in tail to his nephew, the court, upon the nephew's petition, directed an allowance of £500 per annum to be made to him out of the surplus income of the lunatic, after providing for the lunatic's maintenance,—but upon the terms of the petitioner charging the estate with the repayment of the sums received, the Lords Justices, as protectors of the settlement, consenting to the estate-tail being barred to the extent of letting in such charge (*c*).

His next of kin,—provision for.

In the case of a lunatic, the court will not generally alter the state of the lunatic's property,—so as to affect the rights of his representatives, unless where it is for the benefit of the lunatic himself. "The "general object of attention in the administration "is solely and entirely *the interest of the lunatic him-* "*self*, without looking to the interests of those who "upon his death may have an eventual right of

Conversion of lunatic's estate. His interest alone consulted.

(*y*) *In re Farnham*, 1895, 2 Ch. 799.
(*z*) *In re Farnham*, 1896, 1 Ch. 836.
(*a*) *In re Weaver*, 21 Ch. Div. 615; *In re Pink*, 23 Ch. Div. 577.
(*b*) *In re Darling*, 39 Ch. Div. 208.
(*c*) *In re Sparrow*, 20 Ch. Div. 320.

"succession. Accordingly, in such a case, where "the conversion is made by the direction of a court "of competent jurisdiction in lunacy, as there are no "equities between the heir and the next of kin, they "will take the properties to which they are respec- "tively entitled according to the actual character in "which they find them" (*d*). But, as a general rule, where the court makes an actual conversion of the lunatic's estate, it will preserve the original character of the property, and will provide (*e.g.*, in partition actions) that the proceeds of sale shall be settled subject to the same uses as the land of the lunatic before sale (*e*); also, in barring the estate-tail of the lunatic, the court will so exercise its power in that behalf as not to affect the rights of the remainder-men (*f*); and in enfranchising copyholds of the lunatic, it will not affect his customary heir (*g*).

His representatives take the fund in the character in which it is actually found.

But the orde of the court usually protects the rights of the representatives.

The Chancery Division has no original or inherent jurisdiction to give directions as to the maintenance of a person of unsound mind not so found (*h*),—unless where there are trusts to execute, or the fund is paid into court (*i*); the court will, nevertheless, in the case of any lunatic who *e.g.* is lawfully detained as such (*k*), although he has not been found a lunatic, recognise and affirm the position of one assuming to act as the guardian of such a lunatic, and will direct payment out to him of a fund in court belonging to the lunatic,—upon his undertaking to apply the income

Jurisdiction of the court,—over lunatic not so found.

Allowance for maintenance.

(*d*) *Ex parte Philips*, 19 Ves. 118; *Freer* v. *Freer*, 22 Ch. Div. 622; *In re Tugwell*, 27 Ch. Div. 309.

(*e*) *Lillingston* v. *Pares*, 12 Ch. Div. 333; *In re Barker*, 17 Ch. Div. 241; *Att.-Gen.* v. *Ailesbury* (*Marquis*), 12 App. Ca. 672.

(*f*) *In re Fox*, 33 Ch. Div. 37.

(*g*) *In re Ryder*, 20 Ch. Div. 514; *In re Harking*, 37 Ch. Div. 310; 53 Vict. c. 5, s. 123; also *James* v. *Dickinson*, 1897, 2 Ch. 509.

(*h*) *Vane* v. *Vane*, 2 Ch. Div. 124; *In re Bligh*, 12 Ch. Div. 364; Idiots Act, 1886 (49 & 50 Vict. c. 25).

(*i*) *In re Pagani*, 1892, 1 Ch. 236.

(*k*) *In re Watkins*, 1896, 2 Ch. 336.

thereof for the maintenance of the lunatic (*l*); and the capital itself will in a proper case be directed to be so applied (*m*); and in a partition action, such a lunatic may sue by his next friend (*n*). In all these cases, and especially since the Lunacy Act, 1890, it is preferable to proceed before the Masters in Lunacy, the 116th and following sections of that Act giving many facilities for the management and administration of the property of this class of lunatics, including the exercise of his power to *lease* under the Settled Land Act, 1882 (*o*); but if it is desired that a lunatic not so found should exercise, as tenant for life of lands, the power of *sale* given to him by that Act, the Court of Lunacy cannot give its sanction to that, —unless the lunatic is first found a lunatic in the ordinary way (*p*); or unless the power of sale, or of consenting to the sale, is contained in the settlement itself (*q*). And note, that the creditors of a lunatic not so found cannot get paid out of his estate to the prejudice of his being properly provided for,—just as (we have seen) is the case with lunatics who have been so found; but upon the lunatic's death, the guardians of the union which was chargeable for his maintenance and which has maintained him, will be entitled to prove as creditors for the cost of such maintenance, in a creditor's action instituted in the Chancery Division for the administration of the lunatic's estate (*r*)—the relief being limited to six years' arrears (*s*); and even in the lifetime of the

Directions as to, and management of, his estate.

Past maintenance, a provable debt;

and recoverable even in

(*l*) *In re Brandon*, 13 Ch. Div. 773.
(*m*) *In re Tuer*, 32 Ch. Div. 39.
(*n*) *Halfhide* v. *Robinson*, L. R. 9 Ch. App. 373; *Porter* v. *Porter*, 37 Ch. Div. 420.
(*o*) *In re Salt*, 1896, 1 Ch. 117.
(*p*) *Re Martha Baggs*, 1894, 2 Ch. 416 *n.*
(*q*) *Re X.*, 1894, 2 Ch. 415.
(*r*) *In re Webster*, 27 Ch. Div. 710.
(*s*) *Eggleton* v. *Newbeyin*, 36 Ch. Div. 477.

lunatic, those guardians may obtain a magistrate's order, giving them the means of enforcing payment out of the lunatic's estate,—but not so as to interfere with the possession of the receiver in Lunacy (if any) (*t*). the lunatic's lifetime.

(*t*) 53 Vict. c. 5, s. 299; *Winkle* v. *Bailey*, 1897, 1 Ch. 123.

PART III.

THE ORIGINALLY CONCURRENT JURISDICTION

Origin of concurrent jurisdiction.

THE concurrent jurisdiction of courts of equity had its origin in this way,—Either the courts of law, although they had a general jurisdiction in the matter, could not give adequate, specific, or perfect relief; or, under the actual circumstances of the case, they could not give any relief at all. Thus, it often happened, *e.g.*, that a simple judgment for the plaintiff or for the defendant did not meet the full merits and exigencies of the case, although a decree meeting all the circumstances of the case was indispensable to complete distributive justice; or the subject sought could only be effectively obtained, *e.g.*, by a perpetual injunction to restrain trespasses, nuisances, waste, or the like. And accordingly, the concurrent jurisdiction extended to all cases of legal rights, where there was not, under the circumstances, an adequate or an applicable remedy at law; and although, at the present day, the jurisdictions at law and in equity are throughout concurrent, still in all those cases in which the equity jurisdiction would, prior to that fusion, have been the preferable jurisdiction to sue under, in all those cases the Chancery Division is and remains the more appropriate jurisdiction; and within this concurrent jurisdiction, fall

Concurrent jurisdiction extended to cases where there was not a plain, adequate, and complete remedy at law.

the two following groups of cases, namely—(1.) Cases in which the ground of action itself constitutes the foundation for the jurisdiction,—being cases of accident, mistake, or fraud; and (2.) Cases in which the peculiar remedy constitutes the ground of the jurisdiction,—being cases of partnership, account, specific performance, injunction, and the like; and we shall consider each of these groups in their order.

Division of the subject.

CHAPTER I.

ACCIDENT.

Accident,—true meaning of, in equity.

THE term "*accident*" does not in equity signify some casualty, *vis major*, or irresistible force,—but signifies some unforeseen event, loss, or omission which is not the result of negligence or misconduct in the party; *e.g.*, if an annuity has been directed by a will to be secured by the purchase of stock, and an investment sufficient at the time for the purpose has been made, but the stock is afterwards reduced by Act of Parliament,—whereby the investment becomes insufficient,—in such a case, equity relieves the executor from all liability on that account (*a*), although the court may, in a proper case, decree the residuary legatees to make up the deficiency (*b*). It is not, however, in every case of accident that equity will interfere (*c*); for it is certain, that in some cases of accidents courts of law can, and always could, afford adequate relief,—as in cases of wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies; and the first question therefore always is, whether there is and always has been an adequate legal remedy? But although the law now frequently interposes to grant a remedy where it would formerly not have done so, and the Legislature, by express enactment, has in certain

To give equity jurisdiction, there must be no complete legal remedy, and the party must have a conscientious title to relief.

(*a*) *Davies* v. *Wattier*, 1 Sim. & St. 463; *May* v. *Bennet*, 1 Russ. 370; St. 93; National Debt (Conversion) Act, 1888 (51 Vict. c. 2), ss. 20, 27.

(*b*) *Pack* v. *Darby*, W. N. 1895, p. 123.

(*c*) *Whitfield* v. *Fausset*, 1 Ves. Sr. 392.

other cases now conferred on courts of law all the remedial powers of courts of equity (*d*), still the rule is well established, that, if courts of equity originally exercised the jurisdiction, they have not lost that jurisdiction merely by the common law courts having had it subsequently conferred upon them,—"It does "not follow, because the courts of law will give relief, "that this court loses the concurrent jurisdiction "which it always had" (*e*). Accordingly, the cases in which relief in equity against accident will be given are,—either (1.) Cases of lost and destroyed documents; or (2.) Cases of the imperfect execution of powers; or (3.) Cases of erroneous payments; and we will consider each of these three groups of cases in their order.

Courts of equity do not lose their jurisdiction because the common law courts have subsequently acquired it also.

Three groups of cases in which equity relieves against accident.

Until a recent period, the doctrine prevailed, that there could be no remedy on a *lost* bond in a court of common law, because there could be no *profert* or production of the instrument in court, in order that the defendant might demand *oyer* of it—that is, that it should be produced and read in open court (*f*); but now the courts of law dispense with the *profert*, if an allegation of loss, by time and accident, is stated in the declaration (*g*); that circumstance, however, is not permitted in the slightest degree to change the course in equity (*h*); for independently of the old impossibility of making *profert*, there was another good reason for the interference of equity,—*scil.* that court alone could give a complete remedy, with all the fit limitations which justice required, by granting relief only upon the condition that the plaintiff who sought its aid should give a sufficient and suitable

First group of cases,—lost and destroyed documents. (1.) Bonds, being *lost*.

Equity can grant relief by requiring an indemnity which a court of law cannot do, or at least could not do.

(*d*) 55 & 56 Vict. c. 39, s. 7 (lost scrip).
(*e*) *Atkinson* v. *Leonard*, 3 Bro. C. C. 222.
(*f*) *Walmsley* v. *Child*, 1 Ves. Sr. 344.
(*g*) *Read* v. *Brookman*, 3 Tr. 151; *Duffield* v. *Elwes*, 1 Bligh, N. S. 543.
(*h*) *Kemp* v. *Pryor*, 7 Ves. 246, 250.

Where discovery only is sought, no affidavit necessary; but if relief also is asked for, affidavit is necessary.

bond of indemnity (*i*). There used also formerly to be an important distinction of procedure, between cases where a plaintiff, alleging the loss of a bond, sought discovery merely, and cases where he played also for relief; for where discovery only, and not relief, was the object of the bill, there equity would grant the discovery without any affidavit of the loss, and without requiring an indemnity; but equity entertained a suit for relief, as distinct from discovery, only upon the plaintiff making an affidavit of the loss and also offering to execute an indemnity, the affidavit being required to prevent abuse of the process of the court (*k*); and at the present day, the action being now always for relief, the affidavit of loss and a sufficient indemnity is in all cases required.

Affidavit now necessary in all cases.

(2.) Title-deeds being *lost*.

As regards lost title-deeds, the loss was not of itself a ground to come into a court of equity for relief; for if there was no more in the case, a court of law might have afforded relief by admitting evidence of the loss, just as a court of equity would do (*l*),—and upon proof of such loss, by receiving secondary evidence of the contents of the deeds, and (if necessary) of their validity also. To enable the party, therefore, in case of a lost title-deed, to come into equity for relief, he must have established that there was no remedy at all at law, or no remedy which was adequate and adapted to the circumstances of his case; *e.g.*, he might have come into equity when a title-deed either had been destroyed, or else (he knew not which) concealed, by the defendant; for, in that case, a court of equity would have decreed, and a court of law could not have

(*i*) *Ex parte Greenaway*, 6 Ves. 812; *England* v. *Tredegar*, L. R. 1 Eq. 622.
(*k*) *Walmsley* v. *Child*, 1 Ves. Sr. 334.
(*l*) *Whitfield* v. *Fausset*, 1 Ves. Sr. 392.

decreed, that the plaintiff should hold and enjoy the land until the defendant should produce the deed or admit its destruction (*m*). So, if a deed concerning land was lost, and the party in possession prayed discovery, and to be established in his possession under it, equity would relieve,—for no remedy in such a case lay at law (*n*); and even where the plaintiff was out of possession, there were cases in which equity would have interfered upon lost or suppressed title-deeds, and would have decreed possession to the plaintiff,—but in all such cases there must have been other equities calling for the interference of the court (*o*). And, generally, the bill must always have laid some ground besides the mere loss of a title-deed, or other sealed instrument, to justify a prayer for relief,—*e.g.*, that the loss obstructed the right of the plaintiff at law, or left him exposed to undue perils in the future assertion of such right; and the like special ground would still be necessary in such cases, and for obvious reasons, to found the equity jurisdiction.

(3.) Negotiable instruments being *lost*.

With reference to LOST bills of exchange and other negotiable instruments, it was, after some conflict of authority, decided, that if a bill, note, or cheque,—negotiable either by indorsement and delivery, or by delivery only,—was lost, no action would lie at the suit of the loser against any one of the parties to the instrument, either on the bill or note itself, or on the consideration (*p*); and the law was the same, though the bill had never been endorsed (*q*). In this case, therefore, the proper remedy was in equity, not only on the ground of there being no remedy

(*m*) *Whitfield* v. *Fausset*, supra.
(*n*) *Dalston* v. *Coatsworth*, 1 P. Wms. 731.
(*o*) *Dormer* v. *Fortescue*, 3 Atk. 132.
(*p*) *Hansard* v. *Robinson*, 7 B. & C. 90; *Crow* v. *Clay*, 9 Exch. 604.
(*q*) *Ramuz* v. *Crowe*, 1 Exch. 167.

at law, but also on account of the power equity possessed of compelling the plaintiff to give a proper indemnity to the defendant. And the jurisdiction of equity over such cases of lost bills was not taken away by the 17 & 18 Vict. c. 125, s. 87, which enacted, that in case of any action founded upon a bill of exchange or other negotiable instrument, the court of common law should have power to order that the loss of such instrument should not be set up, provided an indemnity was given to the satisfaction of the court against the claims of any other person upon such negotiable instrument (*r*). And as regards actions of this sort, whether in equity or at law, it appears that, in the general case at least, the plaintiff ought before action brought to offer to the defendant a sufficient indemnity,—because his right to sue is not in fact complete until such offer has been made, or at all events his neglect to make such prior offer may be made a ground for depriving him of the costs of the action. But it seems to have been doubtful, whether or not, if a bill or note *not negotiable* be lost, an action would lie at law on the bill, or (failing that) on the consideration; in equity, however, such a security may be assigned, and therefore an indemnity would be justly demandable, and this gives to equity sufficient ground for assuming the jurisdiction. And now, as regards bills and notes (and apparently whether negotiable or not), the Bills of Exchange Act, 1882 (*s*), has provided, that in case of the loss of a bill before same is overdue, the person who was, or who (but for such loss) would be, the holder of the bill may have from the drawer another bill of the same tenor, upon giving the usual indemnity; also, that in any action on the lost bill, the court may, on a sufficient indemnity being given, order that the loss of the bill shall not be set up.

(4.) Non-negotiable instruments being *lost*.

Bills of Exchange Act, 1882,—provisions of, regarding lost bills and notes.

(*r*) *King* v. *Zimmerman*, L. R. 6 C. P. 466.
(*s*) 45 & 46 Vict. c. 61, ss. 69, 70.

(5.) Negotiable and non-negotiable instruments being *destroyed.*

As to DESTROYED *negotiable* instruments, the weight of authority seems to support the conclusion, that at common law, by the custom of merchants, the holder suing on the bill or note must, on payment, deliver up the bill or note, and cannot recover unless he do so, and he cannot do so when the instrument has been destroyed; but that he may in such a case recover on the original consideration, and that is enough (*t*); and in the case of *Wright* v. *Maidstone* (*u*), Wood, V.C., held, that courts of equity have never acquired jurisdiction to give relief on account of the *destruction* of a bill of exchange, because there was a complete remedy in such cases at law. With regard to DESTROYED *non-negotiable* instruments, the rule is the same as for negotiable instruments when destroyed. And, apparently also, in the case of destroyed *bonds*, when the destruction has been accidental, relief may be had, not indeed by reverting to and suing on the original consideration (for that is merged and gone), but by suing on the bond itself, the court, on proof of the destruction of the bond and that the destruction was accidental, making an order that the defendant shall not be at liberty to set up the fact of the destruction in his defence.

(5*a*.) Bonds, being *destroyed.*

Second group of cases,—(1.) Defective execution of powers, being powers simply.

It is a general rule, that the *non-execution* of a mere power will not be aided in equity (*v*); but the rule is different, where there is a *defective* execution of a power, resulting either from accident, mistake, or both; and equity in such cases will relieve against the defective execution, but will relieve only in favour of certain persons who are regarded by a court of equity with peculiar favour,—as (1) A purchaser (*x*), which term includes a mortgagee and a

(*t*) *Hansard* v. *Robinson*, 7 B. & C. 95.
(*u*) 1 K. & J. 708.
(*v*) *Arundell* v. *Phillpot*, 2 Vern. 69; *Bull* v. *Vardy*, 1 Ves. Jr. 272.
(*x*) *Fothergill* v. *Fothergill*, 2 Freem. 257.

lessee (*y*); (2) A creditor (*z*); (3) A wife (*a*); (4) A legitimate child (*b*), for wives and children are in some degree considered as creditors by nature (*c*); and (5) A charity (*d*); but a defective execution will not be aided in favour of the donee of the power (*e*); nor of a husband (*f*); nor of a natural child (*g*); nor of a grandchild (*h*); nor of remote relations, much less of mere volunteers (*i*); and, in fact, in favour of no others than the five favoured classes of persons above enumerated (*k*). The defects which will be aided may be said, generally, to be any which are not of the very essence and substance of the power; *e.g.*, a defect by executing the power by will when it is required to be by deed or other instrument *inter vivos* will be aided (*l*),—but if the power was required to be executed only by will, and it was executed by an absolute and irrevocable deed, no relief would be granted (*m*). Nor will equity aid where the power is executed without the consent of persons who are required to consent to it (*n*),—unless when their consent has become immaterial or impossible to obtain. But equity will supply such defects as the want of a seal, or of witnesses, or of a signature, or defects in the limitations of the property,—and generally any and every defect which is not of the *substance* of the power, or which is not made irremediable by statute. It is necessary, however,

What defects in the execution of a power are aided, and what defects are not aided.

(*y*) *Barker* v. *Hill*, 2 Ch. R. 218; *Reid* v. *Shergold*, 10 Ves. 370.
(*z*) *Pollard* v. *Greenvil*, 1 Ch. Ca. 10; *Wilkes* v. *Holmes*, 9 Mod. 485.
(*a*) *Clifford* v. *Burlington*, 2 Vern. 379.
(*b*) *Sneed* v. *Sneed*, Amb. 64; *Bruce* v. *Bruce*, L. R. 11 Eq. 371.
(*c*) *Hervey* v. *Hervey*, 1 Atk. 561.
(*d*) *Att.-Gen.* v. *Sibthorp*, 2 Russ. & My. 107.
(*e*) *Ellison* v. *Ellison*, 6 Ves. 656.
(*f*) *Watt* v. *Watt*, 3 Ves. 244.
(*g*) *Tudor* v. *Anson*, 2 Ves. Sr. 582.
(*h*) *Watts* v. *Bullas*, 1 P. Wms. 60.
(*i*) *Smith* v. *Ashton*, 1 Freem. 309.
(*k*) *Chetwynd* v. *Morgan*, 31 Ch. Div. 596.
(*l*) *Tollet* v. *Tollet*, 1 L. C. 254.
(*m*) *Reid* v. *Shergold*, 10 Ves. 370; *Adney* v. *Field*, Amb. 654. *Mansell* v. *Mansell*, 2 Bro. C. C. 450.

(2.) Execution of powers in the nature of trusts, although left wholly unexecuted.

to distinguish between mere powers and powers in the nature of trusts; for powers which are powers merely are never imperative, but powers which are in the nature of trusts are, like trusts themselves, always imperative, and are obligatory upon the conscience of the person intrusted (*o*); and if a man is invested with a trust to be effected by the execution of a power, the power is in that case imperative,—in other words, the trust may have been vested in him under the garb or in the disguise of a power, but it is none the less for that a trust; and if he refuse to execute it, or die without having executed it, equity will interpose and give suitable relief,—because his omission to do so, whether by accident or design, ought not to disappoint the objects of the donor (*p*).

Third group of cases. (1.) Accidents in payments by executors or administrators.

In the course of the administration of estates, executors and administrators often pay debts and legacies under a well-founded belief that the assets are sufficient for all purposes; but afterwards, from unexpected occurrences, or from unsuspected debts and claims coming to light subsequently, there is a deficiency of assets for the payment even of the debts; and in these cases, executors used to be entitled to no relief at law; but in a court of equity, if they have acted in good faith and with due caution, they will be entitled to relief,—upon the ground that otherwise they will be innocently subject to an unjust loss from what the law itself deems an accident (*q*). Therefore, if any of the goods of the testator are stolen from the executor, or from the possession of a third person into whose custody they have been lawfully delivered by the executor, the executor shall not in equity be charged with these assets (*r*); or if

(*o*) Wilm. 23.
(*p*) *Warneford* v. *Thompson*, 3 Ves. 513; *Brown* v. *Higgs*, 8 Ves. 574.
(*q*) *Edwards* v. *Freeman*, 2 P. Wms. 447.
(*r*) *Jones* v. *Lewis*, 2 Ves. Sr. 240.

goods of a perishable nature are impaired before any default in the executor to preserve them, he shall not answer for the first value, but shall give that matter in evidence to discharge himself (*s*); and since the Judicature Acts, this is now the view accepted in courts of law also regarding the executor's position (*t*). But the executor will not be permitted to call that an accident which is really a mistake of law on his part,—*e.g.*, if he has distributed the residuary estate on a wrong principle of law, he will be answerable, although his mistake was one purely of law and was otherwise excusable (*u*). And as another illustration of the principle of relief in equity upon the ground of accident, it may be stated, that if a minor is bound as apprentice to a person, and a premium is given to the master, who becomes bankrupt during the apprenticeship, in such a case equity will (or may) interfere, and apportion the premium upon the ground of the failure of the contract from accident (*v*),—a principle of equity which has been adopted by the Legislature in the Bankruptcy Act, 1883 (*x*).

Limit to this relief.

(2.) A minor bound as apprentice, whose master becomes bankrupt.

II. Cases where equity will not give relief.

(1.) In matters of positive contract,—*e.g.*, absolute covenant to pay rent, not relieved against, upon destruction of demised premises.

But courts of equity will not give relief in, *e.g.*, matters of positive contract,—it being no ground for the interference of equity, that the party has been prevented by accident from fulfilling his contract, or has been prevented by accident from deriving the full benefit of his contract. Thus, if a lessee covenants to pay rent, or to keep the demised premises in repair, he will be bound to do so in equity as well as at law, notwithstanding the destruction or injury of those premises by inevitable accident, as if they are burnt

(*s*) *Clough* v. *Bond*, 3 My. & Cr. 496.
(*t*) *Job* v. *Job*, 6 Ch. Div. 562.
(*u*) *Hilliard* v. *Fulford*, 4 Ch. Div. 389.
(*v*) *Hale* v. *Webb*, 2 Bro. C. C. 78.
(*x*) 46 & 47 Vict. c. 52, s. 41.

by fire or lightning, or destroyed by public enemies, or by any other accident, or by overwhelming force (*y*), —the reason being, that he might have foreseen and provided for such contingencies by his contract, and the law will presume an intentional general liability where he has made no exception (*z*). And it may be here observed, that the fulfilment of the covenant to repair may involve the rebuilding of the premises, and the lessee cannot throw that duty on his lessor, excepting by contract (express or necessarily implied) in that behalf (*a*); nor is the payment of the rent suspended during the period of rebuilding (*b*). But the hardship on the tenant in such cases is apparent rather than real,—because, of course, the tenant can always at a trifling cost insure himself against the loss by fire, and the insurance could be (and usually is) made to extend to include also the rent payable during the period of rebuilding. On the other hand, where the duty is imposed by law and not by the contract of the parties, and the duty either is or becomes impossible of fulfilment, through no fault of the tenant, in such a case the duty will be discharged even at law, and no suit in equity for relief therefrom will be necessary (*c*). And again, equity will not give relief, where the parties are equally innocent,—that is to say, have been *equally improvident against contingencies*. Thus, for instance, if there is a contract for a sale at a price to be fixed by an award during the life of the parties, and one of them dies before the award is made, the contract fails, and equity will not enforce it upon the ground of accident,—for the time of making the award is

Liability under covenant to repair,—extent of; and mode of providing against.

(2.) Contracts where parties are equally innocent,—*scil.* equally improvident against contingencies.

(*y*) *Bullock* v. *Dommitt*, 6 T. R. 650; *Pym* v. *Blackburn*, 3 Ves. 38.
(*z*) *Bute* (*Marquis*) v. *Thomson*, 13 M. & W. 487; *Mellers* v. *Devonshire* (*Duke*), 16 Beav. 252.
(*a*) *Belfour* v. *Weston*, 1 T. R. 312; *Brown* v. *Quilter*, 2 Amb. 621.
(*b*) *Leeds* v. *Cheetham*, 1 Sim. 150.
(*c*) *Clifford* v. *Watts*, L. R. 5 C. P. 577; *Taylor* v. *Caldwell*, 3 B. & S. 826; *Baily* v. *De Crespigny*, L. R. 4 Q. B. 185.

expressly fixed in the contract, according to the pleasure of the parties, and there is no equity to substitute a different period (*d*). So also, if there is a contract for the sale of goods at a price which (by agreement of the parties) is to be fixed and ascertained by A. B., and either A. B. dies without having fixed the price, or he refuses or becomes incapable of fixing it, in either of such cases the contract becomes void, and will not be performed in equity,—for speaking strictly, the contract in such a case has not yet become a complete contract, but while remaining *in fieri* has fallen through. But the cases above exemplified are not to be confounded with, *e.g.*, cases in which the parties to a submission to arbitration have agreed that the award shall be made within a time specified in their submission, or have not therein specified any time at all for, the making and publication of the award; for, in all such cases, the court may extend the time for making the award, whether that time is the time specified in the submission (*e*), or is the period of three months prescribed in that behalf by the Arbitration Act, 1889, where no time is specified in the submission (*f*). Again, equity will not grant relief to a party upon the ground of accident, where the accident has arisen from his own gross negligence or fault,—for, in such a case, there is in fact no accident properly so called, and a party has no claim to come into a court of justice to ask to be saved from the consequences of his own culpable misconduct (*g*). So again, equity will not interpose upon the ground of accident, where a party has not a clear vested right, his claim resting in mere expectancy, or in

Arbitrations, —on a special footing.

(3.) Where party claiming relief has been guilty of gross negligence.

(4.) Where party claiming relief has no vested right,

(*d*) *White* v. *Nutts*, 1 P. Wms. 61; *Mortimer* v. *Capper*, 1 Bro. C. C. 156.
(*e*) *Re May and Hareourt*, 13 Q. B. D. 688.
(*f*) *Lord* v. *Lee*, L. R. 3 Q. B. 404; 52 & 53 Vict. c. 49.
(*g*) *Ex parte Greenaway*, 6 Ves. 812.

volition,—*e.g.*, in the case of a testator who intended to make a will in favour of particular persons being prevented by accident from doing so; for a legatee or devisee is a mere volunteer taking by the bounty of the testator, and has no independent right, until there is a title consummated by law (*h*). And lastly, equity will not interpose on the ground of accident where the other party stands upon an equal equity, and is entitled to equal protection, as in the case of a *bonâ fide* purchaser for valuable consideration without notice (*i*).

but only a probability of a right.

(5.) Equity will not aid one party where the other party has an equal equity.

(*h*) *Whitton* v. *Russel*, 1 Atk. 448.
(*i*) *Powell* v. *Powell*, Prec. Ch. 278; *Malden* v. *Menill*, 2 Atk. 8.

CHAPTER II.

MISTAKE.

Mistake.

THE term "mistake" signifies in equity some unintentional act or omission, which is the result of ignorance or surprise, or of imposition and misplaced confidence; and mistakes are either (1) Mistakes of *law*, or (2) Mistakes of *fact*. And, Firstly, as to Mistakes of law:—

I. Mistake of law,—as a general rule, not relievable.

Ignorance of the law is in general no excuse,—*Ignorantia legis neminem excusat;* for the presumption is, that every one assuming to deal with his own property is (by himself or his legal advisers) acquainted with his rights to it or in it, provided he has had a reasonable opportunity of knowing them; and nothing would be more liable to abuse than to permit a person, after parting with his property, to pretend that he was, at the time of parting with it, ignorant of the law affecting his title. But the maxim applies, properly speaking, only to the general law of the country, and not therefore to ignorance of a private *jus* or right; wherefore money paid under a mistake of *law* (*e.g.*, under an error as to the construction of a document) may in general be recovered back (*a*), equally as if the mistake were one of fact or of mixed fact; and it is apparently a rule, that money paid to an officer of the court, under this kind of mistake, may always be recovered back (*b*); and it may be said, generally, that in a court of equity the line between

Ignorantia legis neminem excusat,—meaning of this rule.

Limits of this rule.

Smith Contra 2nd Ed p 200

(*a*) *Rogers* v. *Ingham*, 3 Ch. Div. 351.

(*b*) *Ex parte Simmonds*, 16 Q. B. D. 308; *Dixon* v. *Brown*, 32 Ch. Div. 597; *In re Opera, Limited*, 1891, 2 Ch. 154.

mistakes of law and mistakes of fact has not been very clearly drawn(*c*), and that the court will in general endeavour at least to give relief (*d*),—although in a court of law the tendency is rather the other way (*e*). On the other hand, an agreement entered into in good faith, though under a mistake of law, will, in the general case, be held valid and obligatory upon the parties,—*e.g.*, where a devise was made to a woman upon condition that she should marry with the consent of her parents, and she married without such consent, whereby a forfeiture accrued to other persons, and these latter persons afterwards executed an agreement respecting the estate, whereby the forfeiture was (in effect) waived, the court refused any relief,—Lord Hardwicke saying, "If parties are entering into an agreement, *and the very will out of which the forfeiture arose is lying before them and their counsel* while the drafts are preparing, the parties shall be supposed to be acquainted with the consequence of law, and shall not be relieved on pretence of being surprised" (*f*).

An agreement under a mistake of law binding, where the law must be taken to have been known.

But although relief will not be granted in equity against a mistake in point of law committed with full knowledge of all the facts, there are cases which are apparently exceptions to this general rule, and are usually so classed, but which, upon examination, will be found to have turned, not upon the consideration of a mere mistake of law stripped of all other circumstances,—but upon an admixture of other ingredients going to establish misrepresentation, or some imposition, abuse of confidence, or undue influence, or that sort of surprise which equity uniformly regards

Cases in which equity relieves against a mistake of law.

(*c*) *Cooper* v. *Phipps*, L. R. 2 H. L. 149; *Daniel* v. *Sinclair*, 6 App. Ca. 180.
(*d*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*e*) *Moore* v. *Fulham Vestry*, 1895, 1 Q. B. 399.
(*f*) *Pullen* v. *Ready*, 2 Atk. 591; *Irnham* v. *Child*, 1 Bro. C. C. 92.

(1.) Where a party acts under ignorance of a plain and well-known principle of law.

as a just foundation for relief (*g*). Thus, if a party, acting in ignorance of a clear and settled principle of law, is induced to give up a portion of his indisputable property to another, under the name of a compromise, a court of equity will relieve him from the effect of his mistake,—*e.g.*, if an eldest son and heir-at-law, knowing that he was the eldest son, but too ignorant to know that he was therefore heir-at-law, should agree to divide the estates with his younger brother, such an agreement would be held in a court of equity invalid, and relief would be granted,—*scil.* upon the ground, that the ignorance of a plain and established doctrine, so generally known and of such constant occurrence as one of the simplest canons of descent, may well give rise to *a presumption, that there had been some undue influence, imposition, mental imbecility, or confidence abused* (*h*). And so also cases of *surprise*, combined with a mistake of law, stand upon a ground peculiar to themselves; for in such cases the agreements or acts are unadvised and improvident, and without due deliberation (*i*); and where the surprise is mutual, there is of course a still stronger ground to interfere, for neither party has intended what has been done,—they have misunderstood the effect of their own agreements or acts; or have presupposed some facts or rights existing, as the basis of their proceedings, which in truth did not exist (*k*).

(2.) Surprise combined with a mistake of law remedied.

Compromises, —upheld, where a doubtful point of law.

But where the alleged mistake arises not from ignorance of a plain and settled principle of law, but on a doubtful point of law, a compromise fairly entered into, with due deliberation and full knowledge, will be upheld in a court of equity (*l*), equally

(*g*) *Willan* v. *Willan*, 16 Ves. 82; *Rogers* v. *Ingham*, supra.
(*h*) *Broughton* v. *Hutt*, 3 De G. & Jo. 501; *Cooper* v. *Phipps*, supra.
(*i*) *Ormond* v. *Hutchinson*, 13 Ves. 51.
(*k*) *Cochrane* v. *Willis*, L. R. 1 Ch. App. 58; *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*l*) *Pickering* v. *Pickering*, 2 Beav. 56; *Naylor* v. *Winch*, 1 S. & S. 564.

as in a court of law (*m*); and when family agreements have been fairly entered into, without concealment or imposition on either side, each of the parties investigating the subject for himself, and each communicating to the other all he knows, and all the information which he has received on the question, then, although the parties may have greatly misunderstood their position and mistaken their rights, a court of equity will not disturb the family quiet which is the consequence of that agreement (*n*); and these principles will apply, whether the doubtful points, with reference to which the compromise has been made, are matters of fact or of law (*o*). But in order that a family arrangement may be supported, there must be a full and fair communication of all material circumstances affecting the subject-matter of the agreement, which are within the knowledge of the several parties,—and that whether such information be asked for by the other party or not (*p*); "*for there must not only be good faith and honest* "*intention, but full disclosure; and without full dis-* "*closure, honest intention is not sufficient*" (*q*). Moreover, the disinclination of equity to set aside a family (or other) compromise entered into *bonâ fide*, will be strengthened, where subsequent arrangements have taken place on the footing of such a compromise (*r*); although, where there has been a mixture of mistake, ignorance, imposition, intoxication, and the like, equity will set aside the compromise arrived at, whether between members of a family or between strangers (*s*). But, of course, where a *bonâ fide* pur-

Family compromises,— upheld, if no *suppressio veri* or *suggestio falsi*, but a full disclosure.

Equity will not aid where position of parties has been altered.

(*m*) *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. Div. 266.
(*n*) *Gordon* v. *Gordon*, 3 Swanst. 463; *In re Birchall*, 16 Ch. Div. 41; *Westby* v. *Westby*, 2 Dr. & War. 503.
(*o*) *Neale* v. *Neale*, 1 Kee. 672.
(*p*) *Greenwood* v. *Greenwood*, 2 De G. Jo. & Sm. 28.
(*q*) *De Cordova* v. *De Cordova*, 4 App. Ca. 692.
(*r*) *Bentley* v. *Mackay*, 31 Beav. 143.
(*s*) *Persse* v. *Persse*, 7 C. & Fin. 318.

Equity will not aid against a *bonâ fide* purchaser for value without notice.

chaser for valuable consideration without notice is concerned, equity will not interfere to grant relief; for in such a case the purchaser has at least an equal right to protection with the other party (*t*).

II. Mistake of fact,—as a general rule, relievable.

Principles on which mistake of fact relievable.

(1.) Fact must be material.

Secondly, as to Mistakes of fact:—An act done or contract made under a mistake of fact (*i.e.*, in ignorance of a material fact) is in general relievable in equity; but in order to obtaining this relief, the fact must be material to the act or contract,—for if the act or contract is not materially affected by it, the party claiming relief on that immaterial ground will be denied it. But assuming that the fact is material, then, whether the mistake is that of one party only or is the mistake of both the parties to the contract, relief will be given, varying only in its nature according as the mistake is unilateral or is mutual (*u*),—*e.g.*, if a person should sell a messuage to another which was at the time swept away by a flood (*v*), or should purchase an annuity during the life of A. B., and A. B. was already dead (*x*), without either party having any knowledge of the fact, equity would relieve the purchaser,—upon the ground, that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract; and on the same principle, a contract to purchase property which is already the purchaser's own is relievable,—and that whether the mistake is of the purchaser only, or is the mistake of both parties (*y*), and although the Court may itself have sanctioned the agreement (*z*). But it is not sufficient, in general, to show, that the fact is material; it must, in general, also be shown, that the

(2.) Fact must be such as

(*t*) *Malden* v. *Menill*, 2 Atk. 8.
(*u*) *Paget* v. *Marshall*, 28 Ch. Div. 255.
(*v*) *Hore* v. *Becher*, 12 Sim. 465; *Cochrane* v. *Willis*, supra.
(*x*) *Strickland* v. *Turner*, 7 Exch. 208.
(*y*) *Bingham* v. *Bingham*, 1 Ves. Sr. 126.
(*z*) *Huddersfield Bank* v. *Lister*, 1895, 2 Ch. 273.

fact is one which could not by reasonable diligence have become known; for if by reasonable diligence the fact would have been known, equity will not relieve,—since that would be to encourage culpable negligence on the part of persons whose duty it is to make all due inquiries. Also, generally, in cases where one of the contracting parties has knowledge of a fact material to the contract which he does not communicate to the other, it is necessary, in order that the latter may set aside the transaction on the ground of the other party's withholding of that fact, that the former should have been under an obligation, not merely moral, but legal or equitable, to make the discovery. So also, where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment with regard to the subject-matter,—where there is no confidence reposed, but each party is dealing with the other at arm's length,—equity will not relieve. And therefore, where the fact (not being a fact amounting to the entire subject-matter of the contract) is equally unknown to both parties,—or where each has equal and adequate means of information; or where (to the knowledge of both parties) the fact is doubtful from its own nature,—in every such case, if the parties have acted with entire good faith, a court of equity will not interpose (*a*). The general ground upon which all these distinctions proceed is, that mistake or ignorance of fact in parties is a proper subject of relief,—only where it either constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party; but where each

party could not get knowledge of by diligent inquiry.

(3.) Party having knowledge must have been under an obligation to discover the fact.

(4.) Where means of information are equally open to both, and no confidence reposed, no relief.

General summary of the principles of relief.

(*a*) *Mortimer* v. *Capper*, 6 Ves. 24.

party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference (*b*).

Oral evidence admissible to prove accident, mistake, or fraud,—

It is a general rule of law, that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument, where the latter is required by law,—or to give effect to a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter, or vary a written agreement, either appointed by law or by the mere compact of the parties to be the appropriate and authentic memorial of the particular facts which it recites. But upon principle, oral evidence is admissible to show, that either by accident, mistake, or fraud, a written agreement has not been constituted the depositary of the true intention and meaning of the parties, that is to say, misstates their true intention and meaning. To enforce the performance of an agreement under such circumstances would be the highest injustice; it would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake or accident to resist the claims of justice, under shelter of a rule framed to promote justice (*c*). And generally, where, by mistake, an instrument *inter vivos* is not what the parties intended, or there is a mistake in it other than a mistake in law, and the mistake is clearly made out by admissible and satisfactory evidence, or is admitted by the other side (*d*),

so as to prevent an injustice.

(*b*) *Jones* v. *Clifford*, 3 Ch. Div. 779; *Hanley* v. *Pearson*, 13 Ch. Div. 545.

(*c*) *Murray* v. *Parker*, 19 Beav. 308.

(*d*) *Davis* v. *Symonds*, 1 Cox, 404.

or is evident from the nature of the case, or from the rest of the deed, equity will rectify the mistake (*e*).

Courts of equity will grant relief in cases of mistake in written contracts, not only when the fact of the mistake is expressly established, but also when it is fairly implied from the nature of the transaction. A partnership debt, *c.g.*, as between the partners and their representatives, has been and is treated in equity as the several debt of each partner, though it is at law,—that is to say, towards the outside creditor,—the joint debt of all; because in such cases all the partners have had a benefit from the money advanced or the credit given, and the obligation to pay exists, as between the partners, independently of any instrument by which the debt may have been secured. But where a joint bond has in equity,—*scil.* as between the co-obligors,—been considered as several, there has been a previous credit given to the obligors, and it was not the bond that first created, as between them, the liability to pay (*f*); and therefore where the inference of a several original debt or liability does not exist, a court of equity will not treat the bond or covenant as several,—for, as was said in *Summer* v. *Powell* (*g*), every joint covenant is not in equity to be considered as the several covenant of each of the covenanters; *for when the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which the covenant is expressed; and in such a case, there is nothing but the covenant itself by which its intended extent can be ascertained* (*h*),—*scil.* even as between the covenantors themselves and their representatives.

Mistake implied from nature of the case; *e.g.*, an ostensibly joint debt treated as in fact a several debt.

(*e*) *Fowler* v. *Fowler*, 4 De G. & Jo. 250; *Townshend* v. *Stangroom*, 6 Ves. 333.

(*f*) *Kendall* v. *Hamilton*, 4 App. Ca. 504; *Cambefort* v. *Chapman*, 17 Q. B. D. 229.

(*g*) 2 Mer. 36.

(*h*) *Richardson* v. *Horton*, 6 Beav. 187; *Rawstone* v. *Parr*, 3 Russ. 539.

Difference of remedy, according as mistake is mutual or is unilateral.

When there is a mutual mistake in a deed or contract, the remedy is in general to rectify the document by substituting the terms really agreed to; on the other hand, when the mistake is unilateral, the remedy is, in general, not rectification, but recission (*i*); but the court will occasionally, in lieu of rescinding the contract, give to the defendant the option of taking what the plaintiff meant to give (*k*),—*e.g.*, in cases of contracts for a lease or sale of lands. And there is less difficulty in reforming written instruments where the mistake is made out by other preliminary memoranda of the agreement; and this is strikingly exemplified in the case of marriage settlements, with reference to which the following distinctions have been made, namely, (1.) When both the marriage articles and the marriage settlement were entered into before the marriage, if the articles and the settlement vary in their terms, the settlement will in general be considered the binding instrument, and will not be controlled by the articles,—because, as was observed in *Legg* v. *Goldwire* (*l*), when all parties are at liberty, the settlement will be taken as a new agreement; but even in that case, if the settlement purports to be made *in pursuance of the articles*, the settlement will be rectified in accordance with the articles (*m*); and if it can be shown that the settlement, although not so expressed, was intended to pursue the articles, the court will reform the settlement and make it conformable to the articles (*n*). But (2.) When the settlement is made after the marriage, it will in all cases, whether expressed to be made in pursuance

Mistakes in marriage settlements.

(*a.*) Both marriage articles and settlement before marriage.

(*b.*) Settlement after marriage.

(*i*) *Wilding* v. *Sanderson*, 1897, 2 Ch. 514.

(*k*) *Paget* v. *Marshall*, 28 Ch. Div. 255; *Sutherland* (*Duke*) v. *Heathcote*, 1891, 3 Ch. 504; 1892, 1 Ch. 475.

(*l*) 1 L. C. 17; *In re Badcock*, 17 Ch. Div. 361.

(*m*) *West* v. *Erisey*, 1 Bro. P. C. 225.

(*n*) *Bold* v. *Hutchinson*, 4 De G. M. & G. 568; *Breadalbane* v. *Chandos*, 2 My. & Cr. 739.

of the pre-nuptial articles or not, be controlled and rectified by them (*o*). And note, that the true contract of the parties will in no case be varied or altered; wherefore, in *Barrow* v. *Barrow* (*p*), the erroneous belief by the husband and wife on their marriage that a particular property stood settled, was held to be no ground for rectifying the settlement so as to make it include that property; and the court cannot correct a marriage settlement, unless when all parties interested thereunder acknowledge the mistake and request its correction (*q*); but save and except in the case of marriage contracts (*r*), including divorce agreements (*s*), the mistake (as we have seen) need not be that of *both* parties (*t*),—rescission, and not rectification, being the relief granted when the mistake is unilateral; and rescission will only be granted on the terms of doing equity (*u*).

(2.) Instrument delivered up or cancelled under a mistake.

Where an instrument has been delivered up or cancelled under a mistake of the party, and in ignorance of the facts material to his rights derived under the instrument, a court of equity will grant relief,—upon the ground that the party is conscientiously entitled to enforce such rights; and he ought to have the same benefit as if the instrument were in his possession with its entire original validity (*v*).

(3.) Defective execution of powers.

As to the remedy offered by equity in cases of the defective execution of powers arising from *mistake*, the same general principles are applicable as in cases of defective execution arising from *accident* (*x*).

(*o*) *Honor* v. *Honor*, 1 P. Wms. 123; *Mignan* v. *Parry*, 31 Beav. 211.
(*p*) 18 Beav. 529; *Tucker* v. *Bennet*, 38 Ch. Div. 1.
(*q*) *Sells* v. *Sells*, 1 Dr. & Sm. 45.
(*r*) *Bradford* v. *Romney*, 30 Beav. 431.
(*s*) *Allcard* v. *Walker*, 1896, 2 Ch. 369.
(*t*) *Paget* v. *Marshall*, 28 Ch. Div. 255.
(*u*) *Sutherland* (*Duke*) v. *Heathcote*, supra.
(*v*) *East India Co.* v. *Donald*, 9 Ves. 275.
(*x*) See pp. 499-500, *supra*.

(4.) Mistakes in wills.

In regard to mistakes in wills, there is no doubt that courts of equity have or had jurisdiction to correct them,—when they are apparent upon the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words (*y*); but, for this purpose, the mistake must be apparent on the face of the will, otherwise there can be no relief, parol evidence (*i.e.*, evidence dehors the will) not being admissible to vary or control the terms of the will, although such evidence is admissible to remove a latent ambiguity in the will (*z*). It is well settled, that a mere misdescription of the legatee will not defeat the legacy; and that accidental omissions and clerical errors in wills will be supplied and rectified by evidence to be gathered from the will itself (*a*); but wherever a legacy is given to a person under a particular character, which he has falsely assumed, and which was alone the motive of the gift, he cannot demand his legacy (*b*),—therefore where a woman gave a legacy to her husband, when, in point of fact, he was not her legal husband, having had a former wife living at the date of his marriage with the testatrix, the bequest was in equity held void (*c*); on the other hand, where a testator made a will giving all his property to his wife, and appointing her sole executrix, and she (it was alleged) was not his lawful wife, having had a former husband living, the Court of Chancery in a recent case declined jurisdiction,—upon the ground that the matter was one for the Court of Probate (*d*); and this latter decision goes far towards cutting away altogether the jurisdiction

(*a*.) Mere misdescription of legatee will not defeat legacy, unless, legacy obtained by a false personation.

Semble, the objection to the bequest must now be taken in the Probate Division.

(*y*) *Sweeting* v. *Prideaux*, 2 Ch. Div. 413.
(*z*) *Stebbing* v. *Walkey*, 2 Bro. C. C. 85.
(*a*) *Salt* v. *Pym*, 28 Ch. Div. 153; *Miller* v. *Daintree*, 33 Ch. Div. 198.
(*b*) *Giles* v. *Giles*, 1 Keen, 692.
(*c*) *Kendall* v. *Abbot*, 4 Ves. 808.
(*d*) *Allen* v. *M'Pherson*, 1 H. L. C. 191; *Meluish* v. *Milton*, 3 Ch. Div. 27.

of the Chancery Division in this class of mistakes in wills, and obliges the litigants, apparently, to take the objection in the Probate Division, and no longer, as heretofore, in the Chancery Division (*e*). However, where a legacy is revoked upon a mistake of facts, equity still gives relief,—*e.g.*, if a testator revokes legacies to A. and B., giving as a reason that they are dead, and they are in fact living, equity will hold the revocation invalid, and decree the legacies (*f*); also, a false reason given for a legacy, or for the revocation of a legacy, was not in general a sufficient ground to avoid the act or bequest in equity; and to have such an effect, it must have been clear that no other motive mingled in the legacy, and that it constituted the substantial ground of the gift or bequest (*g*).

(*b.*) Revocation of legacy on a mistake of facts.

But in all cases of mistakes, the party seeking relief must stand upon some equity superior to that of the adverse party,—*e.g.*, equity will not give relief as against a *bonâ fide* purchaser for valuable consideration (*h*). Nor will equity relieve one person claiming under a voluntary defective conveyance against another claiming under a voluntary conveyance (*i*); and it is apparently on this ground that, when a testator gives a pecuniary legacy, and directs that a sum which he specifies, and which he states he has already advanced to the legatee, is to be deducted from the amount of the legacy, the legatee is held to be bound by the amount of the advance as stated, and is not at liberty to adduce evidence to show that the amount was in fact less

Cases in which equity will not relieve.

(1.) No relief unless where a superior equity.

(2.) No relief as between volunteers;

(*e*) *Betts* v. *Doughty*, 5 P. D. 26; *Morrell* v. *Morrell*, 7 P. D. 68; *Re Marchant*, 1893, P. 254.

(*f*) *Campbell* v. *French*, 3 Ves. 321.

(*g*) *Kendall* v. *Abbot*, 4 Ves. 808; *Box* v. *Barrett*, L. R. 3 Ex. 244; *Boddington* v. *Clairat*, 25 Ch. Div. 685.

(*h*) *Powel* v. *Price*, 2 P. Wms. 535; *Davies* v. *Davies*, 4 Beav. 54.

(*i*) *Moodie* v. *Reid*, 1 Mad. 516.

(2a.) Or where defect is declared fatal by statute.

(*k*). Nor will the remedial powers of courts of equity extend to the supplying of any circumstances for the want of which any statute has declared the instrument void (*l*); but the court will, in a proper case, be astute to give relief, even although the relief may *primâ facie* appear to be against the express provisions of the statute,—*e.g.*, in *Hall-Dare* v. *Hall-Dare* (*m*), the court did not find itself prohibited by the statute 3 & 4 Will. IV. c. 74, s. 47, from exercising its ordinary jurisdiction to rectify a deed of resettlement on the ground of mistake, although that deed had been enrolled as a disentailing assurance under the Act; *scil.* the Act, when it excluded, by section 47, the jurisdiction of equity, excluded it only so far as regarded the destruction or non-destruction of the entail, but not further,—consequently the jurisdiction to rectify remained; and a contract to levy a fine or to suffer a common recovery was, and a contract to execute a disentailing deed is, enforceable in equity,—but, of course, only as against the contracting party himself (*n*).

But the statute will not exclude the equitable remedy, excepting so far as it expressly excludes it.

(*k*) *In re Aird's Estate*, 12 Ch. Div. 291; *Ward* v. *Wood*, 32 Ch. Div. 517; *In re Rowe, Pike* v. *Hamlyn*, 1898, 1 Ch. 153.
(*l*) *Dixon* v. *Ewart*, 3 Mer. 322.
(*m*) 31 Ch. Div. 251.
(*n*) *Banks* v. *Small*, 36 Ch. Div. 716.

CHAPTER III.

ACTUAL FRAUD.

In what cases relief given in equity.

Courts of equity have always exercised a general jurisdiction in cases of fraud, the jurisdiction being sometimes concurrent with, and sometimes exclusive of, that of the common law courts. There are frauds for which the common law has always afforded complete and adequate relief,—and in these cases, equity had no occasion to intervene (*a*); but there were, and (notwithstanding the fusion of law and equity) there still are, many cases in which fraud is practically irremediable at law, and over these courts of equity exercise an exclusive jurisdiction (*b*). Moreover, fraud being infinite, the court will not define it, or establish any invariable rule as to the relief which it will give, or the class of cases in which it will relieve; and we shall therefore best show the extent of the equity jurisdiction over fraud by an examination of the classes of cases in which the court has relieved. But before proceeding to that examination, it is proper to here observe, that although courts of law, equally with courts of equity, hold that fraud is not to be presumed, the courts of equity will act upon presumptions of fraud more readily than the courts of common law will do. In other words, the courts of equity will hold fraud established, by presumptive evidence which would not be sufficient in a court of

Difficulty of defining fraud in all its varieties.

Equity acts upon weaker evidence than law in inferring fraud.

(*a*) *Hoare* v. *Bremridge*, L. R. 8 Ch. App. 22.
(*b*) *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603; *In re Terry & White's Contract*, 32 Ch. Div. p. 14.

law to support a verdict (*c*); or, to express the matter more fairly, various circumstances (which at law would not have weighed materially with a jury) are permitted by the Chancery judges, drawing inferences from their varied experiences of like transactions, to influence their minds in arriving at their own conclusions upon the case; but, strictly speaking, nothing is or can be evidence in equity which is not also evidence at law (*d*).

Actual fraud.

There are two principal varieties of Fraud, namely, Actual Fraud and Constructive Fraud. Now, Actual Fraud may be described, as being some act or thing done or omitted, purposely and with a view to doing an injury to some one; and such frauds may arise, either (1) Irrespectively of any peculiarity in the position of the injured party; or (2) Chiefly from a consideration of that peculiar position. And the first principal variety of actual fraud, considering it apart from any peculiarity in the position of the parties, is misrepresentation or *suggestio falsi*. For where a party intentionally misrepresents a material fact, and so produces a false impression, that is a positive fraud (*e*); and if the party to whom the misrepresentation is made acts upon it, to his damage (*f*), the other party will be liable for such damage to the party he has so misled,—and even to any third party who acts upon it, *provided it appear that the false representation was made with the intent that it should be acted upon by such third person* (*g*); and misrepresentations will amount to fraud, not only where they are known to be false by those who make them, but also (at least, for some purposes, and for some purposes only) (*h*),

Of two kinds.

I. Arising irrespectively of position of injured party.

(*a.*) *Misrepresentation.* Where the party makes it intentionally,—and with intent to mislead.

(*c*) *Fullager* v. *Clarke*, 18 Ves. 483.
(*d*) *In re Terry & White's Contract*, 32 Ch. Div. 14.
(*e*) *Hill* v. *Lane*, L. R. 11 Eq. 215.
(*f*) *Slim* v. *Croucher*, 1 De G. F. & J. 518; *Cann* v. *Wilson*, 39 Ch. Div. 39.
(*g*) *Barry* v. *Croskey*, 2 Johns. & Hem. 22; *Angus* v. *Clifford*, 1891, 2 Ch. 449.
(*h*) *Peek* v. *Derry*, 14 App. Ca. 337; *Le Lievre* v. *Gould*, 1893, 1 Q. 491.

where they are made by persons who do not know them to be true or false and yet make them,—or who believe them to be true, when, in the due discharge of their duty, they ought to have known, and ought to have remembered, the fact which negatives the truth of the representation made (*i*). Any deviation from the truth is, of course, contrary to the good faith that ought to prevail in contracts; but the misrepresentation which is to justify the recission of a contract must be a *fraus dans locum contractui*,—that is, a misrepresentation of some material fact giving occasion to the contract, being either the assertion of a fact on which the person entering into the contract relied, or else the suppression of a fact the knowledge of which it is reasonable to infer would have made him abstain altogether from entering into the contract (*k*); and a mere intention may, in particular cases, amount to a material fact within the meaning of this rule (*l*). Again, the misrepresentation must (at least in cases of vendor and purchaser) be not only of something material, but of something in regard to which the one party places a known trust or confidence in the other; but if the purchaser, having to judge for himself, does not avail himself of the means of knowledge open to himself, he cannot be heard to say that he relied on or was deceived by the vendor's misrepresentations (*m*),—unless, perhaps, where the vendor has done something which leads him to abstain from properly inquiring (*n*). But the language of puffing, however much a departure from the truth, will not amount to a fraud in law,—*Simplex commendatio non obligat;* and if the misrepresentation be merely matter of opinion,

What misrepresentations are matter for relief.

(1.) Misrepresentation must be of some material fact, *i.e.*, it must be a case of *fraus dans locum contractui*.

(2.) Misrepresentation must, at least in certain cases, be of something in which there is a confidence reposed.

(*i*) *Rawlins* v. *Wickham*, 3 De G. & Jo. 304.
(*k*) *Pulsford* v. *Richards*, 17 Beav. 96; *Peek* v. *Derry*, supra.
(*l*) *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.
(*m*) *Tamplin* v. *James*, 15 Ch. Div. 215.
(*n*) *Denny* v. *Hancock*, L. R. 6 Ch. App. 1; *Cecil* v. *Webster*, 30 Beav. 62.

in regard to which each party must be taken to rely on his own judgment, there is not, of course, in such a case, any actionable fraud at all; yet what at first sight appears to be matter of opinion merely, may, under exceptional circumstances, become a very material element of fraud (*o*). Of course, if the party to whom a misrepresentation is made was not misled by it, or if he knew it to be false, it cannot have influenced his conduct (*p*); and if the misrepresentation is merely ambiguous, the party complaining of it as a fraud must show the sense in which he understood it (*q*).

(3.) The party must be misled by the misrepresentation to his prejudice.

In the case of misrepresentations made by the directors of joint-stock and other companies, the company is responsible for the damage to the extent of the profits it has made thereby, and otherwise the remedy is against the directors personally (*r*); and the defrauded person may, in such a case, recover,—or (as the case may be) prove for,—the amount paid by him to the company (*s*); and as regards the fraudulent directors, they are jointly and severally liable, and the action may therefore be brought against one or more of them alone without the other or others (*t*). But if any director be himself innocent, although his co-directors are fraudulent, he is not liable, *e.g.*, to refund dividends received by him, and which have been wrongfully paid out of capital (*u*); and no action lies against the executor of a deceased fraudulent director, unless to the extent (if any) that his estate has profited by the fraud (*v*).

Frauds consisting in misrepresentations by directors of companies.

(*o*) *Smith* v. *Land and House Property Corporation*, 28 Ch. Div. 7.
(*p*) *Redgrave* v. *Hurd*, 20 Ch. Div. 1; *Edgington* v. *Fitzmaurice*, 29 Ch. Div. 459.
(*q*) *Smith* v. *Chadwick*, 20 Ch. Div. 27; 9 App. Ca. 187.
(*r*) *Western Bank of Scotland* v. *Addie*, L. R. 1 Sc. App. 145.
(*s*) *Allison's Case*, L. R. 15 Eq. 394.
(*t*) *Parker* v. *Lewis*. L. R. 8 Ch. App. 1035.
(*u*) *In re Durham & Co.*, 25 Ch. Div. 752.
(*v*) *Peek* v. *Gurney*, L. R. 6 H. L. 377.

Remedy where misrepresentation can be made good, and where it cannot.

Generally, where a person has been induced to enter into a contract by a material misrepresentation of the other party, the latter shall be compelled to make it good at the option of the former, if the representation be one which can be made good; and if not, the person deceived shall be at liberty to avoid the contract (*x*); and the court will in a proper case rescind the contract (*y*); and no one can keep a profit obtained by the fraud of another, unless he is himself free from the fraud and has given valuable consideration (*z*). The defrauded party may, however, by his subsequent acts, deprive himself of all right to relief; as if, with full knowledge of the fraud, he gives a release to the party who has defrauded him or continues to deal with him (*a*); but his subsequent acts will, when it is possible to do so, be interpreted as being consistent with the intention to retain his right to relief (*b*).

(*b*.) *Suppressio veri*,—a ground of relief, only where the party was under a legal obligation to disclose.

The second principal variety of actual fraud, considering it apart from any peculiarity in the position of the parties, is concealment or *suppressio veri*,—a *suppressio veri* being as fatal as a *suggestio falsi*. But it is not every concealment, even of material facts, which will entitle a party to the interposition of a court of equity; for, in general, the concealment must, in order to be actionable, amount to *the suppression of facts which the one party was bound in legal duty to disclose to the other party* (*c*); and in general, as between vendors and purchasers of real estate, the purchaser is under no legal duty to the vendor,—for, as was

(*x*) *Rawlins* v. *Wickham*, 3 De G. & Jo. 304, 322; *Attorney-General* v. *Ray*, L. R. 9 Ch. App. 397.
(*y*) *Newbigging* v. *Adam*, 13 App. Ca. 308.
(*z*) *Bridgeman* v. *Green*, Wilm. 64; *Vane* v. *Vane*, L. R. 8 Ch. App. 383; *Marsh* v. *Joseph*, 1897, 1 Ch. 213.
(*a*) *Mitchell* v. *Homfray*, 8 Q. B. D. 587.
(*b*) *Imperial Ottoman Bank* v. *Securities Investment Corporation*, W. N. 1895, p. 23.
(*c*) *Turner* v. *Harvey*, Jacob, 178; *Turner* v. *Green*, 1895, 2 Ch. 206.

said by Lord Thurlow in *Fox* v. *Mackreth* (*d*), if A., knowing of a mine on the estate of B., of which he knows B. to be ignorant, should contract to purchase that estate, the contract would be good, although B. should be left in ignorance of the existence of the mine. On the other hand, a vendor is under certain well-recognised legal duties towards the purchaser; and if, *e.g.*, a vendor should sell an estate, knowing he had no title to it, or knowing that there were incumbrances on it of which the vendee was ignorant, the suppression of such a fact, affecting the title in whole or in part, is a fraud which avoids the sale (*e*). And the intending purchaser even may place himself in such a position as to incur the duty of making certain disclosures,—*e.g.*, a purchaser of property which is being sold under the direction of the court, if he lay any information at all before the court on any particular point, in order to procure the sanction of the court to the sale, must lay before it all the information he possesses that is material on that particular point, to enable the court to form a correct opinion; and he is under this duty, whether the court asks for the information or not,—*scil.* because of his undertaking to give the information; but, apparently, he may in general abstain altogether from laying any information whatever before the court (*f*); and merely because he has undertaken to give information as to one particular point, he is not thereby considered to have undertaken to give information also on other particular points, notwithstanding that such other points may be material in procuring the sanction of the court to the sale (*g*). Also, in many cases, especially in the case of sales of personal chattels, the maxim *caveat*

Duty of purchaser, on a sale by the court,—on his undertaking to give the court information.

As to intrinsic defect in per-

(*d*) 2 Bro. C. C. 420.
(*e*) *Edwards* v. *M'Leay*, 2 Swanst. 287.
(*f*) *Boswell* v. *Coaks*, 11 App. Ca. 232.
(*g*) *Boswell* v. *Coaks*, supra.

emptor is applied; and unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, or unless the vendor is under some obligation to make a disclosure, the vendee is understood to be bound by the sale, notwithstanding there may be any intrinsic defects in the property, known to the vendor but unknown to the vendee, materially affecting its value, and regarding which the vendor has merely held his tongue,—*Nam qui tacet non videtur affirmare* (*h*). But there are cases where, from the very nature of the transaction, the silence of the party—his mere concealment of a fact—imports, and is deemed equivalent to, a direct affirmation. For example, in cases of insurance, the facts and circumstances affecting the risk are generally within the knowledge of the insured only, and the insurer or underwriter places trust and confidence in him as to all such matters,—and the insured is therefore bound to communicate to the underwriter all the facts and circumstances material to the risk that are within his knowledge; and if they are withheld, whether the concealment be by design or by accident, it is equally fatal to the contract (*i*); and as regards life insurances in particular, it will generally happen, that matters of opinion (*e.g.*, whether the intending assured is of temperate habits), stated in answer to the specific questions addressed to the intending assured (or to his referees), are really matters of fact, and material facts affecting the insurance (*k*).

sonal chattels, *caveat emptor*; unless there be some artifice or warranty, or vendor was bound to disclose.

Silence tantamount to direct affirmation,—but in exceptional cases only, —*e.g.*, cases of insurance.

Inadequacy of consideration, or any other inequality in the bargain, is not to be understood as constituting *per se* a ground to avoid a bargain in

Inadequacy of consideration will not *per se* avoid a contract.

(*h*) *Walker* v. *Symonds*, 3 Swanst. 62.
(*i*) *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511; *London Assurance Co.* v. *Mansel*, 11 Ch. Div. 363; *Tate* v. *Hyslop*, 15 Q. B. D. 368.
(*k*) *Thomson* v. *Weems*, 9 App. Ca. 671.

equity (*l*); for courts of equity, equally with courts of law, assume that every one not under some disability or incapacity is entitled to dispose of his property at whatever price he himself fixes, and upon whatever terms he chooses (*m*); and besides, the value of a thing is what it will produce,—and one man may sell for less and another for more; and the sole inducement to the purchaser may have been the lowness of the price. There may, however, be such unconscionableness or inadequacy in a bargain as to demonstrate *per se* some gross imposition or undue influence, and in such cases courts of equity will interfere upon the ground of inadequacy alone; and where the inadequacy is not of that shocking character, still, if there are other ingredients in the case of a suspicious nature, the inadequacy is a strong element and evidence of fraud (*n*),—as if the party is importunately pressed, or is suddenly drawn into the bargain without being permitted to consult disinterested friends (*o*). But circumstances, although at first sight suspicious, may be explained away consistently with perfect honesty and fairness; and even an apparent gross inadequacy may not be a real inadequacy when everything is known,—thus, in *Harrison* v. *Guest* (*p*), where, after the death of a vendor, the sale was impeached by his representatives, on the ground that at the time of the sale he was an illiterate bedridden old man of seventy-one years of age, and had acted without independent professional advice, and had conveyed away the property in question, of the value of £400, for the consideration of a provision by way of board and lodging during his life, which only endured six weeks after the

Inadequacy evidence of fraud,—especially an inadequacy shocking the conscience, or coupled with other circumstances of suspicion.

Harrison v. *Guest*,—an apparent inadequacy explained away.

(*l*) *Harrison* v. *Guest*, 6 De G. M. & G. 424.
(*m*) *In re Wragg*, 1897, 1 Ch. 796.
(*n*) *Harrison* v. *Guest*, supra.
(*o*) *Rees* v. *De Bernhardy*, 1896, 2 Ch. 437.
(*p*) 6 De G. M. & G. 424.

conveyance,—It was held (the evidence showing that the vendor had declined to employ professional advice for himself), that the transaction was not impeachable on the mere ground of the apparent inadequacy of the consideration (*q*).

Fraudulent contracts usually valid until avoided.

And, of course, courts of equity will not, even in cases of gross inadequacy, relieve if the parties can no longer be placed *in statu quo* (*r*). For, in general, contracts affected with fraud are voidable only, and not void; wherefore, such a contract is valid until it is repudiated; and the rescission or repudiation may become impossible after the rights of third parties have intervened,—*e.g.*, a fraudulent contract to take shares in a company cannot be rescinded after the commencement of the winding up of the company (*s*); a *de facto* removal of the shareholder's name from the register, or even the commencement of an action for the removal, is, however, a sufficient repudiation of the fraudulent contract. The court will not, however, readily conclude that the defrauded party has given up his right to relief,—and mere delay in asserting the right to relief, if it is excusable and excused (*t*), or if it has done no harm in the meantime (*u*), will not be considered an abandonment of the right to relief; and, of course, if the fraudulent contract should in any case be void, then no repudiation of it is required,—but this very rarely happens. Occasionally also, contracts for shares, although fraudulent, are not voidable even; for if A. by fraud induces B. to buy A.'s shares,

Circumstances under which recission impossible.

No recission against innocent third parties.

(*q*) *Abbot* v. *Sworder*, 4 De G. & S. 448.
(*r*) *North* v. *Ansell*, 2 P. Wms. 619.
(*s*) *Spackman* v. *Evans*, L. R. 3 H. L. 171; *In re Cape Breton Co.*, 29 Ch. Div. 795; and S. C. (sub nom. *Cavendish-Bentinck* v. *Fenn*), 12 App. Ca. 652; *Ladywell Company's Case*, 35 Ch. Div. 400.
(*t*) *Tibbatts* v. *Boulter*, W. N. 1895, p. 152.
(*u*) *Imperial Ottoman Bank* v. *Securities Investment Corporation*, W. N. 1895, p. 23.

and the company is not implicated in A.'s fraud, there the contract will hold good as between B. and the company, and B.'s remedy is against A. only, and is for a re-transfer of the shares and an indemnity; and the rule is the same even if A. be a director of the company. But if the company is at all implicated in the fraud,—directly or indirectly,—then the contract would be voidable as against the company even,—and that although the fraudulent misrepresentations were *verbal* only, by the mouths of the company's officers (*v*).

Frauds which are so by force of statute merely.

Companies Act, 1862,—s. 164.

There are certain frauds in relation to companies which are frauds by force of statute merely. Thus, under the 164th section of the Companies Act, 1862, any conveyance, mortgage, &c., which, in the case of an individual trader, would be a fraudulent preference on his bankruptcy, is a fraudulent preference on the winding up of the company, and may be set aside accordingly,—but of course only for the benefit of the general body of creditors, and not for the benefit of any one individual creditor (*x*). And,

Companies Act, 1867,—s. 38.

under the 38th section of the Companies Act, 1867, the non-disclosure of contracts between the promoters of a projected company and the persons contracting with them, if the contracts are of a kind to influence the prospective shareholders, renders the

Companies Act, 1867,—s. 25.

prospectus fraudulent (*y*),—the promoters, when at least they are the sole source of information, or are otherwise bound to disclose, being in a sort of fiduciary relation towards such shareholders, and liable for concealment as well as for misrepresentation (*z*); also, note, that if any such contract is in its own

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(*v*) *Lyndc's Case*, 1896, 1 Ch. 178.
(*x*) *Willmott* v. *London Celluloid Co.*, 34 Ch. Div. 147.
(*y*) *New Sombrero Phosphate Co.* v. *Erlanger*, 3 App. Ca. 1218; *Andrews* v. *Mockford*, 1896, 1 Q. B. 372.
(*z*) *Lidney & Wigpool Co.* v. *Bird*, 33 Ch. Div. 85.

nature fraudulent, the mere registration of it under section 25 of the Companies Act, 1867, will not cure it (*a*); and note also, that a prospectus which is otherwise fraudulent, is not good, merely because it discloses all such contracts (*b*); and note also, generally, that making payments out of capital, which ought to be paid (if paid at all) out of profits only, is a fraud in the nature of a misfeasance by the directors and other officials of the company, for which they are answerable to the shareholders (*c*) —unless, *semble*, where in any case the damages are too remote (*d*). Also note, that although you may lawfully apply portion of the capital in the payment of interest on prepaid shares (*e*), yet you cannot issue shares at a discount (*f*),—but you may issue the shares at a premium; and you may issue bonds or debentures either at a discount or at par or at a premium. Moreover, a company may not buy its own shares (*g*); nevertheless, a company which is otherwise duly constituted under the Companies Act is not a fraudulent company, merely because it is (in effect) a one-man company (*h*).

Improper payments generally.

As regards actual frauds arising chiefly from a consideration of the peculiar position of the injured parties,—The law requiring that there shall be free and full consent to bind the parties, and such consent supposing three things, namely, a physical power, a

II. Cases of fraud arising from the condition of the injured parties. Free and full consent neces-

(*a*) *Eddystone Company Case*, 1893, 3 Ch. 9; *In re Wragg*, 1897, 1 Ch. 796.

(*b*) *Aaron's Reefs* v. *Twiss*, 1896, A. C. 273.

(*c*) *The Oxford Benefit Building Society*, 35 Ch. Div. 502; *Leeds Estate Co.* v. *Shepherd*, 36 Ch. Div. 787; *Verner* v. *General Trust Co.*, 1894, 2 Ch. 239.

(*d*) *In re Kingston Cotton Mill Co.*, 1896, 1 Ch. 331; 1896, 2 Ch. 279.

(*e*) *Lock* v. *Queensland Investment Co.*, 1896, A. C. 461.

(*f*) *Ooregum Gold* v. *Roper*, 1892, A. C. 125.

(*g*) *Trevor* v. *Whitworth*, 12 App. Ca. 409.

(*h*) *Saloman* v. *Saloman & Co.*, 1896, A. C. 22.

sary to every agreement.

moral power, and a free exercise of these powers (*i*), —it follows, that if either of these two powers is defective, or if the exercise of either is hindered, the act or contract is not binding. And further, if the power be, *e.g.*, one of consenting to a marriage, the power must be exercised fairly and without bias; and the court will interfere to prevent any undue bias, and also to secure fairness in the giving or withholding of the consent,—therefore, in the case of gifts or legacies given upon condition that the donees or legatees shall not marry without the consent of parents, guardians, or other confidential persons, the doctrine is now firmly established, that courts of equity will not suffer the manifest object of the condition to be defeated by the fraud, or by the dishonest, corrupt, or unreasonable refusal, of the party whose consent is required to the marriage (*k*). And hence also, (1.) The contract of a person *non compos mentis*, wherever there is not entire good faith, or the contract is not just in itself and for the benefit of the *non compos*, will be set aside in a court of equity; but where the contract is entered into with good faith, and is for his benefit, courts of equity, as well as of law, will uphold the transaction; also, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the *non compos*, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, especially if the parties cannot be placed *in statu quo* (*l*). (2.) But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement or lethargy from liquor,—unless it be of such a degree as that the party is utterly deprived for the

Gifts and legacies on condition against marrying without consent.

1. Person *non compos mentis*,— his contracts are usually void.

2. Drunkenness,— amounting to a want of understanding, contracts how affected by.

(*i*) *Allcard* v. *Skinner*, 36 Ch. Div. 145; *Morley* v. *Loughnan*, 1893, 1 Ch. 736.
(*k*) *Dashwood* v. *Bulkeley*, 10 Ves. 245; *Clarke* v. *Parker*, 18 Ves. 18.
(*l*) *Molton* v. *Camroux*, 4 Exch. 17; *Manby* v. *Bewicke*, 3 K. & J. 342.

time of the use of his reason and understanding; but, of course, where there has been some contrivance to draw the party into drink, the court might in that case relieve,—for in general, courts of equity, as a matter of public policy, do not incline, on the one hand, to lend their assistance to a person who has obtained a deed or agreement from another in a state of intoxication, and, on the other hand, they are equally unwilling to assist the intoxicated party (unless he was wholly incapacitated as aforesaid) to get rid of his agreement or deed merely on the ground of his intoxication at the time, but they leave the parties to their ordinary remedies at law, unless there has been some contrivance or some imposition practised (*m*). (3.) Closely allied to the foregoing are cases where a person, although not positively *non compos*, is yet of such great weakness of mind as to be unable to guard himself against imposition,—for in such a case, if the circumstances justify the conclusion, that the party has been imposed on, the transaction will be void in equity; and the burden of proof is on the other party to show that no unfair advantage was taken of the weakness (*n*). And the like rules are applicable as regards wills obtained by the exercise of undue influence over the testator or testatrix,—for wills are in this respect upon the like footing with contracts, being an alienation of the property of the deceased, and usually to persons other than those who would (in the absence of such alienation) be entitled at law to the property; but in order to establish undue influence sufficient to invalidate a will, it must be shown, that the volition of the testator was repressed so as that he did what he did not desire to do; and the mere fact that, in making his will, the testator was influenced by, *e.g.*, immoral

3. Imbecile persons,—where there has been imposition.

Undue influence,—on weak testators.

(*m*) *Clarkson* v. *Kitson*, 4 Gr. 244.
(*n*) *Longmate* v. *Ledger*, 2 Giff. 164.

(*o*) or religious (*p*) considerations, does not amount to such undue influence, so long as the dispositions contained in the will express the wishes of the testator.

4. Persons of competent understanding, under undue influence.

(4.) Cases of an analogous nature may be easily put, where the party is subjected for the time to undue influence, although in other respects and at other times he is of competent understanding,—as where

(*a*.) Duress.

he does an act or makes a contract when he is under duress, or under the influence of extreme terror, or of threats, or of apprehensions short of duress. For in cases of this sort, he has no free will, but stands *in vinculis;* and the constant rule in equity is, that where a party is not a free agent, and is not equal to protecting himself, the court will protect him (*q*);

(*b*.) Extreme necessity.

and circumstances of extreme necessity and distress, although not accompanied by restraint or duress, may in like manner justify the court in setting aside a contract on account of some imposition attendant upon it (*r*), or on account of its improvidence coupled with such necessity or distress as aforesaid (*s*).

5. Infants,—the contracts of, when and when not binding.

(5.) The acts and contracts of infants (not being for necessaries) are not, as a general rule, binding upon them, because the presumption of law is that they have not sufficient reason or understanding to bind themselves. There are indeed certain cases in which infants are permitted by law to bind themselves by their acts and contracts; for,—not to mention contracts for necessaries suitable to their degree and quality, which are, of course, binding upon them when they are not otherwise supplied with necessaries (*t*),—infants are also bound by contracts of hiring and service, and by acts which the

(*o*) *Wingrove* v. *Wingrove*, 11 P. D. 81.
(*p*) *Allcard* v. *Skinner*, supra; *Morley* v. *Loughnan*, supra.
(*q*) *Hawes* v. *Wyatt*, 3 Bro. C. C. 158.
(*r*) *Gould* v. *Okeden*, 4 Bro. P. C. 199; *James* v. *Kerr*, 40 Ch. Div. 449.
(*s*) *Rees* v. *De Bernardy*, 1896, 2 Ch. 437.
(*t*) *Barnes* v. *Toye*, 13 Q. B. D. 410; *Johnstone* v. *Marks*, 19 Q. B. D. 509.

law requires them to do. But, generally, infants are favoured, both at law and in equity, in all things which are for their benefit, and are saved from being prejudiced by anything which is to their disadvantage,—this rule being, however, designed as a shield for their protection, and not as a means of enabling them to perpetrate a fraud or injustice on others (*u*); wherefore an infant may make a valid gift of his property, when he is fully capable of managing his own affairs, and there is no influence brought to bear upon him in making the gift (*v*). And note, that there used to be an important difference between the acts and contracts of infants on the one hand, and those of lunatics, idiots, &c., on the other,—for the act or contract of a lunatic or idiot was and is *ab initio* void, and can never be validated in any mode,—*scil.* if the other contracting party has known of the lunacy at the date of making the contract (*x*); but of the acts and contracts of infants, while some are wholly void, others used to be merely voidable; and where they were voidable, it used to be in the election of the infant to avoid or confirm them when he arrived at full age, his confirmation being in writing. In general, where a contract (not being his own personal contract) may be for the benefit of an infant, it is voidable only,—and he must elect either to confirm or to avoid it, as well at law as in equity; and he must do so within a reasonable time (*y*); but where such a contract can never be for his benefit, it is utterly void; and under the Infants Relief Act, 1874 (*z*), money-lending and money-raising contracts, and all other *personal* con-

Distinction between lunatics and infants,—as regards their contracts.

Infants Relief Act, 1874.

(*u*) *Lempriere* v. *Lange*, 12 Ch. Div. 675.
(*v*) *Taylor* v. *Johnstone*, 19 Ch. Div. 603; *Hoblyn* v. *Hoblyn*, 41 Ch. Div. 200.
(*x*) *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B. 599.
(*y*) *Partridge* v. *Partridge*, 1894, 1 Ch. 351; *In re Laxon & Co.*, 1892, 3 Ch. 555; *Clement's Case*, 1894, 2 Q. B. 482.
(*z*) 37 & 38 Vict. c. 62.

tracts of the infant (not being for necessaries), are made utterly void (*a*),—and these are therefore not confirmable by the infant upon his attaining age; and he cannot be made a judgment debtor in respect thereof (*b*). But the marriage articles of an infant would, *semble*, be good as a contract for necessaries (*c*),—at all events, such a contract would not be void, but voidable, and therefore would be either confirmed or repudiated by the infant on (and within a reasonable time after) his attaining the age of twenty-one years (*d*); also, money actually paid by an infant under a void contract (*e.g.*, upon an agreement for renting a tenement and for the purchase of the furniture therein) cannot be recovered back, there having been part enjoyment by the infant,—*secus*, if there has been no such part enjoyment (*e*). (6.) In regard to *femes covert*, the case used to be still stronger; for, generally speaking, at law they had no capacity to do any acts or to enter into any contracts, such acts and contracts being treated as mere nullities. Courts of equity, however, broke in upon this doctrine, and in many respects treated the wife as capable of disposing of her own separate property, and of doing other acts as if she were a *feme sole;* and in cases of this latter sort, the same principles used to apply to the acts and contracts of a married woman as would have applied to her as a *feme sole*,—unless the circumstances gave rise to a presumption of fraud, imposition, unconscionable advantage, or undue influence. And now, under the Married Women's Property Acts, 1882 and

6. *Femes covert* had not capacity to contract at law, but might do so as to their separate estate in equity.

Their capacity under the Acts of 1882 and 1893.

(*a*) *Coxhead* v. *Mullis*, 3 C. P. Div. 439; *Smith* v. *King*, 1892, 2 Q. B. 543.
(*b*) *Ex parte Beauchamp*, 1894, 1 Q. B. 1.
(*c*) *Duncan* v. *Dixon*, 44 Ch. Div. 211.
(*d*) *Carter* v. *Silber*, 1892, 2 Ch. 278; S. C. (sub nom. *Edwards* v. *Carter*), 1893, A. C. 360; *Farrington* v. *Forrester*, 1893, 2 Ch. Div. 461.
(*e*) *Valentini* v. *Canali*, 24 Q. B. D. 166; and see *Corpe* v. *Overton*, 10 Bing. 252; *Hamilton* v. *Vaughan Co.*, 1894, 3 Ch. 589.

1893, a married woman may maintain an action in her own name for the recovery,—and has the same remedies, civil as well as criminal, for the protection,—of property declared by the Act to be her separate property, as though she were a *feme sole;* and, so far as regards such separate property, she is made fully capable of entering into contracts of every kind, equally as a man may do, and with (in effect) the same consequences.

CHAPTER IV.

CONSTRUCTIVE FRAUD.

Constructive fraud.

By constructive frauds are meant such acts or contracts as, although not originating in any actual design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet,—by reason of their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure public interests,—deemed equally reprehensible with positive frauds, and therefore are prohibited by law, as being acts and contracts done *malo animo;* and cases of this kind are either: (1.) Cases of constructive fraud, so called because they are contrary to some general public policy or to the policy of the law; or (2.) Constructive frauds, so called from the abuse of some peculiar, confidential, or fiduciary relation between the parties; or (3.) Constructive frauds, so called because they unconscientiously compromit, or injuriously affect, or operate substantially as frauds upon, the private rights, interests, duties, or intentions of the parties themselves, or of third persons.

Three classes of constructive frauds.

I. Constructive frauds as contrary to policy of the law.

(1.) Marriage brokage contracts.

I. As instances of constructive frauds, so called because they are contrary to some general public policy, or to some fixed artificial policy of the law, may be mentioned Marriage Brokage Contracts,—by which a person engages to give another some reward or remuneration if he will negotiate a marriage for

him; and these are utterly void (*a*) and incapable of confirmation (*b*); and money paid pursuant to such contracts may be recovered back in equity (*c*); and on the same principle, every contract by which a parent or guardian obtains any remuneration for promoting or consenting to the marriage of his child or ward is void (*d*). The same principle pervades also that class of cases where persons, upon a treaty of marriage, by any concealment or misrepresentation, mislead other parties, or do acts which are by other secret agreements reduced to mere forms or become inoperative; *e.g.*, where a man, on the treaty for the marriage of his sister, let her have money privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, the bond was decreed to be delivered up (*e*). Moreover, the same rules are applied to cases where bonds are given, or other agreements made, as a reward for using influence and power over another person to induce him to make a will in favour of or for the benefit of the obligor,—for all such contracts *tend* to deceive and injure others, and encourage artifices and improper attempts to control the exercise of their free judgment (*f*).

(2.) Reward to parent or guardian to consent to marriage of child.

(3.) Secret agreements in fraud of marriage.

(4.) Rewards given for influencing another person in making a will.

Also, all contracts in general restraint of marriage are void, as being against public policy and the due economy and morality of domestic life; and so, if a condition is not in restraint of marriage generally, but still the prohibition is of so rigid a nature, or so tied up to peculiar circumstances, that the party

(5.) Contracts in general restraint of marriage void.

(*a*) *Hall* v. *Potter*, Show. P. C. 76.
(*b*) *Cole* v. *Gibson*, 1 Ves. Sr. 503; *Roberts* v. *Roberts*, 3 P. Wms. 74.
(*c*) *Smith* v. *Brunning*, 2 Vern. 392.
(*d*) *Kent* v. *Allen*, 2 Vern. 588.
(*e*) *Gale* v. *Lindo*, 1 Vern. 475; *Neville* v. *Wilkinson*, 1 Bro. C. C. 543; *In re Great Berlin Co.*, 26 Ch. Div. 616.
(*f*) *Debenham* v. *Ox*, 1 Ves. 276.

upon whom it is to operate is unreasonably restrained in his choice of marriage, it will fall under the like consideration. Thus, where a legacy was given to a daughter, on condition that she should not marry a man who was not seised of an estate in fee-simple of the clear yearly value of £500, it was held to be a void condition, as leading to a probable prohibition of marriage (*g*). So also, contracts in general restraint of trade are void, as tending to promote monopolies, and to discourage industry, enterprise, and just competition. But the same reasoning does not apply to a limited restraint of trade,—*e.g.*, not to carry on trade at a particular place or with particular persons, or for a limited reasonable time; and a person may lawfully sell a secret in his trade or business, and restrain himself from using that secret (*h*). The court will also (where it can) sever, at least in a severable contract, what is reasonable from what is unreasonable in the restraint (*i*); also, a contract in restraint of trade may nowadays be lawfully valid although unlimited in point of *space*,—*e.g.*, a contract in respect of war material, *i.e.*, guns and ammunition (*k*). Also, all agreements founded upon a violation of public trust or confidence, or of the rules adopted by the courts in furtherance of the administration of public justice, are held void,—*e.g.*, contracts for the buying, selling, or procuring of public offices (*l*), agreements founded on the suppression of criminal prosecutions (*m*), contracts which have a tendency to encourage champerty (*n*); and generally, all agreements founded upon corrupt con-

(6.) Contracts in general restraint of trade void, but not special restraints.

(7.) Agreements founded on violation of public confidence.

(*g*) *Keily* v. *Monck*, 3 Ridg. P. C. 205; *Scott* v. *Tyler*, 2 L. C. 115.
(*h*) *Benwell* v. *Inns*, 24 Beav. 307; *Harms* v. *Parson*, 32 Beav. 328.
(*i*) *Baker* v. *Hedgecock*, 39 Ch. Div. 520; *Mills* v. *Dunham*, 1891, 1 Ch. 576; *Perls* v. *Saalfeld*, 1892, 2 Ch. 149.
(*k*) *Nordenfelt* v. *Maxim Co. Limited*, 1894, A. C. 535.
(*l*) *Chesterfield* v. *Janssen*, 1 Atk. 352.
(*m*) *Johnson* v. *Ogilby*, 3 P. Wms. 277.
(*n*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660.

siderations or moral turpitude, whether they stand prohibited by statute or not, are treated as frauds upon public policy or public law; and, of course, any agreements which tend to "affect the administration of justice," besides being fraudulent, are also illegal (*o*).

(8.) Frauds in relation to the transfer of shares in joint-stock companies.

By the Companies Act, 1862, s. 22, shares in joint-stock companies are made freely transferable, the mode of transfer being that prescribed by the regulations of the company; but a transfer that is subject to some reservation in favour of the transferror is no transfer, so as to get rid of the liability for calls,—such a pretended transfer being, in fact, fraudulent (*p*). Also, when the directors have (as they usually have) a right of rejecting proposed transferees, any concealment or misrepresentation materially affecting the worth of the proposed transferee would be an *actual* fraud, and not constructive merely, and would render the transfer invalid (*i.e.*, voidable) even although accepted (*q*),—but it is otherwise, when the directors have no power of rejection (*r*). And again, as between trustees and *cestuis que trustent*, the trustee whose name is on the share-register is liable, and not the *cestui que trust;* but the trustee (*where the investment is proper*) has the usual right of indemnity (*s*); also, where the shares are placed in the name of the trustee, only colourably and for the purpose of merely evading the legal liability, the *cestui que trust* would be liable (*t*).

As between trustee and *cestui que trust.*

Neither party to an illegal

In general, where the parties are alike involved in illegal agreements, whether *mala prohibita* or *mala*

(*o*) *Lound* v. *Grimwade*, 39 Ch. Div. 605.
(*p*) *De Pass's Case*, 4 De Ge. & Jo. 544.
(*q*) *Ex parte Kintrea*, L. R. 5 Ch. App. 95.
(*r*) *Battie's Case*, 39 L. J. Ch. 391.
(*s*) *City of Glasgow Bank Cases*, 4 App. Ca. 547–581.
(*t*) *Castellan* v. *Hobson*, L. R. 10 Eq. 47.

agreement is aided, as a general rule;

except where agreement is contrary to public policy.

in se, courts of equity, following the rule of law as to the participators in a common fraud, will not interpose to grant any relief to either of them, acting upon the well-known maxim, *In pari delicto, potior est conditio possidentis* (*u*); but where the agreement is challenged as being against public policy, the circumstance that the relief is asked by a party who is *particeps fraudis* is not in equity material,—the reason being, that the public interest requires that relief should be given, and the relief is given, to the public through the party (*v*), and not to the party, excepting as an indirect consequence occasionally.

II. Constructive frauds arising from the fiduciary relation.

The principle upon which the relief is granted.

II. As instances of constructive frauds, so called from the abuse of some peculiar, confidential, or fiduciary relation between the parties,—and in all of which there is to be found more or less an intermixture of deceit, imposition, over-reaching, unconscionable advantage, or other mark of direct fraud,—may be mentioned, in the first place, Frauds on the Relation of Parent and Child,—all contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand *in loco parentis*, being the objects of the court's jealousy; and if they are not entered into with scrupulous good faith, or are not reasonable under the circumstances, they will be set aside, unless third parties have acquired an interest under them (*x*). And where a child, shortly after attaining his or her majority, makes over property to his or her father without consideration, or for an inadequate consideration, equity will require the father to show that the child was really a free agent, and had adequate and independent advice (*y*). In the

(1.) Gifts from child to parent void if not in perfect good faith.

Gift by child shortly after minority.

(*u*) *Osborne* v. *Williams*, 18 Ves. 379.
(*v*) *Roberts* v. *Roberts*, 3 P. Wms. 66; *Rider* v. *Kidder*, 10 Ves. 360.
(*x*) *Wright* v. *Vanderplank*, 8 De G. M. & G. 133; *Kempson* v. *Ashbee*, L. R. 10 Ch. App. 15.
(*y*) *Savery* v. *King*, 5 H. L. Cas. 627; *Bainbrigge* v. *Browne*, 18 Ch. Div. 188.

next place, may be instanced frauds in the relation of guardian and ward; for, of course, while the guardianship lasts, the relative situation of the parties imposes a general inability to deal with each other; but courts of equity proceed yet further in cases of this sort, and will not permit transactions between guardians and wards to stand, *even when they have occurred after the wardship has ceased*, if the intermediate period be short (*z*),—unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian (*a*); but when the influence as well as the legal authority of the guardian over the ward have completely ceased, and the ward has been put in possession of his property after a full and fair settlement of accounts, equity will not interfere to set aside a reasonable gift to the guardian (*b*). And all the like principles are applied to persons standing in the situation of *quasi* guardians, or confidential advisers,—as medical advisers (*c*), or ministers of religion (*d*),—and to every case where influence is acquired and abused, or where confidence is reposed and betrayed (*e*). But it may be stated generally, that, in all the foregoing cases, if the donor (after the confidential relation has ceased) intentionally elects to "abide by the gift," that would be a sufficient confirmation of the gift; and at all events, after such a confirmation, the legal personal representatives of the donor cannot after his death set it aside (*f*),—*secus*, if there has been no such confirmation by the donor herself (*g*).

(2.) Guardian and ward cannot deal with each other during the continuance of the relation.

Gift by ward soon after the termination of guardianship, viewed with suspicion.

Gift upheld when influence and legal authority have ceased.

(3.) *Quasi* guardians.

(*z*) *Pierce* v. *Waring*, 1 P. Wms. 121.
(*a*) *Wright* v. *Vanderplank*, 2 K. & J. 1.
(*b*) *Hatch* v. *Hatch*, 9 Ves. 297.
(*c*) *Dent* v. *Bennett*, 4 My. & Cr. 269.
(*d*) *Nottidge* v. *Prince*, 2 Giff. 246.
(*e*) *Smith* v. *Kay*, 7 H. L. Cas. 751; *Lyon* v. *Home*, L R 6 Eq. 655.
(*f*) *Mitchell* v. *Homfray*, 8 Q. B. D. 537.
(*g*) *Tyars* v. *Alsop*, W. N. 1888, p. 190.

(4.) Solicitor and client.

Some more particular attention requires to be bestowed on those instances of constructive frauds which arise in connection with the relation of solicitor and client. In *Tomson* v. *Judge* (*h*), where A., who was proved to have entertained feelings of peculiar personal regard for B., his solicitor, conveyed to him certain real estate by a deed purporting to be a purchase-deed,—the consideration being expressed to be £100, although the value of the real estate was upwards of £1200; and B. produced evidence to show that no money passed, and that the transaction was never intended to be a purchase, but a gift for his services and from affection,—it was said by the court, that the rule is absolute, *that a solicitor cannot sustain a* GIFT *from his client*, made pending the relation of solicitor and client; and the deed was set aside,—Kindersley, V.C., saying:—"A solicitor can "*purchase* his client's property even while the relation "subsists; the rule of the court being that such "purchases are to be viewed with great jealousy, "and the onus lies on the solicitor to show that the "transaction was perfectly fair, that the client knew "what he was doing, and in particular that a fair "price was given, and of course that no kind of "advantage was taken by the solicitor. Is, then, the "rule with regard to *gifts* the same, or is it more "stringent,—for less stringent it cannot be. There "is this obvious distinction between a gift and a "purchase, that is to say, in the case of a purchase, "the parties are at arm's-length, and each party "requires from the other the full value of that "which he gives in return; but in the case of a "gift, the matter is totally different; and it appears "to me, that there is a far stricter rule established "in this court with regard to *gifts* than with regard "to *purchases*, and that the court makes a gift from

A *gift* from client to solicitor pending that relation cannot stand.

A *purchase* from client, if there is perfect *bona fides*, is good.

(*h*) 3 Drew. 306; *Clarke* v. *Girdwood*, 7 Ch. Div. 9.

"a client to his solicitor absolutely void" (*i*). It is an established rule, therefore, that a solicitor shall not in any way whatever, either personally or through his wife (*k*), in respect of any transactions in the relations between him and his client, make any gain to himself, at the expense of his client, beyond the amount of his just and fair professional remuneration (*l*). Nevertheless, an agreement between a solicitor and his client, that a gross sum shall be paid for costs for business already done is valid, provided the agreement be in writing (*m*); but, in that case, it behoves the solicitor to use great caution, and to preserve sufficient evidence that the transaction was a fair one, and that the client was not under the influence of the solicitor (*n*),—a pressure characterised (rather fantastically) by Lord Thurlow (*o*) as "*the crushing influence of the attorney;*" also, an agreement by a solicitor to receive a fixed sum by ways of costs for *future* business, although it was formerly invalid, and would have been set aside even after payment under the agreement (*p*), will now, under 33 & 34 Vict. c. 28, s. 4 (as regards contentious business), and under 44 & 45 Vict. c. 44, s. 8 (as regards non-contentious business), be good and valid; but every such contract is subject to taxation as a bill of costs, and may (if improper) be set aside (*q*); and in every case, the amount payable under the agreement must be fair, having regard to the

Solicitor must make no more advantage than his fair professional remuneration.

Agreement to pay a gross sum for past business is valid;

and for future business under 33 & 34 Vict. c. 28, and 44 & 45 Vict. c. 44.

(*i*) *Spencer* v. *Topham*, 22 Beav. 573; *Gresley* v. *Mousley*, 4 De G. & Jo. 78; *Lewis* v. *Hillman*, 3 H. L. Cas. 630.
(*k*) *Liles* v. *Terry*, 1895, 2 Q. B. 679; *Goddard* v. *Carlisle*, 9 Price, 169.
(*l*) *Tyrrell* v. *Bank of London*, 10 H. L. Cas. 26.
(*m*) *In re Russell*, 30 Ch. Div. 114.
(*n*) *Morgan* v. *Higgins*, 1 Giff. 277.
(*o*) *Welles* v. *Middleton*, 1 Cox, 125.
(*p*) *In re Newman*, 30 Beav. 196.
(*q*) *Ward* v. *Eyre*, 15 Ch. Div. 130; *In re Palmer*, 45 Ch. Div. 291; *In re Frape*, 1893, 2 Ch. 284.

work done (*r*); and all these rules are now applicable also to solicitors being mortgagees (*s*).

(5.) Trustee and *cestui que trust.*

In the next place, with regard to the relation of trustee and *cestui que trust*, it may be laid down as a general rule, that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging the trust; and it is in consequence of this rule that a purchase by a trustee from his *cestui que trust*, although he may have given an adequate price and gained no advantage, shall be set aside at the option of the *cestui que trust;* and, as observed by Lord Eldon (*t*), "It is founded upon this, that though "you may see in a particular case that the trustee "has not made advantage, it is utterly impossible "to examine, upon satisfactory evidence in the power "of the court (by which I mean in the power of "the parties), in ninety-nine cases out of a hundred, "whether he has made an advantage or not. Suppose "a trustee holds an estate, and by the knowledge "acquired in that character discovers a valuable "coal-mine under it, and, locking that up in his "own breast, enters into a contract to buy it with "the *cestui que trust*,—if he chooses to deny it, how "can the court try that against that denial? The "probability is, that a trustee who has once con-"ceived such a purpose will never disclose it, and "the *cestui que trust* will be effectually defrauded" (*u*). "It has been decided, however, that a trustee may "buy from the *cestui que trust*, provided there is a "clear and distinct contract, ascertained to be such "after a jealous and scrupulous examination of all

Purchase by trustee from *cestui que trust* cannot be upheld;

except on a clear and distinct and fair contract that the *cestui que trust* intended the trustee to purchase.

(*r*) *Ex parte Cuthcart*, 1893, 2 Q. B. 201.
(*s*) 58 & 59 Vict. c. 25.
(*t*) *Ex parte Lacey*, 6 Ves. 627.
(*u*) *Ingle* v. *Richards*, 28 Beav. 361.

"the circumstances, that the *cestui que trust* intended "the trustee should buy, and there is no fraud, no "concealment, no advantage taken by the trustee "of information acquired by him in the character of "trustee" (*v*). And in fact, the rule as expressed by Lord Eldon, in the words quoted above, would at the present day hold good (if at all) in the case only of a trustee *for sale* purchasing from his *cestui que trust* without the leave of the court to bid; but all purchases by trustees will be watched by the court "with infinite jealousy" (*x*); and a trustee is never permitted to partake of the bounty of his *cestui que trust*, except under circumstances which would make the same valid if it were a case of guardianship,—in other words, the relation must have in fact ceased, and it must be proved that the influence arising from that relation has also ceased, in order to the validity of such a gift.

Gift to trustee treated on same principle as one between guardian and ward.

Also, as regards the relation generally of principal and agent, the same principles are applicable; *e.g.*, agents are not permitted to become secret vendors or secret purchasers of property which they are authorised to buy or to sell for their principals (*y*), —or indeed to deal validly with their principals in any case *except where there is the most entire good faith, and full disclosure of all facts and circumstances*, and an absence of all undue influence, advantage, or imposition (*z*). And if an agent, employed to make a purchase, purchase for himself, he will be held a trustee for his principal (*a*); and an agent employed to purchase will not be permitted, unless with the

(6.) Principal and agent.

Agent cannot make any secret profit out of his agency.

(*v*) *Coles* v. *Trecothick*, 9 Ves. 234; *Denton* v. *Donnor*, 23 Beav. 285; and see p. 163, supra.

(*x*) *Fox* v. *Mackreth*, 1 L. C. 123.

(*y*) *Charter* v. *Trevelyan*, 11 C. & F. 714; *Walsham* v. *Stainton*, 1 De G. J. & S. 678.

(*z*) *Dally* v. *Wonham*, 33 Beav. 154; *De Bussche* v. *Alt*, 8 Ch. Div. 286.

(*a*) *Lees* v. *Nuttall*, 1 Russ. & My. 53.

(7.) Counsel, auctioneers, &c., and their clients.

express consent of his principal, to make any profit out of the transaction (*b*). And the same principles apply with almost equal force to other persons standing in confidential or fiduciary situations,—as counsel; the assignees and the solicitors of a bankrupt's estate; auctioneers (*c*), and creditors who have been consulted as to the sale; physicians (*d*), and others shown to have occupied such situations. Also,

(8.) Debtor, creditor, and sureties.

perfect good faith is required between debtor and creditor and sureties; and if a creditor does any act affecting the surety, or if he omits to do any act which he is required to do by the surety, and is bound to do, and that act or omission proves injurious to the surety,—or if the creditor enters into any stipulations with the debtor, unknown to the surety, and inconsistent with the terms of the original contract,—the surety may in general (as will be shown in detail hereafter in the chapter on Suretyship) set up such act, omission, or contract in his defence against any claim made against him as surety.

III. Constructive frauds, as being unconscientious or injurious to the rights of third parties.

III. To the group of constructive frauds, so called because they unconscientiously compromit or injuriously affect or operate substantially as frauds upon the private rights, interests, or duties of the parties themselves, or of third persons, may be referred

(1.) If contract not put into writing through fraud of a party, he cannot set up Statute of Frauds as a defence.

many of those cases arising under the Statute of Frauds, which requires certain classes of contracts to be in writing; for, in the construction of this statute, this general principle has been adopted, namely, that the statute having been designed as a protection against fraud, shall never be made the engine of committing a fraud. In a variety of cases, therefore, where, from fraud, a contract of this sort

(*b*) *Bentley* v. *Craven*, 18 Beav. 75; *Boston Deep Sea* v. *Ansell*, 39 Ch. Div. 339.
(*c*) *Crowther* v. *Elgood*, 34 Ch. Div. 698.
(*d*) *Carter* v. *Palmer*, 8 Cl. & Fin. 657; *M'Pherson* v. *Watt*, 3 App. Ca. 254.

has not been reduced into writing, but has been suffered to rest in confidence or in parol communications between the parties, courts of equity will enforce it,—against the party guilty of a breach of confidence, who attempts to shelter himself behind the provisions of the statute (*e*). Again, common sailors being reputed so extremely generous, improvident, and credulous, and therefore liable to be imposed upon, equity views their contracts respecting wages and prize-money with great jealousy; and generally grants them relief whenever any inequality appears in the bargain, or an undue advantage has been taken (*f*),—and this quite apart from the provisions in their favour contained in the Merchant Shipping Acts. So also, bargains with heirs, reversioners, and expectants, during the life of their parents or ancestors, will be relieved against, unless the purchaser can show that a fair price was paid; and, in this class of cases, fraud is usually, though not always, presumed from mere inadequacy of price (*g*),—a rule founded on good sense, the very fact of the expectant coming into the market to sell his expectancy showing, that he is not in a position to make his own terms, and that he is more or less in the power of the purchaser. In all such cases, therefore, actual distress need not be proved, a court of equity presuming that there is distress, and that the party has not that full power of deliberate consent which is essential to a valid contract; and the onus, therefore, lies upon the person dealing with the reversioner or expectant to show that the transaction is reasonable and *bonâ fide* (*h*). And the rule, according to which a court of equity grants relief, from unconscionable bargains entered

(2.) Common sailors,—contracts by.

(3.) Bargains with heirs and expectants,—on their reversions.

And, generally, with persons having only an *expectation*

(*e*) *Montacute* v. *Maxwell*, 1 P. Wms. 619; *Hussey* v. *Horne Payne*, 4 App. Ca. 311; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.
(*f*) *Dow* v. *Wheldon*, 2 Ves. Sr. 516.
(*g*) *Peacock* v. *Evans*, 16 Ves. 512; *Fry* v. *Lane*, *Whittet* v. *Bush*, 40 Ch. Div. 312.
(*h*) *Rees* v. *De Bernardy*, 1896, 2 Ch. 437.

of property,—on their expectation.

into with heirs and reversioners for the loan of money, applies also generally to cases of money being lent on unconscionable terms (not fully understood by the borrower, and which are known by the lender not to be fully understood by the borrower),—*e.g.*, to a young man, being a minor at the time of his first transaction with the lender, and who is the son of a father possessing large property, the son having no property of his own, or expectation of any, except such general expectations as are founded on his own and his father's position in life, and the money being in such a case lent simply *on the credit of such general expectations*, and in the hope of obtaining the money from the father to avoid the son's exposure (*i*); and in such a case, the jurisdiction of equity is not affected by the 31 & 32 Vict. c. 4, commonly called Lord Selborne's Act, which merely enacts that no purchase made *bonâ fide* of a *reversionary* interest shall be set aside merely *on the ground of undervalue* (*k*). Moreover, the fact that the father or other person standing *in loco parentis* is aware of or takes part in the transaction does not necessarily make that valid which would otherwise be void,—although that circumstance will raise a presumption in favour of the *bonâ fides* of the lender; and when, *e.g.*, a father, being unable himself to supply his son's necessities, assists him in raising money from strangers, and presumably advises him for the best, the court may perhaps infer, but will not readily infer, that the bargain made was fair and for full value (*l*). Upon similar principles also, *post obit* bonds, and other securities of a like nature, are set aside when made by heirs and expectants,—a *post obit* bond being an agreement by the obligor to pay a sum, exceeding

Knowledge of person standing *in loco parentis*, does not *per se* make such transactions valid.

(4.) *Post obits*, —usually good, only for the money lent and 5 per cent. interest.

(*i*) *Nevill* v. *Snelling*, 15 Ch. Div. 679.

(*k*) *Miller* v. *Cook*, L. R. 10 Eq. 641; *Tyler* v. *Yates*, L. R. 6 Ch. App. 665.

(*l*) *Talbot v. Staniforth*, 1 J. & H. 502; *King* v. *Savery*, 5 H. L. Cas. 267.

the sum of ready money received, with interest thereon, on the death of the person under whom he (the obligor) expects to become entitled to some property; but if in other respects these contracts are honestly fair, courts of equity will permit them to have effect,—at least as securities for the sum (with interest thereon) to which *ex æquo et bono* the lender is entitled. So also, where tradesmen and others have sold goods to expectant heirs at extravagant prices, and under circumstances demonstrating imposition or undue advantage, or an intention to connive at secret extravagance in the youthful heirs, courts of equity will reduce the securities, and cut down the claims to their reasonable and just amount; but in all cases where, after the pressure of necessity has been removed, the party freely and deliberately, and upon full information, adopts or confirms the precedent contract, courts of equity will hold the contract to be binding,—for a man acting with his eyes open, and after the pressure has ceased, may by a new agreement bar himself of relief (*m*).

(5.) Tradesmen selling goods at extravagant prices.

The party injured may acquiesce after the pressure of necessity has ceased.

Another class of constructive frauds is, where a man designedly or knowingly produces a false impression on another, and the latter is thereby drawn into some act or contract injurious to his interests; and for this purpose, there is no real difference between an express misrepresentation and one which is naturally implied from the party's conduct; moreover, any one who enables another to commit a fraud is (or may be) himself answerable for the consequences (*n*). If, therefore, a man having title to an estate which is offered for sale stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, the party so standing

(6.) Knowingly producing a false impression to mislead a third party.

A man who has a title to property standing by and letting another pur-

(*m*) *Jacques-Cartier* v. *Montreal District Bank*, 13 App. Ca. 111.
(*n*) *Rice* v. *Rice*, 2 Drew. 73.

chase or deal with it, is bound.

by will be bound by the sale (*o*). So, when the directors of a company (the company having no power to accept bills) accepted a bill, and purported to do so on behalf of the company, they were held personally liable,—*scil.* because by their acceptance they represented that the company had authority to do so, and also to do so by them as the company's directors (*p*). So also, a company will, in the general case, be estopped from saying that any particular shares are not fully paid up, if they have (by their secretary or directors) issued certificates to the effect that the shares are fully paid up (*q*), or if they have otherwise formally certified to that effect (*r*); and the like estoppel will arise, as regards the bonds or debentures of the company (*s*). Also, where executors have put it in the power of a broker to misapply securities (*e.g.*, securities to bearer), they will in general be estopped thereby from disputing the broker's authority (*t*). And where, as in *Slim* v. *Croucher* (*u*), an intending borrower had represented that he was entitled to have a lease for ninety-nine years, and the intending lender required a written intimation from the lessor of his intention to grant the lease, and the lessor (*being told of the requisition and of its object*) signed the required intimation, and the loan was made upon the faith of it; and it turned out afterwards that the lessor had already, some time before, actually granted the lease to the intending borrower, who had forthwith assigned it for value,—The court directed the lessor to repay to the lender the sum advanced, with interest, although

Company estopped by certificate.

Executors estopped by conduct.

(6*a*.) Representations made in forgetfulness of one's own title, are also fraudulent;

even though there be no fraud, but only forgetfulness.

(*o*) *Cawdor* v. *Lewis*, 1 You. & Coll. Ex. Ca. 427; *Wilmott* v. *Barber*, 15 Ch. Div. 96; *Price* v. *Neault*, 12 App. Ca. 110.
(*p*) *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360.
(*q*) *In re Veuve Monnier, ex parte Bloomenthal*, 1896, 2 Ch. 525.
(*r*) *In re Concessions Trusts, ex parte M'Kay*, 1896, 2 Ch. 757.
(*s*) *Robinson* v. *Brewery Co.*, 1896, 2 Ch. 841.
(*t*) *Williams* v. *Colonial Bank*, 15 App. Ca. 267; *Thompson* v. *Clydesdale Bank*, 1893, A. C. 282.
(*u*) 1 De G. F. & Jo. 518.

the lessor had merely *forgotten the previous lease;* but the court would not now, *semble,* hold the lessor liable in such a case, as for a fraud (*v*).

(7.) Agreements at auctions not to bid against one another.

Agreements whereby parties engage not to bid against each other at a public auction, especially where the same is directed or required by law, are held void,—for (however common these agreements may be) they are unconscientious, and have a tendency to cause the property to be sold at an undervalue; and similarly, if bidders or puffers are employed at an auction to enhance the price and to deceive the other bidders, the sale will be held void as against public policy. Wherefore, by 30 & 31 Vict. c. 48, s. 6, the vendor of real property must reserve to himself the right in the particulars or conditions of sale, if he desire to bid, in person or by his agent, at the sale (*x*); and by the Sale of Goods Act, 1893 (*y*), if the right to bid is openly, *i.e.*, expressly reserved, the seller may himself lawfully bid at a sale of his goods, but not otherwise.

(8.) Fraud upon consenting creditors to a composition deed.

As regards composition deeds, if a creditor who is a party to the deed has stipulated for some bonus or other clandestine advantage as a condition of his executing the deed, and so has induced other creditors into signing it,—they supposing the composition to be founded upon the basis of entire equality and reciprocity among the creditors—that is a fraud upon the policy of the law; and the secret arrangement is utterly void, even as against the debtor himself and his sureties; and any money paid under it is recoverable back (*z*). Also, in

(*v*) *Low* v. *Bouverie*, 1891, 3 Ch. 82; *Derry* v. *Peek*, 14 App. Ca. 337; *Le Lievre* v. *Gould*, 1893, 1 Q. B. 491.
(*x*) *Gilliat* v. *Gilliat*, L. R. 9 Eq. 60.
(*y*) 56 & 57 Vict. c. 71, s. 58.
(*z*) *Mare* v. *Sandford*, 1 Giff. 288; *Higgins* v. *Pitt*, 4 Exch. 312; *M'Dermott* v. *Boyd*, 1894, 2 Ch. 428.

(9.) A person obtaining a donation must always be prepared to prove its *bonâ fides*.

every transaction where a person obtains, by gift or donation, a benefit from another, and the transaction is afterwards questioned, the donee ought to be able to show, that the donor voluntarily and deliberately performed the act, knowing at the time its nature and effect (*a*); but such a donee, when the gift is under a voluntary settlement, without power of revocation, has not thrown upon him the onus of showing, that the settlement was intended by the donor to be without power of revocation (*b*). Also, generally, where there has been neither fraud nor undue influence, nor any fiduciary relation between the donor and the donee, nor any mistake on the part of the donor induced by (or on behalf of) the donee, it is (in such a case) necessary for the donor, if he would take back the gift, to show, that there was some mistake on his part of so serious a character as to render it unjust on the part of the donee to retain the gift,—and any trifling misapprehensions will not suffice (*c*).

(10.) A power must be exercised *bonâ fide* for the end designed.

"No point is better established than that a person "having a power of appointment must exercise it "*bonâ fide* for the end designed, otherwise it is cor- "rupt and void" (*d*); and when, therefore, a parent, having a power of apppointment among his children, appoints to one or more of them to the exclusion of the others *upon a bargain for his own advantage*, equity will relieve against the appointment on the ground of fraud,—as, *e.g.*, where there is a secret understanding, that the child shall assign a part of the fund to

(*a*) *Anderson* v. *Elsworth*, 3 Giff. 154.
(*b*) *Coutts* v. *Acworth*, L. R. 8 Eq. 558; *Hall* v. *Hall*, L. R. 8 Ch. App. 430; *Henry* v. *Armstrong*, 18 Ch. Div. 668.
(*c*) *Ogilvie* v. *Littleboy*, W. N. 1897, p. 53.
(*d*) *Aleyn* v. *Belchier*, 1 L. C. 415; *In re Kirwan's Trusts*, 25 Ch. Div. 373; *Whelan* v. *Palmer*, 39 Ch. Div. 648; *Bridger* v. *Deane*, 42 Ch. Div. 9.

a stranger (*e*), or to the father's creditors (*f*). So again, if a parent, having a power to raise portions for his children, and even to fix the time when they are to be raised, appoints to a child during infancy, and while not in want of a portion, and the death of the child is at the time of the appointment expected, he will not be allowed, on the child's death under age, to derive any benefit from the appointment as the personal representative of that child (*g*). And note, that when the exercise of a power of appointment is void on the ground of fraud (or of illegality), if any part of it is free from the fraud (or illegality), and that part is severable, it will, as to that part, be and remain valid, notwithstanding the failure of the exercise of the power as to the other part or parts (*h*). And here it is convenient to notice, that where a father has a power to appoint among his children, and the children are entitled in default of appointment, the father may release the power, even if he should thereby acquire some pecuniary advantage himself which he could not have stipulated for as a condition of his exercising the power (*i*); and such release will not, merely on that account, be deemed a fraud upon the power,—*scil.* when the power is not coupled with any duty on the part of the father. And in a case where there was such special power of appointment in the father, and (in the events which had happened) the power had become an exclusive power to appoint in favour of the daughter or her issue, and (in default of appointment) the daughter

Appointment by a father to a sickly infant.

A void appointment,—good in part, if severable.

Release of power,—may operate for the benefit of the donee of the power.

(*e*) *Daubeny* v. *Cockburn*, 1 Mer. 626.

(*f*) *Carver* v. *Richards*, 1 De G. F. & Jo. 548; *Salmon* v. *Gibbs*, 3 De G. & Sm. 343; and see (as to the duty of the trustees in such a case) *Campbell* v. *Hume*, 1 Yo. & C. C. C. 664.

(*g*) *Hinchenbroke* v. *Seymour*, 1 Bro. C. C. 394; *Roach* v. *Trood*, 3 Ch. Div. 429.

(*h*) *Perkins* v. *Bagot*, 1893, 1 Ch. 283; *De Hoghton* v. *De Hoghton*, 1896, 2 Ch. 385.

(*i*) *Radcliffe* v. *Bewes*, 1892, 1 Ch. 227.

was absolutely entitled to the property,—and it appeared, that the father, being in want of money, released the power, and thereafter he and his daughter mortgaged the property to secure a sum of £10,000 paid to the father, and applied by him for his own purposes,—the court held, that the release was valid, and (with it) the mortgage,—and this decision rests upon the ground that the father was under no duty to exercise the power (*k*).

Doctrine of illusory appointments.

Formerly, where a person having a power of appointing property among the members of a class, although with full discretion as to the amount of their respective shares, exercised that power by appointing to one or more of the objects a merely nominal share, such an appointment, although valid at law, was set aside in equity as an illusory appointment, not being exercised *bonâ fide* for the end designed by the donor (*l*); but in consequence of the great difficulty and conflict of authority as to what might be deemed a nominal or illusory share, the Legislature interfered, in the year 1830, and established (in effect), that no appointment should be invalid on the ground merely that an unsubstantial, nominal, or illusory share of the property had been appointed to any object of the power (*m*); and as a consequence of that Act, the appointor might have cut off any appointee "with a shilling," as the phrase went; and now, under the Powers Amendment Act, 1874 (*n*), the appointor need not now appoint any share at all to any particular appointee, but may cut him off even without the shilling,—*scil.* unless the power itself *expressly* directs that *no object of the power is to receive less than some specified amount;* but the Act applies

Abolished by 1 Will. IV. c. 46.

Cutting off "with a shilling;" and now (since 1874) even without the shilling.

(*k*) *In re Somes, Smith* v. *Somes*, 1896, 1 Ch. 250.
(*l*) *Wilson* v. *Piggott*, 2 Ves. Jr. 351.
(*m*) 1 Will. IV. c. 46.
(*n*) 37 & 38 Vict. c. 37; *In re Capon's Trusts*, 10 Ch. Div. 484.

only to appointments made after the 30th July 1874.

"A man who induces another to enter into a "contract with him by representing an actual state "of things as a security for the enjoyment of an "interest which he himself creates for valuable con- "sideration, is not at liberty by his own act to "derogate from that interest, by determining the "state of things which he has so held forth as the "inducement,"—*e.g.*, where an intending lessor of certain building land represented to the intending lessee thereof, that he (the intending lessor) could not obstruct the sea-view from the houses to be built by the intending lessee,—he himself being a lessee for 999 years of the intervening land under an indenture of lease containing covenants which restricted him from so doing,—and the building lease was accordingly taken, and the houses built, upon the faith of that representation; and, subsequently thereto, the lessor surrendered his 999 years' lease, and took in lieu thereof a new lease by an indenture not containing the restrictive covenants, —the court restrained the lessor from building so as to obstruct the sea-view (*o*). And in the case of *Hudson* v. *Cripps* (*p*), where there was a large building adapted for letting in residential flats, and the plaintiff (and others), occupants of the flats, held under common form tenancy agreements containing provisions or rules for occupation only as residential flats, the landlord was restrained by injunction from converting a large unoccupied portion of this building into a club.

(11.) A man representing a certain state of facts as an inducement to a contract, cannot derogate from it by his own act,—

by, *e.g.*, obstructing a sea-view:

or otherwise destroying the peace and quiet of a building.

(*o*) *Piggott* v. *Straton*, 1 De G. F. & J. 33; *Martin* v. *Spicer*, 14 App. Ca. 12; *Mackenzie* v. *Childers*, 43 Ch. Div. 265.
(*p*) 1896, 1 Ch. 265.

CHAPTER V.

SURETYSHIP.

Utmost good faith required between all parties.

THE contract of suretyship requires the utmost good faith between all the parties to it; and therefore any concealment of material facts, or express or implied misrepresentation of such facts, will invalidate the contract (*a*). But it is a question even now not quite settled (or at least not readily understood), what concealment of facts by the creditor will annul the contract of suretyship; but if the concealment be of facts *which go to increase the risk of the surety*, such concealment will be a fraud,—always assuming that the party was under some obligation to disclose the facts concealed, and that they go directly and proximately to increase the liability of the surety. Therefore, in *Hamilton* v. *Watson* (*b*), where A. became indebted to the B. Company in the sum of £750, and the B. Company having amalgamated with the G. Company, the G. Company took over the rights and liabilities of the B. Company, and called on A. for payment of the debt due from him; and A. thereupon entered into a bond with H. as his surety, under which a new cash account in the name of A. was opened with the G. Company to the amount of £750, *H. not being informed of the previous debt;* and a week after the date of the bond, A. drew upon his new cash account for the whole £750, for which H. had become bound, and therewith paid

What concealment of facts by creditor releases surety?

Either (1.)—The fact must have been one which the creditor was under an obligation to discover (*Hamilton* v. *Watson*);

(*a*) *Davis* v. *London and Provincial Insurance*, 8 Ch. Div. 469.
(*b*) 12 Cl. & Fin. 109.

off the old debt,—it was held, that there had been no such concealment of facts as would discharge the surety,—the mere application of the new credit to the discharge of the old debt (*without any binding agreement beforehand to that effect*) not vitiating the transaction, for the amount of the liability was not thereby increased (*c*). On the other hand, in *Pidcock* v. *Bishop* (*d*), *where it had been agreed beforehand* between the sellers and the purchaser of goods, that the latter should pay 10s. per ton beyond the market price of the goods, in liquidation of an old debt due to the sellers, and the guarantee was in these words: —"I will guaranty you in the payment of £200 "*value*, to be delivered to Tickell in Lightmoor pig-"iron,"—it was held, that the non-communication of the private agreement was a fraud on the surety, who had a legal right to be informed thereof,—for that the effect of the transaction was to compel the sellers to appropriate to the payment of the old debt a portion of those funds which the surety reasonably supposed would go (and in fact impliedly stipulated should go) towards defraying the price or value of the pig-iron supplied; and such a bargain increased (in a sense) the surety's responsibilities (*e*).

Or (2.)—The fact concealed must have been an integral part of the immediate transaction.

Also, although a creditor is not in general bound to inquire into the circumstances under which a person becomes surety to him for a debt, yet under exceptional circumstances he is bound to inquire,—for example, where the dealings between the parties are such as should reasonably create a suspicion in his mind that a fraud is being practised upon the surety; and in *Owen* v. *Homan* (*f*), where A. being largely indebted to B. & Company, and being on

Creditor not bound to inquire as to circumstances of suretyship, if there is no ground to suspect fraud on surety; *secus*, if reasonable ground of suspicion.

(*c*) *Wythes* v. *Labouchere*, 3 De G. & Jo. 593.
(*d*) 3 B. & C. 605.
(*e*) *Maltby's Case*, 1 Dow. 294.
(*f*) 4 H. L. Cas. 997.

the verge of bankruptcy, brought them, on different occasions, bills, &c., signed by himself, and by his aunt as surety,—the aunt being, *to the knowledge of B. & Company*, a married woman, aged seventy-five, and living apart from her husband,—It was held, that the circumstances were such as reasonably to create in the minds of the bankers a suspicion of fraud on the part of the debtor towards his aunt; and that the bankers could not therefore shelter themselves under the plea, that they were not called on to ask, and did not ask, any questions on the subject (*g*).

Rights of creditor against surety, regulated by the instrument of guaranty,—

The rights of the creditor as against the principal debtor may or may not depend upon the instrument of guaranty; but the rights of the creditor as against the surety are wholly regulated by the terms of that instrument (*h*); and inasmuch as, when an obligation exists only in virtue of a covenant, its extent can be measured only by the words in which the covenant is expressed (*i*), therefore, where a surety is bound by a joint-bond, the court will not reform the joint-bond so as to make it several,—unless upon positive proof that it should have been several as well as joint (*k*). And the duration also of the suretyship, and whether or not it is determined by the death of the surety, and by notice of such death (*l*),—also, the question whether the suretyship is for part only or for the whole of the debt (*m*),—these questions appear to be wholly questions of construction; *e.g.*, a suretyship which is expressed to be a continuing one will not be determined by the death of the surety, if the suretyship agreement

as regards, *e.g.*, the continuance or determination of the guarantee.

(*g*) *Maitland* v. *Irving*, 15 Sim. 437.
(*h*) *In re Sass, ex parte N. P. Bank*, 1896, 2 Q. B. 12.
(*i*) *Sumner* v. *Powell*, 2 Mer. 35, 36.
(*k*) *Rawstone* v. *Parr*, 3 Russ. 424, 539.
(*l*) *Lloyds* v. *Harper*, 16 Ch. Div. 290.
(*m*) *In re Sass*, supra.

contains some specific provision for its determination, and such provision is (in its terms) as applicable after the death as before it (*n*). And note, that a surety may be bound even when the principal debtor is not bound; and it would not follow, that because the principal debtor was not bound (*e.g.*, on the ground of illegality in the contract), therefore the surety also was not bound, the contrary appearing to be the fact (*o*).

Remedies available for surety.

(1.) Surety cannot compel *creditor* to proceed against debtor,—save, *semble*, on giving an indemnity;

It has been commonly assumed, that a surety cannot compel the *creditor* to proceed against the debtor; but the truth appears rather to be, that the surety may, upon giving the creditor a sufficient indemnity against the costs of the action, require the creditor to put himself in motion against the debtor (*p*),—at all events, it is quite settled, that, *at any moment after the debt becomes payable*, the surety may himself pay off the creditor, and proceed against the debtor for the money so paid (*q*). Also, a surety has a right to come into equity, to take proceedings in the nature of *quia timet*, to compel the debtor to pay the debt when due, whether the surety has actually been sued on it or not,—for it is "unreasonable that a man should always have a cloud hanging over him" (*r*); but this right only arises where the creditor has a present right to sue his debtor, and refuses to exercise that right (*s*). Also, a surety may file a bill for a declaration, that his liability is at an end,—*scil.* where the course of dealing between principal debtor and creditor has operated as a

but may bring action *quia timet*, to compel payment by *debtor*.

(2.) Judicial declaration, that surety discharged.

(*n*) *Midland R. C.* v. *Silvester*, 1895, 1 Ch. 573; *Coulthart* v. *Clementson*, 5 Q. B. D. 42.
(*o*) *Yorkshire Railway Waggon Co.* v. *Maclure*, 19 Ch. Div. 478.
(*p*) *Newton* v. *Charlton*, 10 Hare, 646, at p. 652.
(*q*) *Wright* v. *Simpson*, 6 Ves. 733.
(*r*) *Antrobus* v. *Davidson*, 3 Mer. 569; *Wooldridge* v. *Norris*, L. R. 6 Eq. 410.
(*s*) *Padwick* v. *Stanley*, 9 Hare, 627.

(3.) Action for reimbursement by debtor.

release (*t*). And where the surety pays the debt on behalf of the principal debtor, the rule, even at law (*u*), is that he has a right to call upon such debtor for reimbursement,—and this right has been put upon the ground of an implied contract on the part of the debtor to repay the money so paid on his account, where there is no express promise creating that right (*v*); and in fact the surety is in such a case subrogated to the creditor, and takes all the creditor's rights (*x*). And if, in addition to any security given by the surety, the creditor has taken some additional or collateral securities from the principal debtor, courts of equity have held, that the surety upon payment of the debt is entitled to have the benefit, not only of the principal security, but also of all those collateral securities thus given by the debtor to the creditor (*y*); and although this right of the surety used not to extend to those securities, *e.g.*, bonds, which upon payment became extinguished (*z*), yet a surety is now entitled, under the Mercantile Law Amendment Act (*a*), to have assigned to him every judgment, specialty, or security which shall be held by the creditor in respect of such debt, whether such judgment, &c., shall or shall not at law be deemed to have been satisfied by the payment of the debt; and the Act operates as an implied assignment of such judgment, specialty, &c., so that the surety thereafter stands for all purposes in the shoes of the creditor (*b*); moreover, this right to the delivery up of collateral securities held by the

(4.) Action for delivery up of securities by creditor.

Extension of right, under 19 & 20 Vict. c. 97, s. 5; also, implied assignment of securities under.

(*t*) *In re Fox, Walker & Co.*, 15 Ch. Div. 400.
(*u*) *Toussaint* v. *Martinnant*, 2 T. R. 105.
(*v*) *Craythorne* v. *Swinburne*, 14 Ves. 162.
(*x*) *Finlay* v. *Mexican Investment Corporation*, 1897, 1 Q. B. 517.
(*y*) *Hodgson* v. *Shaw*, 3 My. & Keen, 190.
(*z*) *Copis* v. *Middleton*, 1 T. & R. 229.
(*a*) 19 & 20 Vict. c. 97, s. 5.
(*b*) *Re M'Myn*, 33 Ch. Div. 575; *Re Churchill*, 39 Ch. Div. 174; *Re Parker*, 1894, 3 Ch. 400.

creditor, extends also to a surety who is such merely because of having endorsed a bill of exchange (*c*).

(5.) Action against co-sureties, for contribution.

Where a debt is secured by the suretyship of two or more persons, and one surety pays the whole or part of the debt, he has in equity, and to a certain extent also at law, a right to contribution from his co-surety; and this doctrine of "contribution is bot- "tomed and fixed on general principles of justice, and "does not spring from contract, though contract may "qualify it" (*d*); and this right of contribution may even exist before actual payment,—as, *e.g.*, when there has been judgment against the surety for the debt (*e*); from which date also, and not from the date of the suretyship, time will begin to run against the claim for contribution (*f*). And the doctrine of contribution applies, whether the parties are bound in the same or in different instruments, *provided they are co-sureties for the same principal and in the same engagement*, even though they are ignorant of the mutual relation of suretyship; and further, there is no difference, if they are bound in different sums, except that the contribution could not be required beyond the sums for which they are respectively bound (*g*). And it has even been held, that a surety who has obtained from the principal debtor a counter-security for the liability he has undertaken is bound to bring into hotchpot, for the benefit of his co-sureties, whatever he receives from that source,—and that even although he consented to be a surety only upon the terms of having such counter-security, and

(*c*) *Duncan Fox & Co.* v. *North and South Wales Bank*, 6 App. Ca. 1.
(*d*) *Dering* v. *Winchelsea*, 1 L. C. 106; *Coope* v. *Twynam*, 1 T. & R. 426; *In re Arcedeckne*, 24 Ch. Div. 709.
(*e*) *Wolmershausen* v. *Gullick*, 1893, 2 Ch. 514.
(*f*) *Wolmershausen* v. *Gullick*, supra; *Robinson* v. *Harkin*, 1896, 2 Ch. 415.
(*g*) *Whiting* v. *Burke*, L. R. 6 Ch. App. 342; *Coles* v. *Peyton*, 1893, 3 Ch. 238.

the co-sureties, when they entered into the contract of suretyship, were ignorant of the agreement for such counter-security (*h*); and it would require a very special contract to deprive the co-sureties of this right. And here note, that the like right to contribution exists also, in the general case, in favour of one director of a company against his co-directors, in respect of advances made to the company upon the express suretyship of the directors, and also where (as from the loan being unauthorised or otherwise) the company is not liable at all, but the directors making the loan are personally liable. And where, as in *Ramskill* v. *Edwards* (*i*), the directors of a company had advanced moneys of the company upon an unauthorised security, and the moneys were lost, and the company recovered the amount thereof against the plaintiff, who was one of the directors, —the court held, that the plaintiff was entitled to contribution as against the co-directors who had participated with him in making the unauthorised investment; also, that the estate of one of such co-directors who had died was liable to contribute; and that another of the same directors who had previously obtained his discharge in bankruptcy, nevertheless still remained (under the then state of the law) liable to contribute, the liability being one which had been "incurred by means of a breach of trust." And, generally, as regards co-trustees, the right of contribution as between them for losses arising from a breach of trust, is (in the absence of fraud) a matter of course (*k*); but the right of indemnity, *i.e.*, of full recoupment, is not a matter of course; but when there are special circumstances,—as where, *e.g.*, the trustee who has been the actor in the breach is the solicitor of the trust, or has derived a personal

Contribution, —as between co-directors;

and as between co-trustees.

(*h*) *Steel* v. *Dixon*, 17 Ch. Div. 825; *Berridge* v. *Berridge*, 44 Ch. Div. 168; *Sheffield Banking Co.* v. *Clayton*, 1892, 1 Ch. 621.

(*i*) 31 Beav. 100.

(*k*) *Fletcher* v. *Green*, 33 Beav. 513; *Binks* v. *Micklethwait*, ib. 409.

benefit from the breach,—then the right of the co-surety to indemnity, *i.e.*, to full recoupment, is allowed (*l*),—*scil.* from the more guilty party. Also, as was mentioned in the chapter on Trustees (*m*), where one of the two trustees is also a beneficiary, and the breach of trust (or the judgment therefor against both) is satisfied out of the beneficial interest of the one, he has no right to contribution against the other, even when they are both in equal blame (*n*). Also, as between co-tort-feasors, there is no right to contribution (*o*).

Contribution, —when excluded.

In certain respects the jurisdiction at common law prior to the Judicature Acts, used to be as regards sureties less beneficial than the jurisdiction in equity; for where there were several sureties and one became insolvent, the surety who paid the entire debt could in equity compel the solvent sureties to contribute *pro ratâ* towards payment of the entire debt (*p*), but could at law recover against the solvent sureties only an aliquot part of the whole, regard being had to the original number of co-sureties (*q*); but the rule in equity would now prevail in such a case (*r*); also, if one of the co-sureties dies, contribution can now be enforced against his representatives, both at law and in equity (*s*). And before equitable pleas were allowed at common law, if it did not appear on the face of the instrument that a person was a surety, but if it appeared, on the contrary, that the principal debtor and the surety were bound jointly and severally and as primary debtors, parol

Differences between law and equity, as regards suretyship,—now abolished: (1.) Extent of remedy over for contribution.

(2.) Admission of parol evidence to show, that apparent principal was surety only.

(*l*) *Bahin* v. *Hughes*, 31 Ch. Div. 390.
(*m*) Supra, p. 171.
(*n*) *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685.
(*o*) *Merryweather* v. *Nixan*, 8 T. R. 184; *The Englishman* v. *The Australian*, 1895, P. 212.
(*p*) *Mayor of Berwick* v. *Murray*, 7 De G. M. & G. 497.
(*q*) *Batard* v. *Hawes*, 2 Ell. & B. 287.
(*r*) *Lowe* v. *Dixon*, 16 Q. B. D. 455.
(*s*) *Primrose* v. *Bromley*, 1 Atk. 88.

evidence was inadmissible at law, to show that the surety was only a surety (*t*); but in equity parol evidence was always in such a case admissible for that purpose (*u*); and such evidence was rendered admissible at law, under an equitable defence pleaded by virtue of the Common Law Procedure Act, 1854 (*v*); and of course there is now no distinction in that respect between law and equity.

General principles regarding sureties:— (1.) Surety may limit his liability by express contract.

Although the doctrine of contribution is founded upon the general equity of the case, and not upon contract, still a person may by express contract take himself either wholly or partially out of the operation of that doctrine,—*e.g.*, where three persons became sureties, and agreed among themselves, that if the principal debtor failed to pay the debt, they should pay only their respective aliquot parts; and afterwards one of them became insolvent, and one of the remaining solvent sureties paid the whole debt, it was held, that he was entitled to recover only one-third from the other solvent surety (*x*); and *vice versâ*, where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount, but can only claim what he has actually paid in discharge of the debt, with interest (*y*).

(2.) Surety can only charge debtor for what he actually paid.

Circumstances discharging the surety:— (1.) If creditor varies contract with debtor,

A surety will be discharged from his liability, where by acts *subsequent* to the contract for suretyship his position has been essentially changed,—*scil.* worsened,—without his consent; *e.g.*, where a person

(*t*) *Lewis* v. *Jones*, 4 B. & C. 506.

(*u*) *Craythorne* v. *Swinburne*, 14 Ves. 160, 170; *Reynolds* v. *Wheeler*, 10 C. B., N. S., 561; *Macdonald* v. *Whitfield*, 8 App. Ca. 733.

(*v*) *Pooley* v. *Harradine*, 7 Ell. & B. 431; *Taylor* v. *Burgess*, 5 H. & N. 1.

(*x*) *Swain* v. *Wall*, 1 Ch. R. 149; *Steel* v. *Dixon*, 17 Ch. Div. 825; *Berridge* v. *Berridge*, 44 Ch. Div. 168; *Ellesmere Brewery Co.* v. *Cooper*, 1896, 2 Q. B. 75.

(*y*) *Reed* v. *Norris*, 2 My. & Cr. 361, 375.

gave a promissory note as surety, upon an agreement that the amount should be advanced to the principal debtor by draft at three months' date, and the creditor, without the concurrence of the surety, paid the amount at once,—it was held, that the agreement had been varied, and the surety was therefore discharged (*z*); but if the variation of liability is in reality in relief *pro tanto* of the surety,—*e.g.*, if part payment by the principal debtor is accepted by the principal creditor in discharge of the whole liability,—the surety is not discharged (*a*). And again, if a creditor, "without the consent of the surety, gives "time to the principal debtor, by so doing he dis- "charges the surety,—that is, if time is given by "virtue of *positive contract* between the creditor and "principal debtor; and in such a case, the surety is "held to be discharged for this reason, because the "creditor by giving time to the principal has, for the "time at least, put it out of the power of the surety "to consider whether he (the surety) will have re- "course to his remedy against the principal debtor "or not, and because he, the surety, cannot in fact "have the same remedy against the principal as he "would have had under the original contract" (*b*); and this rule extends (in the case of mortgage debts) not only to discharge the surety (where he is a surety simply) from all liability on his covenant to pay the mortgage debt (*c*), but also to release the mortgaged property of the surety (where he is a surety co-mortgagor) from its liability to the charge (*d*). It seems, however, that a surety will not be discharged by the creditor's giving time to the debtor, if the

without surety's privity.

(2.) If creditor gives time in a binding manner to debtor, without consent of surety, and thereby affects the remedies of the surety.

Extent of the discharge, in the case of mortgage debts.

(*z*) *Bonser* v. *Cox*, 6 Beav. 110; *Evans* v. *Bremridge*, 8 De G. M. & G. 101; *Holme* v. *Brunskill*, 3 Q. B. D. 495.
(*a*) *Webster* v. *Petre*, 4 Exch. Div. 127.
(*b*) *Samuell* v. *Howorth*, 3 Mer. 272; *Rees* v. *Berrington*, 2 L. C. 992; *Bailey* v. *Edwards*, 4 B. & S. 711.
(*c*) *Bolton* v. *Buckenham*, 1891, 1 Q. B. 278.
(*d*) *Bolton* v. *Salmon*, 1891, 2 Ch. 48.

creditor's remedies against the surety are not thereby diminished or affected, but are accelerated,—*scil.* because, in such a case, the surety's remedies against the principal debtor remain also unaffected (*e*); nor will the surety be discharged, if the giving of time to the principal debtor is either expressly provided for or impliedly involved in the original agreement of suretyship (*f*); also, generally, the surety will not be discharged, if the creditor, on giving further time to the principal debtor, *reserve* his right to proceed against the surety,—"for when the right is reserved, "the principal debtor cannot say it is inconsistent "with giving him time that the creditor should be "at liberty to proceed against the sureties, and that "they should turn round upon the principal debtor, "notwithstanding the time so given him; for he was "a party to the agreement by which that right was "reserved to the creditor, and the question whether "or not the surety is informed of the arrangement "is wholly immaterial" (*g*). And the rule is the same, when the principal debtor purports to be released, but the creditor reserves his rights against the surety; but where the purported release is in general terms, the surety will be discharged,—and that not from any equity in his favour, but from considerations of bare justice to the principal debtor; for "it would "be a fraud on the principal debtor to profess to "release him and then to sue the surety, who in his "turn would sue him; but where the bargain is that "the creditor is to retain his remedy against the "surety, there is no fraud on the principal debtor" (*h*). So also, although it is a settled principle of law, that a release or discharge of one surety by the

Surety not discharged, where creditor giving time reserves his rights against surety.

(3.) If the creditor releases the principal debtor.

(3*a*.) If the creditor releases one cosurety.

(*e*) *Price* v. *Edmunds*, 10 B. & C. 578; *Clarke* v. *Birley*, 41 Ch. Div. 422.

(*f*) *Rouse* v. *Bradford Bank*. 1894, 2 Ch. 32; 1894, A. C. 586.

(*g*) *Webb* v. *Hewitt*, 3 K. & J. 442; *Wyke* v. *Rodgers*, 1 De G. M. & G. 408.

(*h*) *Tasmania Bank* v. *Jones*, 1893, A. C. 313.

creditor, even when founded on a mistake of law, operates as a discharge of the others (*i*); yet if the release can be construed as a *covenant not to sue*, it will not operate as a discharge of the co-sureties (*k*); and the same rule applies to a release of, or covenant not to sue, the principal debtor. But it is to be particularly observed, that although a creditor, upon giving time to the principal debtor, or on covenanting not to sue him, may reserve his right against the sureties, yet he cannot do so if he give to the debtor an *actual release*, as distinguished from a mere purported release or covenant not to sue,—for the debt is, in consequence of the release (being an *actual release*), gone at law (*l*); *secus*, where the release is merely by operation of law, that is to say, where it is a mere *implied* release (*m*). And where there was an agreement between a bond debtor and his creditor, for the latter to take all the debtor's property and to pay the other creditors five shillings in the pound, this agreement, though it was not a discharge of the bond at law by way of accord and satisfaction, still operated in equity as a satisfaction of the debt; and it was not possible in equity, upon such a transaction, to reserve any rights against the surety; and any attempt to do so would have been void, as being inconsistent with the agreement (*n*),—for there was, in fact, a *novation* of the debt in such a case (*o*). And lastly, inasmuch as a surety is entitled, on payment of the debt, to all the securities which the creditor

Creditor cannot reserve his rights against surety, if he *release* the principal debtor or one co-surety.

(4.) If creditor loses or allows securities to

(*i*) *Cheetham* v. *Ward*, 1 B. & P. 633; *Nicholson* v. *Revell*, 4 A. & E. 675; *Ex parte Jacobs*, L. R. 10 Ch. App. 211; *Sydney Bank* v. *Taylor*, 1893, A. C. 317.

(*k*) *Bailey* v. *Edwards*, 4 B. & S. 761; *Ward* v. *National Bank of New Zealand*, 8 App. Ch. 755.

(*l*) *Kearsley* v. *Cole*, 16 Mee. & W. 136.

(*m*) *In re London Chartered Bank of Australia*, 1893, 3 Ch. 540; *Dane* v. *Mortgage Insurance Corporation*, 1894, 1 Q. B. 54.

(*n*) *Nicholson* v. *Revell*, supra.

(*o*) *Oakeley* v. *Pasheller*, 4 Ch. & F. 207; *Head* v. *Head*, 1894, 2 Ch. 236.

go back into debtor's hands.

has or has ever had against the principal,—whether such securities were given at the time of the contract of suretyship, and with or without the knowledge of the surety (*p*), or whether they were given after that contract, and with or without the knowledge of the surety (*q*),—it follows that, if a creditor who has had, or ought to have had, such securities, loses them, or suffers them to get back into the possession of the debtor, or does not make them effectual by giving proper notice (*r*), or otherwise fails in making them perfect, *e.g.*, by neglecting to register a bill of sale (*s*), the surety, to the extent of such security, will be discharged (*t*),—as he will also be, *semble*, to the extent of any rights of action or other benefits which the creditor has given up or renounced, without the sanction of the surety (*u*); and where a creditor, by neglecting the statutory formalities, lost the benefit of an execution under a warrant of attorney, which, according to the agreement of suretyship, he had proceeded to enforce, it was held, that the surety was thereby discharged (*v*).

Marshalling of securities,—as against sureties.

All the general rules regarding the marshalling of securities which are stated and illustrated in the chapter on Marshalling Assets, *supra*, are applicable as against sureties also (*x*); and the order of working out the successive redemptions and foreclosures of mortgaged estates, stated in the chapter on Mortgages,

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(*p*) *Mayhew* v. *Crickett*, 2 Swanst. 185.
(*q*) *Pearl* v. *Deacon*, 1 De G. & Jo. 461; *Berridge* v. *Berridge*, 44 Ch. Div. 168.
(*r*) *Strange* v. *Fooks*, 4 Giff. 408.
(*s*) *Wolff* v. *Jay*, L. R. 7 Q. B. 758.
(*t*) *Capel* v. *Butler*, 2 S. & S. 457; *Taylor* v. *Bank of New South Wales*, 11 App. Ca. 596.
(*u*) *West of England Insurance* v. *Isaacs*, 1896, 2 Q. B. 377.
(*v*) *Watson* v. *Alcock*, 4 De G. M. & G. 242; *Rainbow* v. *Juggins*, 5 Q. B. D. 422; *Carter* v. *White*, 25 Ch. Div. 666.
(*x*) P. 319.

supra (*y*), is applicable also to sureties,—being subject, as against sureties also, to the doctrine of consolidation, stated and illustrated in the same chapter, but now greatly cut down, as there also stated, by the Conveyancing and Law of Property Act, 1881 (*z*).

Sureties who are mere covenantors, and sureties who are co-mortgagors,—distinguished.

But regarding sureties in mortgage deeds, some rather nice distinctions require to be taken; for if A. is the mortgagor, B. the surety, and C. the mortgagee, and C. lends a further sum to A., C. will in general have the right as against B. to tack the further advance to the first mortgage debt (*a*); but if A. is the mortgagor, B. the surety, and C. the mortgagee, and B. is not merely a covenantor for the payment of the debt, but is also a co-mortgagor with A., bringing some property of his (B.'s) own into the security, then if C. lends a further sum to A., C. cannot in general as against B. tack this further advance to the first mortgage debt,—because B. has in this latter case not merely a right (on payment of the first mortgage debt) to the delivery up of the security, but has an actual right or equity of redemption (*b*); and the consequences of this distinction are very curious, because, in the latter case, if B. redeems C. his first mortgage, then C. will be liable to redeem B. what he has paid; and in effect, therefore, when B. is a co-mortgagor, C.'s making the further advance operates to discharge B. (redeeming the first mortgage) altogether from the suretyship (*c*).

On bankruptcy of principal

Where the principal debtor becomes a bankrupt,

(*y*) P. 360.

(*z*) *Bowker* v. *Bull*, 1 Sm. N. S. 29; *Farebrother* v. *Wodehouse*, 23 Beav. 18, 19; *Forbes* v. *Jackson*, 19 Ch. Div. 615, following *Newton* v. *Charlton*, 10 Ha. 646; and distinguish *Williams* v. *Owen*, 13 Sim. 597; and *Dawson* v. *Bank of Whitehaven*, 6 Ch. Div. 218, reversing S. C. as reported in 4 Ch. Div. 639.

(*a*) *Williams* v. *Owen*, 13 Sim. 597.

(*b*) *Bowker* v. *Bull*, 1 Sim. N. S. 29; *Higgins* v. *Frankis*, 15 L. J. Ch. 329; *Aldworth* v. *Robinson*, 2 Beav. 287.

(*c*) *Beevor* v. *Luck*, L. R. 4 Eq. 537; *Kinnaird* v. *Trollope*, 39 Ch. Div. 636.

debtor,—proof against his estate, by creditor and by surety.

the creditor and the surety may (each of them) prove in the bankruptcy,—the creditor in respect of his debt, and the surety in respect of his liability; but this distinction is to be taken, namely, that when the surety is surety for the whole debt, the creditor (and not the surety) shall prove (*d*); but when the surety is surety for part only of the debt, and he has paid his part, he may prove in respect of that part, and the principal creditor may prove in respect of the residue (*e*), or even, in the general case, in respect of the whole original debt (*f*).

(*d*) *In re Sass, ex parte N. P. Bank*, 1896, 2 Q. B. 12.
(*e*) *In re Blackburne*, 9 Morrell, 249.
(*f*) *In re Blakesley*, 9 Morrell, 173; *In re Rees*, 17 Ch. Div. 98.

CHAPTER VI.

PARTNERSHIP.

Courts of equity exercise a full concurrent jurisdiction with courts of law in all matters of partnership; and there is, in fact, a quasi-fiduciary relation between partners (*a*), involving (for some purposes) the principles applicable to a trust; and it may be said, that the jurisdiction of courts of equity is, practically speaking, an exclusive jurisdiction in all cases of any complexity or difficulty,—for wherever an account, or contribution, or an injunction, or a dissolution was sought in cases of partnership, or where a due enforcement of partnership rights, duties, and credits was required, the remedial justice administered by courts of equity was complete, while the redress at law was most imperfect; and the Judicature Act, 1873 (s. 34), recognised this superiority, by assigning to the Chancery Division of the High Court all matters of partnership involving either accounts or a dissolution.

Equity has a practically exclusive jurisdiction, in partnerships.

The law of partnership has been declared, and codified to some extent, by the Partnership Act, 1890 (*b*); but it is expressly provided by the Act (s. 46), that the rules of equity (and indeed of the common law generally) shall, except as varied by the Act, continue in force,—so that it is convenient

Partnership Act, 1890, codifies the law.

(*a*) *Betjemann* v. *Betjemann*, 1895, 2 Ch. 474; *Friend* v. *Young*, 1897, 2 Ch. 421.

(*b*) 53 & 54 Vict. c. 39.

to expound the principles of equity in like manner and in the like order as before, noting merely the statutory adoption of these principles where the Act has adopted them. And firstly, a court of equity will, in a proper case, decree the specific performance of a contract to enter into partnership for a fixed and definite period of time (*c*); but it will not do so when no term has been fixed,—for such a decree would be useless when either of the parties might dissolve the partnership immediately afterwards (*d*); and it will not in general decree specific performance, even when a definite term has been fixed, unless there have been acts of part performance (*e*); nor where the business of the partnership is altogether illegal,—*secus*, if the business (*e.g.*, that of bookmakers and betting agents) (*f*) is not in itself illegal, but is legal, although liable to be conducted illegally. So also, after the commencement and during the continuance of the partnership, courts of equity will in many cases interpose to decree what is (in effect) the specific performance of particular clauses in the articles of partnership,—*e.g.*, where there is a clause in the articles providing for the insertion of the name of a particular partner in the firm name, and there is a studied inattention to the application of the partner to have his name so inserted, courts of equity will grant an injunction against the use of any firm name not including his name (*g*). So, where there is a clause in the articles whereby the partners agree not to engage in any *other* business, courts of equity will act by injunction to enforce such a clause; and if profits have been made by any partner in violation of such an agreement, the profits will be decreed to

Specific performance of partnership agreement,—when and when not decreed.

Injunction,—when and when not granted.

(1.) Against omission of name of one of the partners.

(2.) Against carrying on another business.

(*c*) *Buxton* v. *Lister*, 3 Atk. 385; *England* v. *Curling*, 8 Beav. 129.
(*d*) *Hercey* v. *Birch*, 9 Ves. 357.
(*e*) *Scott* v. *Rayment*, L. R. 7 Eq. 112.
(*f*) *Thwaites* v. *Coulthwaite*, 1896, 1 Ch. 496.
(*g*) *Marshall* v. *Colman*, 2 J. & W. 266, 269.

belong to the partnership (*h*); and the law is now the same as regards carrying on any *rival* business, even where there is no express agreement not to engage in any other business (*i*). A court of equity will also interfere by injunction to prevent such acts, on the part of any of the partners, as tend either to the destruction of the partnership property (*k*), or to impose an improper liability on the others, or which tend to the exclusion of the other partners from the exercise of their partnership rights, whether those rights be founded on the law relating to partnerships in general, or on express agreement (*l*), and although no dissolution is prayed (*m*); but courts of equity will not interefere where the remedy at law is adequate. Also, where the partnership agreement contains (as it usually does) a clause referring disputes to arbitration, courts of equity have, since the Common Law Procedure Act, 1854, and more particularly since the Arbitration Act, 1889 (*n*), shown an inclination to enforce such agreements for reference, remitting the parties to the arbitration as their self-chosen exclusive forum (*o*),—provided of course the question in difference is not paramount to the agreement for reference (*p*), and provided the whole question in dispute may be determined in the arbitration, but not so as to split up the ground of action (*q*); and the court justifies itself, in making these references, under the express words contained in section 4 of the Act of 1889, which re-enacts section

(3.) Against destruction of partnership property.

(4.) Against exclusion of partner.

Where an agreement to refer to arbitration,—stay of proceedings, very commonly directed, on ground of agreement to refer.

(*h*) *Somerville* v. *Mackay*, 16 Ves. 382.
(*i*) 53 & 54 Vict. c. 39, s. 30.
(*k*) *Marshall* v. *Watson*, 25 Beav. 501.
(*l*) *Walker* v. *Mottram*, 19 Ch. Div. 355; *Dawson* v. *Beeson*, 22 Ch. Div. 504.
(*m*) *Hall* v. *Hall*, 12 Beav. 414.
(*n*) *Pini* v. *Roncoroni*, 1892, 1 Ch. 633.
(*o*) *Willesford* v. *Watson*, L. R. 14 Eq. 572; *Hodgson* v. *Railway Passengers Co.*, 9 Q. B. D. 188; *Hack* v. *London Provident Building Society*, 23 Ch. Div. 103.
(*p*) *Mulkern* v. *Lord*, 4 App. Ca. 182; *Martin's Case*, 17 Q. B. D. 609.
(*q*) *Turnock* v. *Sartoris*, 43 Ch. Div. 150; *Ives* v. *Willans*, 1894, 2 Ch. 478.

11 of the Act of 1854, namely,—that whenever the parties to any deed or instrument in writing agree to refer their disputes, and any one or more of them nevertheless commences an action relative to such disputes, the other parties or any of them (being defendants to the action) may, *before pleading thereto, or taking any other step in the action* (*r*), apply for a stay of all the proceedings therein, on the ground of the agreement to refer; and in every such case, the court, "upon being satisfied that no sufficient reason "exists why the matters in dispute cannot or ought "not to be referred to arbitration according to the "agreement," may (in its judicial discretion) (*s*) make an order staying all proceedings in the action,—provided the applicants for such order have always been (and are) ready and willing to join and concur in all matters necessary or proper for causing the dispute to be decided by arbitration, but not otherwise (*t*); but the order to stay usually reserves liberty to apply; and under the liberty so reserved, the court will either revoke the submission or give its direction to the arbitrators, if they are proceeding wrongly (*u*); and in and by the award, the arbitrators or umpire may award even that the partnership shall be dissolved (*v*); and after award made, either party may (for sufficient reasons) apply to the court to remit or to set aside the award (*x*).

Conditions of the reference.

Court holds its jurisdiction in reserve.

Partnership,—constitution of.

A partnership may be constituted in various ways, by agreement, whether express or implied; and there

(*r*) *Bartlett* v. *Ford's Hotel*, 1896, A. C. 1.

(*s*) *Clegg* v. *Clegg*, 44 Ch. Div. 200; *Vawdrey* v. *Simpson*, 1896, 1 Ch. 166; *Renshaw* v. *Queen Anne's Mansions*, 1897, 1 Q. B. 662; and disting. *Lyon* v. *Johnson*, 49 Ch. Div. 579; and *Barnes* v. *Youngs*, 1898, W. N. p. 11.

(*t*) *Davis* v. *Starr*, 41 Ch. Div. 242.

(*u*) *Hart* v. *Duke*, 32 L. J. Q. B. 55; *Robinson* v. *Davies*, 5 Q. B. D. 26; and consider *Brierley Hill Local Board* v. *Pearsall*, 9 App. Ca. 595.

(*v*) *Vawdrey* v. *Simpson*, supra.

(*x*) 52 & 53 Vict. c. 49, ss. 10–11; *In re Palmer and Hosken*, 1898, 1 Q. B. 131.

is scarcely any variety of term which may not be included in the agreement,—but, of course, nothing that is illegal may be included therein (*y*); and an infant even may become a partner (*z*). Also, it appears that persons become partners, at least *inter se*, if they agree to go shares in the profits and losses of the business (*a*),—although merely sharing in the profits, without being at the same time liable also for the losses, and without being invested with the capacity of agent for self and copartners (*b*), would not constitute a man a partner; and, of course, a mere part-ownership of real estate (or of any other property) is not a partnership, whether the profits of the common property are shared or not between the part-owners (*c*). In the absence of any stipulation to the contrary, the shares of the partners in the capital and in the profits and losses are equal (*d*); and when a partnership has run out its agreed term, and nevertheless continues after the term, it is a partnership at will, upon all the old terms which are applicable to a partnership at will (*e*), including (it may be) the term under which an option of purchase arises (*f*).

Dissolution of partnership,—modes of. (1.) By operation of law.

A partnership may be dissolved in various ways: (1.) By operation of law,—Of events on which, by operation of law, the partnership is determined, the principal ones seem to be,—the death of one of the

(*y*) *Harvey* v. *Hart*, W. N. 1894, p. 72; *Thwaites* v. *Coulthwaite*, 1896, 1 Ch. 496.

(*z*) *Re Beauchamp Brothers*, 1893, 2 Q. B. 534; 1894, A. C. 607.

(*a*) *Pawsey* v. *Armstrong*, 18 Ch. Div. 698; *Walker* v. *Hirsch*, 27 Ch. Div. 460.

(*b*) *Cox* v. *Hickman*, 8 Ho. Lo. 268; *In re Hildesheim*, 1893, 2 Q. B. 357; 53 & 54 Vict. c. 39, re-enacting (s. 2) and repealing (s. 48) Bovill's Act, 28 & 29 Vict. c. 86; *In re Young, ex parte Jones*, 1896, 2 Q. B. 484; *In re Fort, ex parte Schofield*, 1897, 2 Q. B. 495.

(*c*) 53 & 54 Vict. c. 39, s. 2.

(*d*) 53 & 54 Vict. c. 39, s. 24.

(*e*) *King* v. *Chuck*, 17 Beav. 325; *Yates* v. *Finn*, 13 Ch. Div. 839; *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298.

(*f*) *Daw* v. *Herring*, 1892, 1 Ch. 284.

partners, unless there be an express stipulation to the contrary (*g*); the bankruptcy of all or of one of the partners (*h*); the conviction of any one of them for felony (*i*); and a general assignment by one or more of the partners, whether the partnership be determinable at will, or, it seems, even where it is for a definite period (*k*); and to these may, perhaps, be added, any event which makes either the partnership itself, or the objects for which it was formed, illegal (*l*); and in all these cases, the partnership determines by operation of law, from the happening of the particular event, without any option in either of the parties.

(2.) By agreement of the parties.

(2.) By agreement of the parties,—By mutual agreement of *all* the partners, the partnership, though for an unexpired term, may of course be put an end to (*m*); and by virtue of a clause in the partnership articles, an effective notice of dissolution may in a proper case be given by one or more of the partners without the consent of all,—and in such latter case, the court has jurisdiction to compel (where necessary) the other partners to sign a notice of the dissolution for the *Gazette*, and this although no other relief may be claimed in the action (*n*). Any member of an ordinary partnership, the duration of which is indefinite, may dissolve it at any moment he pleases; and the partnership will then be deemed to continue only so far as may be necessary for the purposes of winding up its then pending affairs (*o*); but the court would, in such a case, restrain an immediate dissolution of the partner-

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(*g*) *Crawshay* v. *Maule*, 1 Swanst. 495; *Backhouse* v. *Charlton*, 8 Ch. Div. 444; 53 & 54 Vict. c. 39, s. 33.
(*h*) *Crawshay* v. *Collins*, 15 Ves. 228; 53 & 54 Vict. c. 39, s. 33.
(*i*) Co. Litt. 391 *a*.
(*k*) *Heath* v. *Sansom*, 4 B. & Ad. 172; *Nerot* v. *Burnard*, 4 Russ. 247.
(*l*) *Exposito* v. *Bowden*, 7 E. & B. 763; 53 & 54 Vict. c. 39, s. 34; *Thwaites* v. *Coulthwaite*, supra.
(*m*) *Hall* v. *Hall*, 12 Beav. 414.
(*n*) *Hendry* v. *Turner*, 32 Ch. Div. 335; 53 & 54 Vict. c. 39, s. 37.
(*o*) *Peacock* v. *Peacock*, 16 Ves. 50; 53 & 54 Vict. c. 39, s. 26.

ship, if it appeared that irreparable mischief would ensue from such a proceeding (*p*), or if the partner claiming to determine the partnership was not acting *bonâ fide*, but was seeking to obtain for himself an undue advantage (*q*). A partnership may also expire by the efflux of the time fixed upon by the partners for the limit of its duration, or by the accomplishment of the object for which the partnership was constituted (*r*). (3.) Dissolution by decree of a court of equity,—A court of equity will in many cases decree a dissolution at the instance of a partner, and this principle has been recognised by the Partnership Act, 1890; for under that Act, the court may dissolve a partnership, wherever it is "just and equitable" to do so (*s*),—*e.g.*, where the business has been and is being carried on at a loss; and under that Act, and also apart from and before that Act, the following may be mentioned as the specific cases in which, and grounds upon which, the court will decree a dissolution:—(*a.*) A partnership may be dissolved, as from its commencement, where it has originated in fraud, misrepresentation, or oppression (*t*); or (*b.*) If one partner grossly misconducts himself in reference to partnership matters, acting in persistent breach of the partnership articles, or in violation of the general trust and confidence between the partners, that will be a ground for a dissolution (*u*). So, (*c.*) If there have been continual breaches of the partnership contract by one of the partners, as if he has persisted in carrying on the business in a manner totally different from that agreed on, the court will dissolve

(3.) By decree of court,—on any of the six grounds following:—

(*a.*) Partnership induced by fraud.

(*b.*) Gross misconduct and breach of trust.

(*c.*) Continual breaches of contract.

(*p*) *Blissit* v. *Daniel*, 10 Hare, 493; *Levy* v. *Walker*, 10 Ch. Div. 436.
(*q*) *Neilson* v. *Mossend Iron Co.*, 11 App. Ca. 298.
(*r*) *Featherstonehaugh* v. *Fenwick*, 17 Ves. 298; 53 & 54 Vict. c. 39, s. 32.
(*s*) 53 & 54 Vict. c. 39, s. 35.
(*t*) *Rawlins* v. *Wickham*, 1 Giff. 355; 53 & 54 Vict. c. 39, s. 41.
(*u*) *Smith* v. *Jeyes*, 4 Beav. 503; *Harrison* v. *Tennant*, 21 Beav. 482; 53 & 54 Vict. c. 39, s. 35.

the partnership (*v*); but there must be a substantial failure in the performance of the agreement on the part of the defendant,—for it is not the office of a court of equity to enter into a consideration of mere partnership squabbles (*x*). (*d.*) If a partner, who ought to attend to the business, wilfully and permanently absents himself from it, or becomes so engrossed in his private affairs as to be unable to attend to it, this would seem, independently of agreement, to be a ground for dissolution (*y*). (*e.*) And although the court will not dissolve a partnership merely on account of the disagreements or incompatibility of temper of the partners, where there has been no breach of the contract (*z*), yet, if the disagreements are so great as to render it impossible to carry on the business, *all mutual confidence being destroyed*, there cannot be a doubt that the court will dissolve the partnership (*a*); and in this latter case, the dissolution will in general take effect from the date of the judgment, and not (as in the usual case) from the date of *serving* the writ (*b*). Also, (*f.*) Whenever a partner who is to contribute his skill and industry in carrying on the business, or who has a right to a voice in the partnership, becomes permanently insane, a court of equity will dissolve the partnership (*c*); but insanity in a partner is not, in the absence of agreement, *ipso facto* a dissolution, but is only a ground (the case being otherwise proper) for a dissolution by decree of the court (*d*);

(*d.*) Wilful and permanent neglect of business.

(*e.*) Extreme disagreements or incompatibility of temper.

(*f.*) Insanity of partner,—whose skill is indispensable.

(*v*) *Waters* v. *Taylor*, 2 V. & B. 299.

(*x*) *Wray* v. *Hutchinson*, 2 My. & K. 235; *Anderson* v. *Anderson*, 25 Beav. 190.

(*y*) *Smith* v. *Mules*, 9 Hare, 556.

(*z*) *Goodman* v. *Whitcomb*, 1 J. & W. 589, 592; *Jauncey* v. *Knowles*, 29 L. J. Ch. 95.

(*a*) *Watney* v. *Wells*, 30 Beav. 56; 53 & 54 Vict. c. 39, s. 35.

(*b*) *Lyon* v. *Tweddell*, 17 Ch. Div. 529; *Unsworth* v. *Jordan*, W. N. 1896, p. 2.

(*c*) *Waters* v. *Taylor*, 2 V. & B. 303; *Rowlands* v. *Evans*, 30 Beav. 302.

(*d*) *Jones* v. *Noy*, 2 My. & K. 125; 53 & 54 Vict. c. 39, s. 35.

and the court will also restrain an insane partner from interfering in the partnership business (*e*).

Share in partnership, a right to money.

The share of a partner is his proportion of the partnership assets, after they have all been realised and converted into money, and after all the debts and liabilities of the firm have been paid and discharged; and it is this only which on the death of a partner passes to his representatives (*f*). And where a dissolution has taken place, an account will be decreed,—and, if necessary, a manager or receiver will be appointed to close the partnership business, and to make sale of the partnership property,—so that a final distribution may be made of the partnership effects; but an account will not in general be decreed, nor will a manager or receiver be appointed, —except with a view to a dissolution (*g*), or unless with a view to the sale of the business as a going concern (*h*). Still, where a partner has been wrongfully excluded, or the conduct of the other party has been such as would entitle the complaining partner to a dissolution as against him, a general account, at any rate up to the time of filing the bill, will be decreed,—without either a dissolution or any view to a sale of the business; but in no case will a continuous account be decreed, as that would be, in part at least, a carrying on of the business by the Court of Chancery (*i*). Also, upon an actual dissolution, the court will, in a proper case, order the defendants to repay to the plaintiff a due proportion of any premium paid by him as the price of his having become a partner (*k*); but if this relief is desired,

Account only on dissolution.

Account, where no dissolution prayed, but in which a dissolution might have been prayed.

Premium,—return of.

(*e*) *J*—— v. *S*——, 1894, 3 Ch. 72.
(*f*) *Knox* v. *Gye*, L. R. 5 H. L. 656; *Noyes* v. *Crawley*, 10 Ch. Div. 31; 53 & 54 Vict. c. 39, ss. 43, 44.
(*g*) *Baxter* v. *West*, 28 L. J. Ch. 169.
(*h*) *Taylor* v. *Neate*, 39 Ch. Div. 538.
(*i*) *Loscombe* v. *Russell*, 4 Sim. 8; *Fairthorne* v. *Weston*, 3 Hare, 387.
(*k*) 53 & 54 Vict. c. 39, s. 40.

case must be made out for it at the trial of the action (*l*), and not afterwards,—although, under special circumstances, the relief may be provided for even upon a case made after the trial (*m*).

Terms of dissolution,—as to payment of debts, &c.; and as to distribution of surplus assets.

Upon a dissolution of the partnership, and in settling the accounts between the partners, the provisions in that behalf applicable contained in the partnership articles must of course apply,—including the option thereby given (if such option is thereby given) to either partner to purchase the share or shares of the other partner or partners,—which option, if a term is limited for the exercise thereof, must be exercised within the time so limited, and cannot afterwards be exercised (*n*); and subject to such agreement (if any), the provisions applicable are those expressed in sect. 44 of the Partnership Act, 1890,—under which provisions, the losses of the partnership (including losses and deficiencies of capital) are first to be paid or made good—*scil.* first out of profits, next out of capital, and lastly by the partners individually accruing to their respective proportions of the profits; and thereafter the assets (including the sums, if any, contributed by the partners to make good the losses aforesaid) are to be applied,—first, in paying the outside debts and liabilities of the partnership; secondly, in paying all advances made by the partners beyond their capital; thirdly, in paying out the capital of the partners; and lastly, the ultimate residue (if any) is to be divided among the partners in the same proportions in which the profits are divisible. And it appears, that if the dissolution is in such a case proceeding under the order of the court, the payment of the costs of the action will be provided for,—next after

Costs,—upon dissolution by order of the Court.

(*l*) *Wilson* v. *Johnstone*, L. R. 16 Eq. 606.
(*m*) *Edmonds* v. *Robinson*, 29 Ch. Div. 170.
(*n*) *Dibbins* v. *Dibbins*, 1896, 2 Ch. 348.

the payment of all the partnership debts (including debts due to either of the partners themselves), and will be directed to be paid before the repayment of the capitals of the partners and out of the estate remaining before such payment, so as to fall on the partners in proportion to their shares and interests in the partnership (*o*).

Partner making advantage out of the partnership property, accountable to other partners.

A partnership, though in a certain sense expiring on any of the events that have been mentioned—such as death, effluxion of time, or bankruptcy of a partner—does not expire for all purposes; for all the partners are interested in the business until all the affairs of the partnership have been finally settled by all (*p*); and the partners thus continuing the business are accountable to the rest, not merely for the ordinary profits, but for all the advantages which they have obtained in the course of the business (*q*); and if there are no profits, they shall, in general, have no remuneration for their trouble (*r*). But there is no fiduciary relation between the surviving partners and the representatives of the deceased partner; therefore, although they may respectively sue each other in equity, their rights are legal rights for an account, and will be barred by the Statute of Limitations (*s*),—unless in cases of fraud; for, each partner being entitled to assume that his partner is honest in his partnership dealings, and not being bound to suspect any fraud on the part of his co-partner, the statute will only run from the date of the discovery of the fraud (*t*).

Representatives of deceased partner entitled to an account,—unless barred by time.

(*o*) *Ross* v. *White*, 1894, 3 Ch. 326.
(*p*) *Crawshay* v. *Collins*, 2 Russ. 344; 53 & 54 Vict. c. 39, ss. 38, 39.
(*q*) *Clements* v. *Hall*, 2 De G. & J. 173; *Dean* v. *M'Dowell*, 8 Ch. Div. 345; 53 & 54 Vict. c. 39, s. 42.
(*r*) *Aldridge* v. *Aldridge*, W. N. 1894, p. 50; 1894, 2 Ch. 97.
(*s*) *Knox* v. *Gye*, L. R. 5 H. L. 656; *Friend* v. *Young*, 1897, 2 Ch. 421.
(*t*) *Rawlins* v. *Wickham*, 3 De G. & Jo. 304; *Betjemann* v. *Betjemann*, 1895, 2 Ch. 474.

Representatives of deceased partner have no lien.

The representatives have no lien on any specific part of the partnership estate,—which estate in the first instance accrues therefore in its entirety to the surviving partners both at law and in equity (*u*); and the surviving partner or partners can therefore make a valid mortgage of the partnership assets, and that either for a present advance (*v*), or by way of security for a past partnership debt (*x*). But bankruptcy is unlike death in these particulars,—for the bankrupt partner's share remains his, and therefore vests in the trustee of the bankrupt, and that notwithstanding any clause to the contrary in the articles of partnership (*y*). And as regards realising out of a partner's share, during such partner's life, a judgment debt obtained against him individually (*i.e.*, for his separate debt), it is now provided (*z*), that (in lieu of execution issuing on such judgment) the court shall make an order charging such share with the judgment debt and interest thereon; and the court may go on to appoint a receiver, and to direct all proper accounts in aid of, and towards the realisation of, such charge,—the charge so given having the same effect as (and neither more nor less than) a voluntary charge given by the judgment debtor (*a*).

Judgment debt,—charge for, on partner's share, and realisation of such charge.

In equity, land forming an asset of the partnership is money;

From the fact that the share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money, and applied in liquidation of the partnership debts, it necessarily follows, that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representa-

(*u*) 53 & 54 Vict. c. 39, s. 20.
(*v*) *Buchart* v. *Dresser*, 4 D. M. & G. 542.
(*x*) *Bradford Bank* v. *Cure*, 31 Ch. Div. 324.
(*y*) *Collins* v. *Barker*, 1893, 1 Ch. 578.
(*z*) 53 & 54 Vict. c. 39, s. 23.
(*a*) *Brown, Janson & Co.* v. *Hutchinson*, 1895, 2 Q. B. 126; *Wild* v. *Southwood*, W. N. 1896, p. 165.

tives of a deceased partner, be deemed to be personal and not real estate,—unless indeed such conversion is inconsistent with the agreement between the parties (*b*); and partnership land being to all intents and purposes personal estate, it is even liable to probate duty (*c*), and to account duty (*d*), or now to estate duty (*e*). And not only are lands purchased out of partnership funds for partnership purposes treated in equity as personalty (*f*), but the rule is the same in certain cases where lands have been acquired by devise, the question in such latter case being whether or not the lands are "*substantially involved in the business*" (*g*).

and personal representative takes.

In cases of partnership debts,—*scil.* being debts the liability for which accrued before the death of the deceasing partner, but not otherwise (*h*),—the creditors may, at their option, pursue their legal remedies against the survivors or survivor, or else resort in equity to the estate of the deceased,—and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivors or survivor to pay (*i*), and even where the partnership is a foreign one (*j*). To any such action against the estate of a deceased partner, the surviving partner or partners were (strictly speaking) necessary parties, being interested in the taking of the partnership, and even of the private, accounts; and under the simplified practice now introduced,

Creditors may, on decease of one partner, go against survivors, or against the estate of deceased.

(*b*) *Steward* v. *Blakeway*, L. R. 4 Ch. App. 603; 53 & 54 Vict. c. 39, s. 22; *Wilson* v. *Holloway*, 1893, 2 Ch. 340; *Davis* v. *Davis*, 1894, 1 Ch. 393.
(*c*) *Att.-General* v. *Ailesbury* (*Marquess*), 12 App. Ca. 472.
(*d*) *Att.-General* v. *Dodd*, 1894, 2 Q. B. 150.
(*e*) 57 & 58 Vict. c. 30.
(*f*) *Phillips* v. *Phillips*, 1 M. & K. 649.
(*g*) *Waterer* v. *Waterer*, L. R. 15 Eq. 402; 53 & 54 Vict. c. 39, s. 20.
(*h*) *Friend* v. *Young*, 1897, 2 Ch. 421; *Court* v. *Berlin*, 1897, 2 Q. B. 396.
(*i*) *Bearing* v. *Noble*, 2 R. & My. 495; 53 & 54 Vict. c. 39, s. 9.
(*j*) *Matheson* v. *Ludwig*, 1896, 2 Ch. 836.

Separate creditors paid out of separate estate before partnership creditors.

they would therefore require, not indeed to be made parties to the action, but to be served with notice of the judgment for administration (*k*),—in order that (if they chose) they might attend the future proceedings. The liability of partners, although sometimes called a joint and several liability,—in respect of every matter falling within the ordinary or extended scope of the business, (*l*)—differs in important particulars from a joint and several liability (*m*); for, although the separate estate of the deceased is liable, yet it is liable only as for a joint debt,—consequently the separate creditors of the deceased are entitled to be paid their debts in full before the creditors of the partnership can claim anything from his separate estate (*n*); and if therefore a partnership creditor should (as he may) institute proceedings for the administration of the estate of a deceased partner, and his debt is a joint debt only, and there is a constat at the hearing that the separate estate will leave no surplus (after payment of the separate creditors) to be applicable towards paying the plaintiff's joint debt, his action or summons will be dismissed (*o*). And a creditor of the partnership, who is also a debtor to the deceased, cannot, in an administration of the deceased's estate, set off as a general rule his separate debt against the joint debt due to him (*p*); but a joint debt contracted in fraud of any of the partners may, at the option of the creditor, be treated either as a joint or as a separate debt (*q*); also, when there is no joint estate (*r*), the

(*k*) Order xvi. Rule 40 (1884); *Beckett* v. *Ramsdale*, 31 Ch. Div. 177.
(*l*) *Cleather* v. *Twisden*, 28 Ch. Div. 340; *Rhodes* v. *Moules*, 1895, 1 Ch. 236.
(*m*) *Kendall* v. *Hamilton*, 4 App. Ca. 538; *Cambefort* v. *Chapman*, 19 Q. B. D. 229; *Cleather* v. *Twisden*, supra.
(*n*) *Ridgway* v. *Clare*, 19 Beav. 111; *Ex parte Wilson*, 3 M. D. & De G. 57.
(*o*) *Edwards* v. *Barnard*, 32 Ch. Div. 447.
(*p*) *Stephenson* v. *Chiswell*, 3 Ves. 566.
(*q*) *Ex parte Adamson*, 8 Ch. Div. 807; *In re Davison*, 13 Q. B. D. 50.
(*r*) *Cooper* v. *Adams*, 1894, 2 Ch. 557.

distinction between joint and separate creditors is not regarded; nor, of course, need it be regarded, if the estate of the deceased partner is known beforehand to be perfectly solvent,—that is to say, able to pay all debts, as well joint as separate, in full. The joint creditors,—that is to say, the creditors of the partnership,—have, of course, a right to the payment of their debts out of the partnership funds before the separate creditors of the partners; and the rule is the same, even although the partnership is ostensible only (*s*); but this preference was, at law, generally disregarded; and in equity it was, and is, worked out, only through the equity of the partners over the whole fund (*t*). Also, as a general rule, the executors of a deceased partner (who was also a creditor of the firm) cannot prove in competition with the outside joint creditors (*u*).

Partnership creditors paid out of partnership funds before separate creditors.

The goodwill of the business is in general an asset of the partnership (*v*),—unless it is a merely personal goodwill (*x*); and on the retirement of a partner, the assignment which he executes should expressly extend to assigning the goodwill,—because otherwise (and in the absence of express agreement to the contrary) the right to continue to use the name of the retiring partner as (or as part of) the old partnership style will not pass (*y*),—although using that old style is not a "*holding out*," such as will involve on the retiring partner a continuing liability (*z*).

Goodwill,—an asset.

Goodwill,—assignment of, when necessary.

(*s*) *Ex parte Sheen*, 6 Ch. Div. 235; *Ex parte Blythe*, 16 Ch. Div. 620.

(*t*) *Twiss* v. *Massey*, 1 Atk. 67; *Lacey* v. *Hill*, 4 Ch. Div. 537.

(*u*) *Ex parte Andrews*, 25 Ch. Div. 505; 53 & 54 Vict. c. 39, s. 44; *In re Young, ex parte Jones*, 1896, 2 Q. B. 484.

(*v*) *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Vernon* v. *Hallam*, 34 Ch. Div. 749.

(*x*) *Cooper* v. *Metropolitan Board of Works*, 25 Ch. Div. 472.

(*y*) *Gray* v. *Smith*, 43 Ch. Div. 208; *Thorneloe* v. *Hill*, 1894, 1 Ch. 569.

(*z*) *Ex parte Central Bank*, 1892, 2 Q. B. 633.

Goodwill,—survival of, on expiration of partnership term,—

And it being now well settled (*a*) as regards goodwill generally, that (in the absence of some express provision to the contrary) the vendor of it may set up a rival business although he may not solicit or canvass the customers of the old business, that rule applies also where, under a special provision in that behalf contained in the partnership articles, the goodwill belongs (on the expiration of the partnership) to either of the partners exclusively (*b*). Also, *semble*, upon the death of a partner, if the partnership articles provide that the business shall be carried on by the surviving partner or partners, and contain no provision relative to the goodwill, the estate of the deceased partner is not entitled to receive anything from the partnership in respect of his interest in the goodwill,—for that has survived into the surviving partners (*c*).

and upon death of partner.

Two firms having a common partner could not sue one another at law, but might do so in equity.

Upon the technical principles of the common law, in the case of two firms dealing with each other, where some or all of the partners in one firm were partners with other persons in the other firm, no suit could be maintained at law in regard to any transactions or debts between the two firms (*d*); but in equity, it was sufficient that all parties in interest were before the court as plaintiffs or as defendants; and in such a case, they need not, as at law, have been on opposite sides of the record,—courts of equity, which look behind the form of transactions to their substance, treating the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were, in fact, corporate companies (*e*). Again, one partner

(*a*) *Trego* v. *Hunt*, 1896, A. C. 7.
(*b*) *Trego* v. *Hunt*, supra; *Jennings* v. *Jennings*, 1898, W. N. p. 10.
(*c*) *Steuart* v. *Gladstone*, 10 Ch. Div. 626; *Hunter* v. *Dowling*, 1895, 2 Ch. 223.
(*d*) *Bosanquet* v. *Wray*, 6 Taunt. 597.
(*e*) *De Tastet* v. *Shaw*, 1 B. & A. 664.

could not, at law, maintain a suit against his co-partners to recover the amount of any money which he had paid for the partnership,—since he could not sue his co-partners without suing himself also, as one of the partnership (*f*); but he might have done so in equity. And now, of course, all these distinctions between law and equity are abolished; and by Order xlviii. (A), regulating the mode in which partners as such may sue and be sued in the High Court, in the Chancery Division and in the Queen's Bench Division indifferently, suits between firms having a common partner, and suits by one partner against his co-partners, are expressly provided for (*g*).

At law, one partner could not sue his co-partners in a partnership transaction, but might do so in equity.

(*f*) *Sedgwick* v. *Daniel*, 2 H. & N. 319; *Atwood* v. *Maude* L. R. 3 Ch. App. 369.

(*g*) And see 53 & 54 Vict. c. 39, s. 23.

CHAPTER VII.

ACCOUNT.

I. Account,—when it lay at law.

I. THE action of account was one of the most ancient forms of action at the common law; but the modes of proceeding in that action, although aided from time to time by statute, were found so very dilatory, inconvenient, and unsatisfactory (*a*), that as soon as courts of equity began to assume jurisdiction in matters of account, the remedy at law began to decline, and to fall into disuse. For, at the common law, an action of account lay in two classes of cases only, that is to say,—(1.) Where there was either a privity in deed by the consent of the party,—as against a bailiff, or a receiver appointed by the party; or a privity in law, *ex provisione legis*,—as against guardians in socage (*b*), and their executors and administrators (*c*); and (2.) By the law merchant,—according to which, one naming himself a merchant might have an account against another naming him as a merchant,—and charge him as a receiver (*d*),—or against his executors (*e*).

1. In cases of privity in deed or of privity in law.

2. Between merchants.

Suitors preferred equity, because of its power of discovery and of administration.

The reasons for the disuse of the action of account at common law, and its progress in equity, are not hard to find,—one ground having been, that courts of common law could not compel a discovery from

(*a*) *How* v. *Earl Winterton*, 1896, 2 Ch. 626, at p. 639.
(*b*) Co. Litt. 90 *b*.
(*c*) 3 & 4 Anne, c. 16.
(*d*) Co. Litt. 172 *a*; 11 Rep. 89.
(*e*) 13 Edw. III. c. 23.

the defendant on his oath; and another ground having been, that the machinery and administrative powers of the courts of common law were not so well adapted for the purposes of an account as the machinery available in a court of equity,—two grounds both of which have now ceased to exist; for ever since the coming into operation of the Judicature Acts in November 1875, the jurisdiction in account has become co-extensive and wholly concurrent both at law and in equity,—so much so, that an account, however simple (and suitable therefore for a court of common law), may now be taken in the court of equity, and an account so complex as to have formerly necessitated having recourse to a court of equity may now be taken in a court of common law; but in almost all cases of accounts, the Equity Division of the High Court is and remains the more convenient jurisdiction; and we propose, therefore, to show the principal cases in which an action for an account more properly lies in the Equity Division.

1. Equity assumed jurisdiction where there existed a fiduciary relation between the parties,—as in favour of a principal against his agent, though not in favour of the agent against his principal. The rule is thus stated by Sir J. Leach (*f*):—The defendants here "were agents for the sale of the property of the plain-"tiff, and whenever such a relation exists, a bill will "lie for an account; *the plaintiff can only learn, from the* "*discovery of the defendants, how they have acted in the* "*execution of their agency.*" But an agent is not precluded from setting up the Statute of Limitations against his principal (*g*),—unless a confidential relation

1. Principal against agent,—subject to the Statute of Limitations;

(*f*) *Mackenzie* v. *Johnson*, 4 Mad. 373.
(*g*) *Lake* v. *Bell*, 34 Ch. Div. 462; *Dooby* v. *Watson*, 39 Ch. Div. 178; *Friend* v. *Young*, 1897, 2 Ch. 421.

but agent cannot have account against his principal.

in the nature of a trust has been created (*h*). And note that, although it has been argued that if the principal may commence an action against his agent, the agent may likewise do so against his principal, yet the rights of principal and agent are not correlative; for the rights of the principal rest upon the trust and confidence reposed in the agent, but the agent reposes no such confidence in the principal (*i*). And note also, that, by analogy to the case of principal against agent, the Court of Chancery decrees an account against the infringer of a patent,—on the ground that the patentee may adopt the acts of the defendant as those of his agent; and from this principle it follows, that the plaintiff in such a suit must elect between an account and damages, for he cannot claim both, at the same time approbating and reprobating the agency of the defendant (*k*); and the same rules are applicable to the case of the assignee of a patent suing a licensee of the assignor (*l*). And, of course, accounts between trustees and *cestuis que trustent*, which may properly be deemed confidential agencies, are peculiarly within the jurisdiction of courts of equity (*m*).

(*a.*) Patentee against infringer.

(*b.*) *Cestui que trust* against trustee.

2. Cases of mutual accounts between plaintiff and defendant. "Mutual accounts,"—where each of two parties has received and also paid on the other's account.

2. Equity would also assume jurisdiction, where there were mutual accounts between the plaintiff and the defendant. And upon the question, what are mutual accounts, the best definition is to be found in the judgment in *Phillips* v. *Phillips* (*n*):—"I understand a mutual account to mean not merely "where one of the two parties has received money "and paid it on account of the other, but *where each*

(*h*) *Burdick* v. *Garrick*, L. R. 5 Ch. App. 233; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.
(*i*) *Padwick* v. *Stanley*, 9 Hare, 627.
(*k*) *Watson* v. *Holliday*, 20 Ch. Div. 780.
(*l*) *Bergmann* v. *M'Millan*, 17 Ch. Div. 423.
(*m*) *Docker* v. *Somes*, 2 My. & Keen, 664.
(*n*) 9 Hare, 471.

"*of two parties has received and also paid on the other's* "*account.* I take the reason of that distinction to "be, that in the case of proceedings at law, where "each of the two parties has received and paid on "account of the other, what would be to be recovered "would be the balance of the two accounts; and "the party plaintiff would be required to prove, not "merely that the other party had received money "on his account, but also to enter into evidence of "his own receipts and payments—a position of the "case which, to say the least, would be difficult to "be dealt with at law. Where one party has merely "received and paid moneys on account of the other, "it becomes a simple case; for the party plaintiff has "to prove that the moneys have been received, and "the other party has to prove his payments; and the "question is only of receipts on the one side and "of payments on the other, and is a mere question "of set-off; but it is otherwise where *each party* has "received and paid" (*o*).

3. An action for an account would also lie, where there were circumstances of great complication; and upon the question what amount of complication was necessary to give jurisdiction to a court of equity, independently of any other circumstances, the judgment of Lord Redesdale in *O'Connor* v. *Spaight* (*p*) is in point:—"The ground on which I think that this "is a proper case for equity is, that the account has "become so complicated, that a court of law would "be incompetent to examine it upon a trial at *nisi* "*prius* with all necessary accuracy. . . . This is a "principle on which courts of equity constantly act, "by taking cognisance of matters which, though "cognisable at law, are yet so involved with a com-

3. Circumstances of great complication.

The test is—Can the accounts be examined on a trial at *nisi prius?*

(*o*) *Fluker* v. *Taylor*, 3 Drew. 183.
(*p*) 1 Sch. & Lefr. 305.

"plex account that it cannot properly be taken at "law." But this principle was not quite settled (*q*); and it was by no means to be taken as a universally conclusive criterion, especially after the Common Law judges had a special power conferred on them by the Common Law Procedure Act, 1854, on a cause coming on at *nisi prius*, to compel a reference of it to arbitration; and now under the Judicature Acts, as modified by the Arbitration Act, 1889 (*r*), matters of account as well as other matters may be variously referred to an official or other referee for report (*s*). And the suggested rule, therefore, cannot perhaps be put higher than this—that the difficulty of examining the accounts at *nisi prius* will be a strong circumstance in favour of a resort to the aid of equity; and, in short, the equity to an account must be judged from the nature and facts of each particular case (*t*).

Compulsory reference to arbitration by 17 & 18 Vict. c. 125, s. 3; and references of various sorts for report under Judicature Acts and rules, as modified by Arbitration Act, 1889.

Chief defences to suit for an account. (1.) Stated or settled account.

It is ordinarily a good bar to a suit for an account, that the parties have already in writing stated and adjusted the items of the account and have struck the balance (*u*),—for, in such a case, a court of equity will not interfere, an *indebitatus assumpsit* being available at law. If, therefore, there has been an account stated, that may be set up by way of plea as a bar to all discovery and relief,—unless some matter is shown which calls for the interposition of a court of equity. But if there has been any mistake, or omission, or accident, or fraud, or undue advantage,—by which the account stated is in truth vitiated, and the balance is incorrectly fixed—a court of equity will not suffer it to be conclusive upon the parties, but

Equity will "open" the whole account if there be mistake or fraud; and in other cases, particular items only

(*q*) *Taff Vale Rail. Co.* v. *Nixon*, 1 H. L. Cas. 111; *Phillips* v. *Phillips*, 9 Hare, 475.
(*r*) 52 & 53 Vict. c. 49, ss. 13–17.
(*s*) *Longman* v. *East*, 3 Q. B. D. 295.
(*t*) *South-Eastern Railway Co.* v. *Martin*, 2 Phill. 758.
(*u*) *Dawson* v. *Dawson*, 1 Atk. 1.

will in some cases direct the whole account to be "opened,"—*i.e.*, taken *de novo;* and in other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition, is not shown to affect or to stain all the items of the transaction, the court will content itself with allowing the account to stand, with liberty to the plaintiff to "surcharge and falsify" it—the effect of which is, to leave the account in full force as a stated account, except so far as it can be impugned by the opposing party, who has the burden of proof on him to establish errors and mistakes; and the showing an omission for which credit ought to be given is a surcharge; and the proving an item to be wrongly inserted is a falsification; and the *onus probandi* is always on the party having liberty to surcharge and falsify (*v*); and this liberty to surcharge and falsify includes an examination not only of errors of fact, but of errors of law. What shall constitute, in the sense of the court of equity, a stated or settled account, is in some measure dependent on the circumstances of each case,—for the acceptance of an account may be express, or it may be implied from circumstances; but mere acquiescence in stated accounts, though for a long time, amounts only to an admission or presumption of their correctness, and does not of itself establish the fact of the account having been settled (*x*). However, the court is generally unwilling to open a settled account, especially after a long time has elapsed,—except in cases of manifest fraud (*y*); but in the case of settled accounts between trustee and *cestui que trust*, and other persons standing in confidential relations to one another, where *mala fides* is alleged, there is scarcely any length of time that will prevent the court from opening the account

will be examined, *i.e.*, liberty will be given to "surcharge and falsify."

(2.) Laches and acquiescence.

(*v*) *Pitt* v. *Cholmondeley*, 2 Ves. Sr. 565.
(*x*) *Hunter* v. *Belcher*, 2 De G. J. & S. 202; *Gething* v. *Keighley*, 9 Ch. Div. 547.
(*y*) *Banner* v. *Berridge*, 18 Ch. Div. 254.

altogether (*z*), or at any rate giving liberty to surcharge and falsify. And it should be remembered, that a broker is in a fiduciary relation to his client (*a*),—although a banker (merely as such) is not in any such relation towards his customer (*b*). Also, *semble*, an assurance society is not in any fiduciary relation towards the person entitled to the policy moneys, but is rather in the position of a mere stake-holder (*c*).

Broker and banker,—difference between.

Accounts are often taken (*e.g.*, between partners) without any very strict compliance with the articles regulating the manner of taking the account; and the question then arises, how far the account (although not stated in a regular manner) is to be taken as a settled account, and binding accordingly in the absence of fraud. And it appears, that the court will hold the account, although irregularly taken, to be a settled account, if, under all the circumstances, it appears that the parties so intended,—for being *sui juris*, they may validly agree to variations in the mode of taking the account (*d*).

Accounts, although not taken in literal accordance with the contract of the parties, may be settled accounts notwithstanding.

It appears, that, when land is held by several owners as tenants in common, and one of them is alone receiving the profits (*e*), or is alone working the mines within or under the land (*f*), the remedy of the other or others is account and not trespass,—*scil.* in the absence of an *ouster* of the title of the other or others (*g*).

Account,—at the suit of one tenant against his co-tenant.

(*z*) *Todd* v. *Wilson*, 9 Beav. 486; *Watson* v. *Rodwell*, 11 Ch. Div. 150; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 196.

(*a*) *Ex parte Cook*, 4 Ch. Div. 123.

(*b*) *Foley* v. *Hill*, 1 Phill. 405.

(*c*) *Matthew* v. *Northern Assurance Co.*, 9 Ch. Div. 80; *Crossley* v. *City of Glasgow Life Assurance Co.*, 4 Ch. Div. 421; *Webster* v. *British Empire Assurance Co.*, 15 Ch. Div. 169.

(*d*) *Coventry* v. *Barclay*, 3 D. J. & Sm. 320; *Holgate* v. *Shutt*, 28 Ch. Div. 111; *Hunter* v. *Dowling*, 1893, 3 Ch. 212.

(*e*) *Jacobs* v. *Seward*, L. R. 5 Ho. Lo. 464.

(*f*) *Job* v. *Potton*, L. R. 20 Eq. 84.

(*g*) *Jacobs* v. *Seward*, supra.

CHAPTER VIII.

SET-OFF; AND APPROPRIATION OF PAYMENTS,— AND OF SECURITIES.

I. Set-off.

I. SET-OFF.—"Natural equity says, that cross de- "mands shall compensate each other, by deducting "the less sum from the greater, and that the dif- "ference is the only sum which can be justly due" (*a*); but the common law having required that, when the mutual debts were unconnected, the respective creditors should sue in independent actions, therefore the Legislature interfered, and (by the statutes of "Set-off") (*b*) allowed a set-off in the case of bankrupts, and in a few other cases; and although these old statutes have since been repealed (*c*), yet the principle of set-off which they introduced is saved by the repealing statute; and the principle itself was already too well established to be affected by the repeal of the old statutes.

At law, no set-off in case of mutual unconnected debts.

As regards *connected* accounts of debit and credit, the law always was, that the balance only of the accounts was recoverable, both at law and in equity; and that was a virtual set-off between the parties (*d*); and such set-off was available at law, even as against agents (such as factors) trading ostensibly as prin-

As to connected accounts, balance recoverable both at law and in equity.

(*a*) *Green* v. *Farmer*, 4 Burr. 2220.
(*b*) 4 Anne, c. 17, s. 11; 2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 4.
(*c*) 42 & 43 Vict. c. 59.
(*d*) *Dale* v. *Sollet*, 4 Burr. 2133; *In re Whitehouse & Co.*, 9 Ch. Div. 95.

cipals (*e*); and the courts of equity followed in general the courts of law as regards set-off, so that, *e.g.*, if there was no connection between the demands, the rule in equity was as at law—that is to say, if the accounts were *unconnected*, there was no set-off either at law or in equity, but, if the demands were connected, there was a set-off (*f*). However, the courts of equity went beyond the law, and by virtue of their general jurisdiction granted relief in the cases even of reciprocal independent debts, *provided there was a mutual credit*—that is to say, in all cases where there was an existing debt due to one party and a credit by the other party, founded on and trusting to such existing debt as the means of discharging it (*g*). Thus, for example, if A. should be indebted to B. in the sum of £10,000 in a bond, and B. should borrow of A. £2000 on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption, that there was a mutual credit between the parties as to the £2000, as an ultimate set-off, *pro tanto*, against the debt of £10,000; and in such a case, although a court of law would not have set-off these independent debts, yet a court of equity would not have hesitated to do so, upon the ground either of the presumed intention of the parties, or of what was called a natural equity (*h*); also, debts and other demands which had *a common origin* would be set-off against each other (*i*),—*scil.* because the common origin of the debts imported a sort of mutual credit. But the mere existence of reciprocal

Cases in which equity allowed, although law did not allow, a set-off.

(1.) In the case of mutual independent debts, where there was mutual credit, or the debts had a common origin.

(2.) In the case of mutual equitable debts, or a legal debt on

(*e*) *George* v. *Clagett*, 7 T. R. 359; *Fish* v. *Kempton*, 7 C. B. 687; *Montagu* v. *Forwood*, W. N. 1893, 136; 1893, 2 Q. B. 350.

(*f*) *Rawson* v. *Samuel*, 1 Cr. & Ph. 161, 172, 173.

(*g*) *Ex parte Prescott*, 1 Atk. 230; and consider *Tayler* v. *Tayler*, L. R. 20 Eq. 155; *Christmas* v. *Jones*, 1897, 2 Ch. 190.

(*h*) *Roxburghe* v. *Cox*, 17 Ch. Div. 520.

(*i*) *Government of Newfoundland* v. *Newfoundland R. C.*, 13 App. Ca. 199.

debts, without such mutual credit, was not, even in a case of insolvency, sufficient to have sustained a set-off (*k*); for, generally, the mere existence of reciprocal or cross demands was not sufficient to justify a set-off in equity (*l*); and in these cases, therefore, a set-off would have been allowed in equity, only when the party seeking the benefit of it could show some *equitable* ground for being protected against his adversary's demand; and apart, therefore, from such equitable ground, a court of equity would not, *e.g.*, have interfered to prevent a party recovering damages awarded for breach of contract, merely because of an unsettled account between him and the other party, although such account was in respect of dealings arising out of the same contract (*m*). However, where there were cross demands between the parties of such a nature that, if both were recoverable at law, they would be the subject of a set-off, then if either of the demands was a matter of equitable jurisdiction, the set-off would have been enforced in equity (*n*),—*e.g.*, if a legal debt was due from the plaintiff to the defendant, and the plaintiff was the assignee of a legal debt due from the defendant to some third person, courts of equity would have set-off the one against the other, assuming that the respective debts could properly be set-off, the one against the other, at law (*o*). And, of course, a set-off will now be allowed at law where it would have been (and would now be) allowed in equity; and *vice versâ*, where it would now be allowed at law, it will be allowed also in equity.

one side, and an equitable debt on the other, where there was mutual credit as to such debts.

In cross demands, which, if recoverable at law, would be a subject of set-off, equity relieved.

But a set-off would always have been prevented by some intervening equity; *e.g.*, an occupation rent

Debts not set-off where an

(*k*) *James* v. *Kynnier*, 5 Ves. 110; *Piggott* v. *Williams*, 6 Mad. 95.
(*l*) *Rawson* v. *Samuel*, 1 Cr. & Ph. 161.
(*m*) *Best* v. *Hill*, L. R. 8 C. P. 10.
(*n*) *Clarke* v. *Cort*, 1 Cr. & Ph. 154.
(*o*) *Williams* v. *Davies*, 2 Sim. 461.

equity intervenes,—*e.g.*, debt against call;

with which a tenant in common is chargeable, and which might be set-off against his share of the sale proceeds in a partition action, cannot be so set-off as against the mortgagee of the tenant in common (*p*). Also, a shareholder in a limited company, who is also a creditor, would not (and will not), in general, be allowed, in the winding-up of the company, to set-off his debt against calls made on him; but in such a case, he must, in general, first pay the calls due, and then take a dividend on his debt rateably with the other creditors,—the equity of the general creditors intervening to prevent the set-off in such a case; for otherwise, in the event of a deficiency of assets, the creditor-shareholder would get an undue preference, and would in effect receive twenty shillings in the pound on the amount of his debt (*q*); and the same rules are applicable to directors being creditors of the company (*r*). On the other hand, when the company is the debtor (*e.g.*, on debentures), calls may in general be set-off against such a debt (*s*). Also, where, in cases of bankruptcy, there have been mutual credits, mutual debts, or other mutual dealings (*t*) between the bankrupt and any other person proving or claiming to prove a debt under the bankruptcy, . . . the sum due from the one party shall be set-off against any sum due from the other party,—and this rule extends not only to liquidated damages (*u*), but also to unliquidated damages arising in connection with a contract (*v*); and such right of set-off is available also in the administration

Secus, debt against debt;

(*p*) *Hill* v. *Hickin*, 1897, 2 Ch. 579.
(*q*) *Grissel's Case*, L. R. 1 Ch. App. 528; *Ince Hall Co.* v. *Douglas Forge Co.*, 8 Q. B. D. 179.
(*r*) *In re Exchange Banking Co.*, 21 Ch. Div. 519; *Ex parte Pelly*, 21 Ch. Div. 496; *Ex parte Theys*, 25 Ch. Div. 587.
(*s*) *Christie* v. *Taunton, &c. Co.*, 1893, 2 Ch. 175.
(*t*) *Palmer* v. *Day & Son*, 1895, 2 Q. B. 618; *In re Mid-Kent Fruit Co.*, 1896, 1 Ch. 567.
(*u*) *Booth* v. *Hutchinson*, L. R. 15 Eq. 30.
(*v*) *Jack* v. *Kipping*, 9 Q. B. D. 113; *Elliott* v. *Turquand*, 7 App. Ca. 79.

of insolvent estates (*x*),—but not, *semble*, in the winding-up of companies (*y*),—although, where the company is not being wound up, it is available, as against the debenture holders of the company when their security (the usual floating security) extends to the whole property of the company (*z*). Also, the lien of a solicitor on costs appears to be, in general, no longer a bar to a set-off of costs against debt (*a*), or of costs against costs (*b*),—*scil.* when all the costs are in one proceeding; but it is otherwise, if the costs (as to part thereof) have been incurred in one proceeding and (as to the other part thereof) have been incurred in some other proceeding totally unconnected (*c*),—as, *e.g.*, some in the High Court and the others in the County Court (*d*).

or costs against costs.

The courts of equity, following the law, would not, in the general case, allow a set-off of a joint debt against a separate debt, or conversely of a separate debt against a joint debt, or of debts accruing in different rights,—*e.g.*, an executor and trustee of a legacy, who was also the residuary legatee, claiming as creditor of the husband, who was the administrator of his deceased wife the legatee, was not allowed to set-off the debt against the legacy (*e*). Also, where money has been received for a specific purpose by, *e.g.*, a solicitor, he cannot apply it for any other purpose,—as, *e.g.*, in discharge of his lien (or debt), for costs (*f*),—not even as regards any

No set-off of debts accruing in different rights;

or where money is specifically appropriated;

(*x*) *Mersey Steel Co.* v. *Naylor*, 9 App. Ca. 434; *Sovereign Life Assurance* v. *Dodd*, 1892, 2 Q. B 573.
(*y*) *Re Washington Diamond Co.*, 1893, 3 Ch. 95.
(*z*) *Howard* v. *Rowatt's Wharf*, 1896, 2 Ch. 93.
(*a*) *Pringle* v. *Gloag*, 10 Ch. Div. 676.
(*b*) *Westacott* v. *Bevan*, 1891, 1 Q. B. 774; Order liv. Rule 14, (1883).
(*c*) *Blakey* v. *Latham*, 41 Ch. Div. 518.
(*d*) *In re Bassett*, 1896, 1 Q. B. 219; *Hassell* v. *Stanley*, 1896, 1 Ch. 607.
(*e*) *Bailey* v. *Finch*, L. R. 7 Q. B. 34; *Elgood* v. *Harris*, 1896, 2 Q. B. 491.
(*f*) *Stumore* v. *Campbell & Co.*, 1892, 1 Q. B. 344.

balance of the moneys which may remain over after the specific purpose is answered (*g*),—unless with the express consent of the party from whom the money was received. However, occasionally,—that is to say, when there are special circumstances raising an equity in that behalf, the courts would allow a set-off of cross demands existing in different rights; *e.g.*, where, as in *Ex parte Stephens* (*h*), bankers who were under a direction to lay out money in certain annuities, in the name and to the use of S., did not do so, but, representing that they had done so, made entries, and accounted for the dividends accordingly; and S., relying on their representations, gave a joint and several promissory-note with her brother to the bank, to secure the brother's private debt to them; and the bankers failed, and their assignees in bankruptcy sued the brother alone,—on a claim by S. and her brother, praying that they might be at liberty to set-off what was due on the note against the debt due from the bankers to S., the court allowed the set-off (*i*).

unless where necessary to prevent an injustice amounting to fraud.

No set-off of debts of intrinsically different qualities.

There can, of course, be no set-off of a non-actionable claim against an actionable debt (*k*); or of an ordinary executable debt against one that is exempt from recovery by execution (*l*); or, *semble*, of a debt which is statute-barred against a debt which is not statute-barred (*m*). Apparently, also, an executor may not retain (*i.e.*, set-off) a legacy given to A. B. against a liability (being a mere liability) which the testator has incurred on behalf of

(*g*) *In re Mid-Kent Fruit Factory*, 1896, 1 Ch. 567.
(*h*) 11 Ves. 24.
(*i*) *Vulliamy* v. *Noble*, 3 Mer. 593.
(*k*) *Rawley* v. *Rawley*, 1 Q. B. D. 460; *Hodgson* v. *Fox*, 9 Ch. Div. 673.
(*l*) *Gathercole* v. *Smith*, 17 Ch. Div. 1.
(*m*) *Walker* v. *Clements*, 15 Q. B. 1046; *Lovell* v. *Forester*, W. N. 1890, p. 64.

(*e.g.*, as surety or guarantee for) the legatee (*n*),— although he may do so as against a debt due from the legatee (*o*), or to the extent of any actual payment made by the testator, (or, *semble*, by the executor as such), under legal compulsion on account of the liability (*p*). Debt and liability,— distinguished.

II. *Appropriation of Payments.*—Questions as to the appropriation, or (as it is termed in the Roman law) the *imputation*, of payments, arise in this way: —Supposing a person owing another several debts makes a payment to him, the question arises, to which of these debts shall such payment be appropriated or imputed; for instance, suppose A. owes to B. two distinct sums of £100 and £100, and A. could set up the Statute of Limitations as a defence to an action for the earlier of the two debts, but not to an action brought for the other, it is clear that if A. paid £100 to B., and that payment could be imputed to the earlier debt, B. could still recover from him another £100; whereas, if it were appropriated to the later debt, he would be without remedy as to the earlier. Or again, suppose A. owes B. two sums of £500, for the first of which C. is a surety; if A. pays B. £500, and it is imputed to the first £500, C.'s liability will cease; but if it be imputed to the other £500, C.'s liability will remain (*q*). The law has therefore laid down certain rules to regulate the matter. II. Appropriation, or imputation, of payments.

The first rule upon the subject of appropriation is, that the debtor has the first right to appropriate any payment which he makes to whatever debt due to (1.) Debtor has first right to appropriate payment to

(*n*) *In re Binns, Lee* v. *Binns*, 1896, 2 Ch. 584.
(*o*) *In re Watson, Turner* v. *Watson*, 1896, 1 Ch. 925.
(*p*) *Jones* v. *Pennefather*, 1896, 1 Ch. 956; *Adcock* v. *Evans*, 1896, 2 Ch. 345.
(*q*) *Clayton's Case*, 1 Mer. 572.

which debt he chooses at time of payment.

his creditor he may choose to apply it, *provided the debtor exercise this option at the time of making the payment* (*r*); and the intention of the person making the payment may not only be manifested by him in express terms (*s*), but it may be inferred from his conduct at the time of payment, or even from the nature of the transaction (*t*). The second rule is, that where the debtor has himself made no specific appropriation of any payment, the creditor is at liberty to apply that payment to any one or more of the debts which the debtor owes him (*u*); and it seems, that the creditor need not make an immediate appropriation of the payment, but may do so at any time, at least before action (*v*); but he may not apply a general payment to an item in the account which is illegal or contrary to law (*x*). But where A. was indebted to B. on several accounts, and a payment was made, as for the first instalment of a composition on the several debts, but the arrangement subsequently broke down, owing to the non-payment of the other instalments,—it was held, that it was not open to either party *subsequently* to appropriate the payment to any specific debt,—because, from the nature of the transaction, it must be deemed to have been paid *in respect of all the debts rateably* (*y*). And note, that where there are two debts, one of them barred by the Statute of Limitations, and a payment is made by the debtor without appropriating the payment, although the creditor may appropriate it towards satisfaction of the debt already barred, yet such appropriation will have no operation to revive the debt

(2.) If debtor omit, the creditor has the next right of appropriation to what debt he chooses.

Secus,—if payment is an instalment attributable to all the debts.

Statute-barred debts, appropriation to, effect of.

(*a*.) Appropriation will not revive a debt already barred.

(*r*) *Anon.*, Cro. Eliz. 68.
(*s*) *Ex parte Imbert*, 1 De G. & Jo. 152.
(*t*) *Young* v. *English*, 7 Beav. 10; *Friend* v. *Young*, 1897, 2 Ch. 421.
(*u*) *Lysaght* v. *Walker*, 5 Bligh, N. S. 1, 28.
(*v*) *Philpott* v. *Jones*, 2 Ad. & Ell. 44; *Simson* v. *Ingham*, 2 B. & C. 65; *Friend* v. *Young*, 1897, 2 Ch. 421.
(*x*) *Wright* v. *Laing*, 3 B. & C. 165.
(*y*) *Thomson* v. *Hudson*, L. R. 6 Ch. App. 220.

already barred (*z*); and where there are several debts, some of which are barred, if a payment is made on account of principal or interest generally, although the effect of such payment will be to take out of the operation of the statute any debt which is not barred at the time of payment, yet it will not revive a debt which is then already barred; and the inference in such a case will be, that the payment is to be attributed to the debts not already barred (*a*). And the third rule as to the appropriation of payments is this, namely, that where neither debtor nor creditor has made any appropriation, the law will appropriate the payment to the earlier, and not (as the Roman law does) to the more burdensome debt (*b*),—a rule commonly known as the rule in *Clayton's Case* (*c*). In that case, it appeared, that, on the death of D., a partner in a banking firm, there was a balance of £1713 in favour of C., who had a running account with the firm; that after the death of D., the surviving partners became bankrupt; but that, before their bankruptcy, C. had drawn out sums to a larger amount than £1713, and had paid in sums still more considerable; and it was held, that the sums drawn out by C. after the death of D. must be appropriated to the payment of the balance of £1713 then due, in relief of the estate of D.,—which estate was therefore discharged from the debt due from the firm at his death, the sums subsequently paid in by C. constituting a new debt, for which the surviving members of the firm were alone liable; and the decision proceeded on this ground, namely, that there was no room for any other appropriation than that which arose from the order in which the receipts and payments

(*b*.) A general payment by debtor takes a debt not already barred out of the statute, but does not revive a barred debt.

(3.) If neither debtor nor creditor makes the appropriation, the law makes it.

Current accounts, law of appropriation in cases of.

(*z*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455; *Friend* v. *Young*, supra.
(*a*) *Nash* v. *Hodgson*, 6 De G. M. & G. 474; *Friend* v. *Young*, supra.
(*b*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455.
(*c*) 1 Mer. 585; *Birt* v. *Birt*, 11 Ch. Div.; *Blackburn Benefit Building Society* v. *Cunliffe*, 22 Ch. Div. 61; *Wenlock* v. *River Dee Co.*, 19 Q. B. D. 229.

were carried into the account,—"*presumably the sum "first paid in was first drawn out; presumably the first "item on the debit side of the account was discharged or "reduced by the first item on the credit side; and it is "upon that principle, that all accounts current are settled, "and particularly cash accounts.*"

Clayton's Case,—when inapplicable?

But the rule in *Clayton's Case* is only applicable when there is, in fact, an account current between the parties, and not otherwise (*d*); moreover, that rule, where it is applicable, being only a presumption of law, the rule may be excluded or displaced by other considerations. Therefore, where the current account at a bank is an account guaranteed by a third party, and the guarantee ends (say, by the death of the guarantor), and a sum of £1000 is then owing on the account,—the estate of the guarantor remains in general liable for that amount, notwithstanding that the principal debtor may have subsequently paid into the bank other moneys,—at least this will be so, if such other moneys are carried to a new account at the bank distinct from the guaranteed account, and there is no contract, express or implied, that the payments made by the principal debtor after the determination of the guarantee shall be applied in reduction or in liquidation of the guaranteed account (*e*). So again, when the current account at the bank is made up, partly of moneys belonging to the customer in his own right, and partly of moneys belonging to him as a trustee for divers classes of *cestuis que trustent*,—paid in at different times indiscriminately, and drawn upon indiscriminately,—the rule in *Clayton's Case* applies indeed as between the divers classes of *cestuis*

(1.) As between a guaranteed account, and a new account not guaranteed.

(2.) As between trust moneys and trustee's own moneys mixed in one account.

(*d*) *Cory Brothers* v. *Mecca S.S. Owners*, 1897, A. C. 286.
(*e*) *In re Sherry*, 25 Ch. Div. 692; *Rouse* v. *Bradford Bank*, 1894, 2 Ch. 32.

que trustent, i.e., inter se (*f*); but its application as between any one *cestui que trust* and the trustee is excluded,—for the trustee could not, as against such *cestui que trust*, be permitted (*for the benefit of his own estate or of his general creditors*) to allege, that what he had drawn out and applied for his own purposes was the trust fund and not his own fund (*g*); and even if the trust fund is not, or has ceased to be, capable of identification or of being ear-marked, it may yet be followed,—upon the principle, that the *cestui que trust* as against his trustee is entitled to a *charge* upon the whole account for the proportion thereof belonging to the trust fund (*h*).

III. *Appropriation of Securities.*—Closely connected with the doctrine of the appropriation of payments is the doctrine of the appropriation of securities. For example, where A. borrows money from B., and gives B. securities for the loan, A. is of course entitled to be indemnified by B., *to the extent of these securities*, against personal payment of the loan; and subject thereto, B. may (in general) deal with the securities, rendering to A. the surplus (if any) after payment of the loan; but B. may not (except by previous agreement with A.) deal with the securities in such a manner as to deprive A. of the real indemnity which is afforded him by the securities,—*therefore, to the extent that B. disposes of the securities, the loan is discharged.* And so, where A. borrows from B. loans at successive times, giving successive securities to provide for the payment of the successive loans, A. is deemed to have appropriated the successive securities to the successive loans,—which, accordingly, are discharged by the realisation of the successive securities

III. Appropriation of securities.

The securities go in discharge of the debt or debts secured,—

(*a.*) Whether one debt;

or (*b.*) Successive debts.

(*f*) *In re Hallett's Estate*, 13 Ch. Div. 696; *Hancock* v. *Smith*, 41 Ch. Div. 456; *Wood* v. *Stenning*, 1895, 2 Ch. 433.

(*g*) *Ex parte Dale & Co.*, 11 Ch. Div. 772.

(*h*) *In re Hallett's Estate*, supra.

Appropriation of "short bills" towards meeting acceptances,—practice of, and effect of.

respectively appropriated thereto; and until such realisation, the securities remain appropriated. This practice of successive borrowing on successive securities is, we may mention, very usual among merchants, —for example, A. draws bills on B., and B. accepts the bills, on the faith of A. sending (and A. in due course sends) to him securities (that is to say, remittances) usually in the form of "*short bills*," with the intention that B. shall negotiate these short bills and apply the proceeds in providing for his acceptances,—this application of these proceeds both discharging B. as acceptor and indemnifying A. as drawer. Now, in such a case, if A. and B. should both of them go bankrupt or become insolvent while any of these acceptances are outstanding, and while any of the "short bills" remain in specie in the hands of B., it is evident, that the "short bills," so remaining in specie in B.'s hands, are properly applicable according to their appropriation,—that is to say, in or towards providing against the acceptances, and to that extent relieving the estate of B. and also the estate of A. of portion of its indebtedness; and this principle (which is said to be an adjustment of the equities between the two estates) holds good even in favour of any third parties who hold the acceptances of B., and who are therefore commonly called the "Bill-holders," at the time of the double bankruptcy or insolvency,—so that the bill-holders, deriving this equity under A. and B., become entitled to have the appropriation maintained in their favour, and the remittances, *i.e.*, the short bills remaining *in specie*, applied in or towards payment of the acceptances; and the principle, in this application of it, is commonly called the rule in *Ex parte Waring* (*i*). But it is to be observed, that the rule in question is only applicable when A. and B. are both of them bankrupt or insolvent;

Effect of,—where both drawer and acceptor become bankrupt.

Benefit of, enures even in favour of third parties, holders of the acceptances.

(*i*) 19 Ves. 345; *City Bank* v. *Luckie*, L. R. 5 Ch. App. 773.

therefore, Firstly, if B. alone is bankrupt and A. is not, it is clear that the bill-holders prove against B.'s estate, on his liability as acceptor, and get say 3s. 4d. in the pound, and thereafter obtain payment of the residue of their debt from A. on his liability as drawer,—so that the short bills remaining in specie in the hands of B. go back to A. in or towards restoring his indemnity (*k*). And again, Secondly, if A. is bankrupt and B. is not, it is equally clear that B. discharges his acceptances in full, and applies the short bills as his own property to the extent of what he has had to pay on his acceptances,—and the bill-holders in that case do not trouble A.'s estate at all (*l*). And, generally, so long as both A. and B. are solvent, the bill-holders cannot interfere with what B. may choose to do with the securities, even although appropriated,—for the appropriation is only as between A. and B. (*m*); but, of course, by special agreement with the bill-holders, the appropriation might even in such case be extended in their favour (*n*). If (as is usually the case) the securities are negotiable instruments, then B.'s indorsee thereof would take free of the equity of A. to be indemnified,—but not if such indorsee had notice of the appropriation as between B. and A. (*o*). And it is to be observed, that, even as between A. and B. themselves, it is not in every instance where bills are drawn by A. on B. as against cargoes consigned by A. to B. that those cargoes (or other remittances) are appropriated to meet the bills; but the appropriation must be proved (*p*).

Secus, if not a double bankruptcy: application of the "short bills" in such a case.

Secus, also if neither party bankrupt,—application of "short bills" in such a case.

Appropriation must in all cases be proved.

(*k*) *Powles* v. *Hargreaves*, 3 De G. M. & G. 430.
(*l*) *Powles* v. *Hargreaves*, supra.
(*m*) *Banner* v. *Johnstone*, L. R. 5 H. L. 157.
(*n*) *Agra* v. *Masterman's Bank*, L. R. 2 Ch. App. 391.
(*o*) *Steele* v. *Stuart*, L. R. 2 Eq. 84; *Banco de Lima* v. *Anglo-Peruvian Bank*, 8 Ch. Div. 160.
(*p*) *Phelps, Stokes & Co.* v. *Comber*, 29 Ch. Div. 813; *Brown, Shipley & Co.* v. *Kough*, ib. 848.

CHAPTER IX.

SPECIFIC PERFORMANCE.

Breach of contract, at common law a question of damages.

By the common law, every executory contract to sell or transfer a thing was treated as a merely personal contract,—so that, if left unperformed by the party, no redress could be had excepting in damages; and when, as usually happened, the executory contract purported on the face of it not to be itself the contract, but expressed that a formal contract was to be prepared, then no remedy at all, even for damages, lay at law for its non-performance (*a*). But the courts of equity interposed in these and such like cases, and required in general from the conscience of the party a strict performance of what he could not, without manifest fraud or wrong, refuse (*b*); but the ground of this interference of equity having been the inadequacy or total absence of the remedy at law, it followed that, in general, where damages were recoverable and would be adequate as a compensation, equity would not interfere (*c*); and such appears to be still the law under the Judicature Acts.

In equity, contract must be exactly performed.

Inadequacy of remedy at law, ground of equity jurisdiction.

Cases in which equity will not decree specific performance of an agreement or contract:—

There were, however, certain cases where equity refused, and in which therefore the High Court would still refuse, to compel specific performance:—For example: Firstly, (1.) The court will not decree specific performance of an agreement to do an act

(1.) An illegal or immoral contract.

(*a*) *Buxton* v. *Lister*, 3 Atk. 383.
(*b*) *Foster* v. *Wheeler*, 38 Ch. Div. 130.
(*c*) *Harnett* v. *Yielding*, 2 Sch. & Lef. 553.

which is immoral (*d*), or which is contrary to the law (*e*),—when at least, in the words of Sir William Grant, "You cannot stir a step but through the immoral or illegal agreement." It is to be observed, however, that a separation agreement is not either illegal or immoral,—*scil.* where the separation is imminent, and not merely prospective or remote; and such an agreement will therefore (when it is legal) be specifically enforced (*f*),—the proper separation deed being directed to be settled in chambers; and a married woman may lawfully bind herself by such an agreement, even when it is in the nature of a compromise arrived at in divorce proceedings (*g*); and further, the wife's compliance with the specific provisions contained in the separation deed, by which the separation agreement shall have been specifically performed, will thereafter be enforced by injunction (*h*). Secondly, (2.) The court will not enforce specific performance of an agreement without consideration, or that is merely voluntary,—*e.g.*, in *Jefferys* v. *Jefferys* (*i*), where a father, by voluntary settlement, *covenanted* to surrender certain copyholds in trust for his daughters, and afterwards devised the same copyhold estates to his widow,—the court refused, at the suit of the daughters, to give any relief against the widow; also, generally, the court will not enforce the specific performance of a contract that is revocable or determinable by either of the parties to it (*k*). And again, Thirdly, (3.) The incapacity of the court to compel the complete execution of a con-

Separation agreements,—enforcement of.

(2.) An agreement without consideration,—or which is revocable or determinable by either party.

(3.) A contract which the court cannot enforce,—

(*d*) *Ewing* v. *Osbaldiston*, 2 My. & Cr. 53.
(*e*) *Thwaites* v. *Coulthwaite*, 1896, 1 Ch. 496.
(*f*) *Gibbs* v. *Harding*, L. R. 5 Ch. App. 336; *Hart* v. *Hart*, 18 Ch. Div. 670.
(*g*) *Hart* v. *Hart*, supra; *Cahill* v. *Cahill*, 8 App. Ca. 420.
(*h*) *Besant* v. *Wood*, 12 Ch. Div. 605; and see *Whitmore* v. *Whitmore*, 1 Lee, 300; *Hooper* v. *Hooper*, 30 L. J., Prob. 49.
(*i*) Cr. & Ph. 141.
(*k*) *Hercy* v. *Birch*, 9 Ves. 357; *Sturge* v. *Mid. Rail. Co.*, 6 W. R. 233.

tract limits also its jurisdiction to compel specific performance,—*e.g.*, in cases of agreement to do acts involving personal skill, knowledge, or inclination; therefore, in *Lumley* v. *Wagner* (*l*), where a lady agreed in writing with a theatrical manager to sing at his theatre for a definite period, and by a clause subsequently agreed to by her, she engaged not to use her talents at any other theatre or concert-room without the written authorisation of the manager,—it was held, that though the court would restrain the lady from singing at any other theatre, it could not compel her to sing at the theatre of the plaintiff according to her agreement (*m*); and on the same principle, the court refuses specific performance of an agreement for the sale of the good-will of a business unconnected with the business premises, by reason of the impossibility of the thing and the uncertainty of the subject-matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it (*n*). And the court will not in general interfere in cases of contracts to build or repair,—because if A. will not build, B. may (*o*); and the plaintiff has an adequate remedy in damages (*p*); and besides, building contracts are for the most part too uncertain to enable the court to carry them out (*q*). However, where such an agreement is clear and definite in its nature, the court might without much difficulty (and perhaps would) entertain a suit for its performance (*r*),—especially if the plaintiff would

(*a.*) Where personal skill is required.

(*b.*) Contract to transfer good-will of a business without the premises.

(*c.*) Contracts to build or repair.

(*l*) 1 De G. M. & G. 604.

(*m*) *Martin* v. *Nutkin*, 2 P. Wms. 266; *Dietrichsen* v. *Cabburn*, 2 Phil. 52.

(*n*) *Baxter* v. *Conolly*, 1 J. & W. 576; *Darbey* v. *Whittaker*, 4 Drew. 134, 139, 140.

(*o*) *Errington* v. *Aynesley*, 2 Bro. C. C. 343.

(*p*) *South Wales Railway Co.* v. *Wythes*, 5 De G. M. & G. 880; *Ryan* v. *Mutual Tontine*, 1893, 1 Ch. 116.

(*q*) *Mosely* v. *Virgin*, 3 Ves. 184.

(*r*) *Lucas* v. *Comerford*, 1 Ves. 235; *Lane* v. *Newdigate*, 10 Ves. 192; *Nuneaton Local Board* v. *General Sewage Co.*, L. R. 20 Eq. 127.

otherwise be remediless (*s*),—as, *e.g.*, where the plaintiff cannot himself execute the building contract otherwise than through the defendant, or without a trespass (*t*). Also, (3*a*.) Where, as occasionally happens, an agreement comprises two or more matters, some of which, if they stood alone, would be specifically enforceable, while the others of them (either because of illegality or for some other reason) are not specifically enforceable,—*e.g.*, where there is a building agreement and the agreement provides that the lessor shall grant leases piecemeal to the builder or his assigns upon the completion of the buildings on the several plots, if the conditions as to building on any plot have been fulfilled, the court will enforce the agreement to grant a lease of that plot, notwithstanding that, as regards the other plots, or any of them, the buildings have not yet been erected, and the court could not specifically enforce the agreement to build (*u*). So also, where some of the terms of an agreement are legal and the others are illegal, if these latter are clearly severable, the court will enforce specifically the terms which are legal,—provided they are in their own nature otherwise specifically enforceable, and a piecemeal performance of the agreement is consistent with the intention of the parties (*v*). And, (3*b*.) In case of contracts in restraint of trade, if the limits of the restraint therein appearing to be prescribed are unreasonable, the court will (if it can) give the restraint a reasonable limit and enforce it accordingly (*x*). But, as a rule, if a

(3*a*.) Severable contracts,—when part thereof will be specifically performed.

(3*b*.) Contract in restraint of trade,—modification and enforcement of.

(*s*) *Wilson* v. *Furness R. C.*, L. R. 9 Eq. 28; *Storer* v. *Great North-Western R. C.*, 2 Yo. & C. C. C. 48.

(*t*) *Wolverhampton R. C.* v. *London and North-Western R. C.*, L. R. 16. Eq. 433; *Fortescue* v. *Lostwithiel R. C.*, 1894, 3 Ch. 621.

(*u*) *Wilkinson* v. *Clements*, L. R. 8 Ch. App. 96.

(*v*) *Odessa Tramways Co.* v. *Mendel*, 8 Ch. Div. 235; *Dubouski* v. *Goldstein*, 1896, 1 Q. B. 478.

(*x*) *Baines* v. *Geary*, 35 Ch. Div. 154; *Rogers* v. *Maddocks*, 1892, 3 Ch. 346; *Badische Anilin* v. *Schott*, ib. 447; *Dubouski* v. *Goldstein*, supra.

contract is to be specifically enforced at all, the whole contract is to be enforced(*y*),—excepting perhaps some term (*e.g.*, as to the valuation of timber) which under the circumstances is immaterial (*z*). Fourthly, (4.) Where the specific performance of a contract will be decreed upon the application of one party, the court will in general maintain the like suit at the instance of the other party,—the court in all such cases acting upon the principle that the remedy, if it exists at all, ought to be mutual and reciprocal, as well for the vendor as for the purchaser (*a*); and therefore conversely, if a contract is not enforceable against one of the parties, it will not be enforced at his suit against the other,—for a contract, in order to be specifically enforceable, must be mutually binding (*b*); therefore, an infant cannot sustain a bill for specific performance,—for the court will not compel a specific performance as against him (*c*), either directly by a decree for specific performance, or indirectly by means of an injunction to enforce his negative agreement (*d*); and an infant's apprenticeship agreement is not, as a general rule, specifically enforceable,—at least by decree of a court of equity (*e*), although it may be elsewhere enforceable, as before the justices (*f*). An apparent but no real exception to this rule arises under the Statute of Frauds; for the plaintiff may obtain specific performance of a contract signed by the defendant although not signed by himself,—*scil.* because the Statute of Frauds (*g*) only requires the agreement

(4.) Contract wanting in mutuality.

Statute of Frauds no exception to this rule, excepting in appearance.

(*y*) *Stocker* v. *Wedderburn*, 3 K. & J. 393.
(*z*) *Richardson* v. *Smith*, L. R. 5 Ch. App. 648.
(*a*) *Adderley* v. *Dixon*, 1 S. & S. 607.
(*b*) *Forrer* v. *Nash*, 35 Beav. 171; *Brewer* v. *Broadwood*, 22 Ch. Div. 105; *Wylson* v. *Dunn*, 34 Ch. Div. at 576.
(*c*) *Flight* v. *Bolland*, 4 Russ. 301.
(*d*) *De Francesco* v. *Barnum*, 43 Ch. Div. 165.
(*e*) *De Francesco* v. *Barnum*, 45 Ch. Div. 430.
(*f*) *Meakin* v. *Morris*, 12 Q. B. D. 352; *Corn* v. *Matthews*, 1893, 1 Q. B. 310.
(*g*) 29 Car. II. c. 3.

to be signed by the party to be charged, and the plaintiff, by commencing the action, has, it is said, made the remedy mutual (*h*); also, note, that where the contract is constituted by an offer and an acceptance of such offer, the offer in writing of the defendant may be accepted by word of mouth of the plaintiff (*i*). Fifthly, (5.) The court will not specifically enforce a contract for the loan of money, whether on mortgage or without any mortgage or security, it being considered that damages for the breach of such a contract are an adequate remedy (*k*). Lastly, (6.) The court will not specifically enforce the contract of the donee of a testamentary power of appointment to leave the appointment property to any particular individual,—not even where such contract is for value (*l*); but the party will be left to his remedy in damages for the breach.

(5.) Contract for the loan of money.

(6.) Contract by donee of power to make particular appointment.

Having premised these general observations, it is proposed to treat of specific performance, firstly, in the case of contracts respecting chattels personal; and secondly, in the case of contracts respecting land; but it is most needful to remember, that the court decrees the specific performance of contracts not upon any mere distinction between realty and personalty, but simply because damages at law will not (when it will not) afford in the particular case a complete remedy. Thus, in the case of a contract for land, if (as is usually the case) the damages at law,—which must be calculated upon the general money value of the land,—will not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value; and if (as

Division of subject, according as the property is realty or is personalty.

Contracts as to realty enforced, because remedy at law is inadequate.

(*h*) *Flight* v. *Bolland*, 4 Russ. 301.
(*i*) *Warner* v. *Willington*, 3 Drew. 523; *Reuss* v. *Picksley*, L. R. 1 Exch. 342.
(*k*) *Sichel* v. *Mosenthal*, 30 Beav. 371; *South African Territories* v. *Wallington*, 1897, 1 Q. B. 692.
(*l*) *Hill* v. *Schwarz*, 1892, 3 Ch. 510.

Contracts concerning personalty not enforced, because the legal remedy, as a rule, is adequate.

occasionally happens), in the case of a contract for the sale of stock or goods, the damages at law,—calculated upon the market price of the stocks or goods,—will not be as complete a remedy to the purchaser as the delivery of the stock or goods contracted for,—there, and in either of these cases, and on the ground simply of the inadequacy of the damages, the court will decree specific performance; but otherwise it will not do so (*m*).

I. Contracts respecting personal chattels. General rule.

Firstly, then, with regard to contracts respecting personal chattels,—The general rule is, not to entertain jurisdiction for the specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature (*n*). But to this rule there are certain exceptions, or rather the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy; and where such damages are not adequate, specific performance will be decreed. Wherefore, in *Duncuft* v. *Albrecht* (*o*), the Vice-Chancellor decreed specific performance of an agreement for the sale of *shares* in a railway company, which he said were a very different thing from *stock,—for stock was always to be had in the market, but railway shares were limited in number, and were not always to be had in the market* (*p*). And similarly, specific performance would be decreed of a contract for the purchase of timber which was peculiarly convenient to the purchaser by reason of its vicinity (*q*); also, of a contract by a landowner for the sale of the timber on his estate, where the object of the contract on the landowner's part was to clear his

Exceptions to general rule: (1.) Contract respecting shares in a railway company.

(*m*) *Adderley* v. *Dixon*, 1 S. & S. 610.
(*n*) *Pooley* v. *Budd*, 14 Beav. 34.
(*o*) 12 Sim. 199; and see *Graham* v. *O'Connor*, W. N. 1895, p. 157.
(*p*) *Doleret* v. *Rothschild*, 1 Sim. & Stu. 598; *Odessa Tramways* v. *Mendel*, 8 Ch. Div. 235.
(*q*) *Buxton* v. *Lister*, 3 Atk. 385.

land,—for in all that class of cases, damages would not, by reason of the special circumstances, be a complete remedy (*r*). Again, in *Adderley* v. *Dixon* (*s*), where there had been a sale and purchase of certain debts which had been proved under two commissions of bankruptcy, specific performance of the agreement was enforced at the suit of the vendor,—for that was a sale of the uncertain dividends to become payable from the estates of the two bankrupts, and damages at law could not accurately represent the value of such dividends; and therefore to have compelled the purchaser to take such damages would have been to compel him to (in effect) sell the purchased dividends at a conjectural price, which he could not have been compelled to do; and on the principle of mutuality, the vendor also might therefore have specific performance of such an agreement (*t*). The court will also compel the specific delivery of articles of unusual beauty, rarity, and distinction, where the damages would not be an adequate compensation for their non-delivery (*u*); and in *Dowling* v. *Betjemann* (*v*), the court would have ordered the delivery up to an artist of a picture painted by himself, as having a special value to him,—only the plaintiff appeared, in that case, to have himself put a fixed price upon the picture, so that the damages became an adequate remedy. And the court will also compel the specific delivery up of heirlooms or chattels of peculiar value to the owner, on the ground that the specific thing is the object, and damages will not afford an adequate compensation (*x*),—*e.g.*, the Pusey horn and the patera of the Duke of Somerset were things of such a character as a jury might (possibly)

(2.) Sale of assigned debts under a bankruptcy.

(3.) Contracts as to rare and beautiful articles.

(4.) Delivery up of heirlooms and other chattels of peculiar value.

(*r*) *Adderley* v. *Dixon*, 1 Sim. & Stu. 607.
(*s*) 1 Sim. & Stu. 607.
(*t*) *Wright* v. *Bell*, 5 Price, 325; *Cogent* v. *Gibson*, 33 Beav. 557.
(*u*) *Falcke* v. *Gray*, 4 Drew. 658.
(*v*) 2 J. & H. 544.
(*x*) *Somerset* v. *Cookson*, 1 L. C. 891; *Pusey* v. *Pusey*, 1 Vern. 273.

estimate by their weight—obviously a very inadequate and unsatisfactory measure of damages; and it would be strange if, in such cases, the law did not afford any remedy; and great would be the injustice if an individual could not have his own property back, but should be obliged to take for it the estimate of people who could not value it as he did (*y*). Also, where a fiduciary relation subsists between the parties,—whether it be that of an agent, a trustee, or a broker,—in all these cases, and whether the subject-matter be stocks or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party intrusted with the goods, or by a person claiming under him, and will compel a specific delivery up of the articles (*z*). And note here, that the Courts of Common Law obtained, under the Common Law Procedure Act of 1854 (*a*), after judgment in an action of detinue, the same jurisdiction to compel the return of a chattel as the Court of Chancery; but the latter court might have enforced its decree by attachment, whilst the Courts of Common Law could only have enforced restitution by distress (*b*); but now, of course, under the Judicature Acts, the power of courts of law in this respect is co-extensive with the power of courts of equity.

(5.) Specific performance where a fiduciary relation exists.

Common law powers as to specific delivery under 17 & 18 Vict. c. 125, and now under Judicature Acts.

II. Contracts respecting land. Generally enforced, because damages at law no remedy.

Secondly, With regard to contracts respecting land,—These in general differ greatly from contracts respecting personal property; for if the latter contract is not specifically performed by the vendor, the purchaser may in general provide himself with other personal property of a like description with that contracted for,—and this by means of the damages which

(*y*) *Fells* v. *Read*, 3 Ves. 70; *Beresford* v. *Driver*, 16 Beav. 134.
(*z*) *Wood* v. *Rowcliffe*, 2 Ph. 383; *Edwards* v. *Clay*, 28 Beav. 145.
(*a*) 17 & 18 Vict. c. 125, s. 78.
(*b*) Day's Com. Law Proc. Acts, 249.

he recovers in the action,—so that he in a manner specifically performs the contract for himself; but with regard to contracts respecting a specific messuage or specific parcel of land, the locality, character, vicinage, soil, and accommodations of the specific messuage or land may give it a peculiar and specific value in the eyes of the purchaser, which cannot in general be replaced by any other messuage or land, although of the same precise value in the market; and damages would not therefore be adequate relief (*c*), and would not attain, or enable the purchaser to attain, the object desired; and for these reasons, the court almost invariably decrees the specific performance of contracts regarding lands; and the jurisdiction where it exists extends also to lands out of the jurisdiction, if the contracting parties are within it (*d*). And before proceeding farther, it may be usefully mentioned here, that the phrase "specific performance" is capable of being, and commonly is, used in two senses, that is to say—(1.) In the sense of turning an executory contract into an executed one,—by decreeing the execution of the document (usually a lease or conveyance) which in and by the executory contract is provided for; and (2.) In the sense of carrying out "*in specie*" the very act or thing which the contract provides or agrees shall be done; and note, that the former of these two senses is the stricter sense of the phrase,—and it is in that sense that the phrase is commonly, although not invariably, used, in cases where the court decrees specific performance; and the latter of these two senses of the phrase is not strictly correct, although it is the sense in which the phrase is commonly, although not invariably, used, when the court procures (in effect) the specific performance of a con-

Specific performance,—the two senses in which this phrase is used.

(*c*) *Adderley* v. *Dixon*, 1 Sim. & Stu. 607.
(*d*) *In re Longdendale Cotton Spinning Co.*, 8 Ch. Div. 150; *Penn* v. *Lord Baltimore*, 2 L. C. 837.

tract by means of an injunction,—the injunction restraining the party from some definite specified act, which would be in breach of the contract (*e*).

Contracts in writing,—ascertainment and enforcement of.

Firstly, therefore, the courts will grant specific performance of a contract in writing,—being a contract which is otherwise proper, either in itself or from its circumstances, to be specifically performed; and for the purpose of arriving at the contract, or of ascertaining what the written contract is,—whether the writing was required by the Statute of Frauds or not,—two or more documents mutually completory may be read together, whether they connect *inter se* upon the face of them, or whether their connection requires to be a little aided by extrinsic evidence (*f*); and in all cases, parol or extrinsic evidence will be admitted for the purpose of identifying the particular land comprised in the contract (*g*). But, in fact, the court will, under certain circumstances, decree specific performance of the contract, even although the provisions of the Statute of Frauds have not been complied with; for although that statute says, that no action shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged with it,—and a contract must, as a general rule, in order to be specifically enforced, comply with the provisions of that statute (*h*), whether it is comprised in one or in several documents (*i*),—yet the court is in the daily habit of relieving, where the party seeking relief has been put into a situation which

Cases in which even the Statute of Frauds is broken in upon. (*a.*) If unconscientious to rely on it,—generally.

(*e*) See *Wolverhampton R. Co.* v. *L. & N. W. R. Co.*, L. R. 16 Eq. at p. 439, per Lord Selborne.

(*f*) *Jones* v. *Victoria Graving Dock Co.*, 2 Q. B. D. 314; *Long* v. *Millar*, 4 C. P. D. 450; *Pearce* v. *Gardner*, 1897, 1 Q. B. 688.

(*g*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Shardlow* v. *Cotterell*, 20 Ch. Div. 90; *Plant* v. *Bourne*, 1887, 2 Ch. 281.

(*h*) *Shardlaw* v. *Cotterell*, supra.

(*i*) *Baumann* v. *James*, L. R. 3 Ch. App. 508; *Studds* v. *Watson*, 28 Ch. Div. 305.

makes it generally against conscience in the other party to insist on the want of writing as a bar to the relief (*k*); *for the statute having been made to prevent fraud, cannot be permitted to be used as the engine of fraud* (*l*). For example, the court would enforce specific performance of a contract within the statute, although not in writing, where the contract was fully set forth in the bill, and was confessed by the answer of the defendant (*m*),—for if the defendant did not insist on the defence, he might fairly be deemed to have waived it; but the defence of the statute might (and may) be insisted on by the defendant, and such a defence was (and is) good (*n*). Also, when the agreement was intended to be put in writing, and it is only through the fraud of one of the parties that it has not been put (completely) into writing, so as to fully satisfy the statute, the court will relieve against the want of writing, and will specifically perform the contract,—if it be a contract which is otherwise proper for specific performance (*o*). And more important than all, the court would (and will) enforce specific performance of a contract within the statute, where the parol agreement has been partly performed by the party praying relief; therefore, where one party has carried out his part of the agreement in the confidence that the other party will do the same, and it would be a fraud upon the former to suffer the latter to escape from the performance of the agreement (*p*), equity will decree specific performance. But acts merely ancillary to

(*b*.) Where the agreement was confessed by the defendant's answer,—

unless the defendant, notwithstanding, insisted upon the defence.

(*c*.) Where the contract is partly performed by the party seeking aid.

(*k*) *Bond* v. *Hopkins*, 1 S. & L. 433.

(*l*) *Haigh* v. *Haye*, L. R. 7 Ch. App. 469; *Davis* v. *Whitehead*, 1894, 2 Ch. 133; *Rochefoucauld* v. *Boustead*, 1897, 1 Ch. 194.

(*m*) *Gunter* v. *Halsey*, Amb. 586.

(*n*) *Blagden* v. *Bradbear*, 12 Ves. 466, 471; *Skinner* v. *M'Douall*, 2 De G. & Sm. 265; *James* v. *Smith*, 1891, 1 Ch. 384.

(*o*) *Maxwell* v. *Montacute*, Prec. Ch. 526; *Lincoln* v. *Wright*, 4 De G. & Jo. 16.

(*p*) *Hussey* v. *Horne Payne*, 4 App. Ca. 311; *M'Manus* v. *Cooke*, 35 Ch. Div. 681.

(1.) Introductory or ancillary acts are not acts of part-performance.

an agreement are not considered as acts of part-performance,—*e.g.*, delivering an abstract of title, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value the stock, making valuations, admeasuring the lands, registering prior deeds, and acts of the like nature are not sufficient (*q*), being merely acts for which damages are an adequate compensation. Also, in order that any acts of alleged part-performance may be, in fact, acts of part-performance, they must of course be referable to the agreement, and to that alone,—for if they are referable otherwise, they cannot properly be said to be done by way of part-performance of *the* agreement (*r*). Consequently, the mere possession of the land contracted for will not of itself be deemed a part-performance if it be wholly independent of the contract,—*e.g.*, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up his possession as an act of part-performance of the agreement, it was held not to be such, because it was referable otherwise than to the agreement,—*scil.* to his pre-existing character of tenant (*s*). Or again, where a tenant from year to year continues in possession, and lays out such moneys on the farm as are usual in the ordinary course of husbandry,—that is no part-performance of an agreement for a lease (*t*). But if the possession be delivered, and delivered and obtained *solely under the contract*,—or if the possession, although delivered *before* the contract, is continued *subsequently* to the contract, and the *continuance of the possession is referable unequivocally to the contract* (*u*); or if, in the case

(2.) Acts of part-performance must be referable alone to the agreement alleged.

Possession, or expenditure, referable solely to agreement, an act of part-performance.

(*q*) *Hawkins* v. *Holmes*, 1 P. Wms. 770; *Pembroke* v. *Thorpe*, 3 Swanst. 437; *Williams* v. *Walker*, 9 Q. B. D. 576.
(*r*) *Gunter* v. *Halsey*, Amb. 586; *Lacon* v. *Mertins*, 3 Atk. 4.
(*s*) *Wills* v. *Stradling*, 3 Ves. 378; *Morphett* v. *Jones*, 1 Swanst. 181.
(*t*) *Brennan* v. *Bolton*, 2 Dr. & War. 349.
(*u*) *Hodson* v. *Heuland*, 1896, 2 Ch. 428.

of an existing tenancy, the nature of the holding is made different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, *referable solely and exclusively to the contract*,—there the possession will take the case out of the statute,—and especially so, where the party let into or remaining in possession has expended money in building and on repairs or other improvements,—for, under such circumstances, if the parol contract were to be deemed a nullity, the expenditure would operate to his prejudice, and a fraud would have been practised upon him; and besides, he would be a trespasser (*v*). But note here, that the mere want of writing to evidence the contract will not afford any ground for the court entertaining an action for the specific performance of it,—in other words, the mere fact that the plaintiff cannot at law recover damages for breach of the contract (not being able to prove it for want of the necessary written evidence), this will not of itself entitle him to specific performance (*x*). Also, if the contract has (*e.g.*, through lapse of time) become impossible of specific performance, even acts of part-performance will cease to be available as a ground for claiming the specific performance of the contract; and in such a case, the plaintiff will not even have damages (*y*),—for generally the circumstance that there is no legal remedy does not of itself suffice to give a court of equity jurisdiction (*z*).

The agreement must originally have been cognisable in a court of equity, independently of the acts of part-performance.

Further, it is to be observed, that payment of a part, or even of the whole, of the purchase-money is

(3.) The payment of part or whole

(*v*) *Lester* v. *Foxcroft*, 1 L. C. 828; *Gregory* v. *Mighell*, 18 Ves. 328; *Pain* v. *Coombs*, 1 De G. & Jo. 34, 46; *Ramsden* v. *Dyson*, L. R. 1 Ho. Lo. 129, per Lord Kingsdown, at pp. 170–171.

(*x*) *Kirk* v. *Bromley Union*, 2 Phil. 640; *Humphreys* v. *Green*, 10 Q. B. D. 148.

(*y*) *Savery* v. *Pursell*, 39 Ch. Div. 508.

(*z*) *East India Co.* v. *Veerasawmy Moodelly*, 7 Moo. P. C. C. 482.

of purchase-money is not an act of part-performance, because repayment will put the parties into the same position as before.

not an act of part-performance,—so as to take a contract out of the Statute of Frauds (*a*); for the statute having said with respect to *goods*, that part-payment shall suffice, and having not said so with respect to *lands*, the courts have considered that the omission of lands was intentional (*b*). And even marriage is not, of itself, an act of part-performance,—for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage, in order to be binding, must be in writing (*c*); but where, as in *Surcombe* v. *Pinniger* (*d*), a father, previous to the marriage of his daughter, told her intended husband that he meant to give certain leasehold property to them on their marriage, and after the marriage *he gave up possession of the property to the husband, to whom he also handed the title-deeds*,—The court held, that there had been part-performance, *scil.* by the delivering up of possession to the husband, which was a true act of part-performance beyond and distinct from the marriage. And it seems, that if there be "a written engagement after marriage, in "pursuance of a parol agreement before marriage, "this takes the case out of the statute" (*e*); and the reason is this, that the object of the 4th section of the Statute of Frauds was not to alter principles of law, but modes of evidence; and it is sufficient therefore (at least *as between the parties*) if there be a memorandum clearly containing the terms of the agreement before the action or suit arises (*f*). And here it may be stated, that, with regard not only to parol marriage contracts but to other parol con-

(4.) Marriage is not in itself a part-performance, although not usually capable of being undone; but acts of part-performance independently of the marriage are a part-performance.

A post-nuptial written agreement in pursuance of an ante-nuptial parol agreement enforced.

A representation for the purpose of in-

(*a*) *Hughes* v. *Morris*, 2 De G. M. & G. 349.
(*b*) *Clinan* v. *Cooke*, 1 S. & L. 41.
(*c*) *Warden* v. *Jones*, 2 De G. & Jo. 76; *Lassence* v. *Tierney*, 1 Mac. & G. 551.
(*d*) 3 De G. M. & G. 571; *Ungley* v. *Ungley*, 5 Ch. Div. 887.
(*e*) *Barkworth* v. *Young*, 26 L. J. Ch. 157; *Dashwood* v. *Jermyn*, 12 Ch. Div. 776; *Hope* v. *Hope*, W. N. 1893, p. 20.
(*f*) *Bailey* v. *Sweeting*, 30 L. J. C. P. 150.

tracts generally, "a representation made by one party, "although by parol, for the purpose of influencing "the conduct of the other party, and acted on by "the latter, will be sufficient,—although never sub- "sequently evidenced by writing,—to entitle him to "the assistance of the court for the purpose of making "good such representation" (*g*); and it is a leading principle, repeatedly adopted in equity, that where, upon the marriage of two persons, a third party makes a representation upon the faith of which the marriage takes place, he shall be bound to make his representation good (*h*); and an injunction will be granted to restrain, *e.g.*, the enforcement of a demand, which the party seeking to enforce it has (while the marriage treaty was pending) falsely represented to the father of the lady to be non-existing (*i*); and although the party be an infant at the time, he or she will be bound by his or her misrepresentation (*k*). But of course, where the representation is not of an existing fact, but of a mere intention,—or where the promiser will not bind himself by a contract, but gives the other party to understand that he must rely upon his honour for the fulfilment of his promise,—in these cases, of course, the court will not enforce the performance of the representation or promise (*l*).

fluencing another, which has that effect, will be enforced.

Where on marriage a third party makes a representation, on the faith of which marriage takes place, he is bound to make it good.

Representation of a mere intention, or a promise upon honour, not enforced.

It is now proposed to consider the principal defences that may be set up to a suit for specific performance, there being ten such defences,—over and beyond the defence of the Statute of Frauds, which has been already sufficiently dealt with,—that is to say:—

Grounds of defence to a suit for specific performance.

(*g*) *Hammersley* v. *De Biel*, 12 Cl. & Fin. 62, 78; *Ramsden* v. *Dyson*, supra; *Alderson* v. *Maddison*, 8 App. Ca. 467.

(*h*) *Bold* v. *Hutchinson*, 5 De G. M. & G. 558; *Goldicutt* v. *Townsend*, 28 Beav. 445; *Prole* v. *Soady*, 2 Giff. 1.

(*i*) *Neville* v. *Wilkinson*, 1 Bro. C. C. 543; *Cahill* v. *Cahill*, 8 App. Ca. 420.

(*k*) *Mills* v. *Fox*, 37 Ch. Div. 153.

(*l*) *Mounsell* v. *White*, 4 H. L. Cas. 1039; *Jorden* v. *Money*, 5 H. L. Cas. 185.

(1.) Misrepresentation by plaintiff having reference to the contract.

(1.) A misrepresentation having relation to the contract made by one of the parties to the other, is a ground for refusing the interference of the court at the instance of the party who has made the misrepresentation, and may even be a ground for setting aside the contract altogether at the instance of the party deceived (*m*); and for this purpose, a misrepresentation by an agent is the misrepresentation of his principal (*n*); and a representation in the case of a sale of leasehold lands, that the lease contained no unusual covenants, would be a good ground for refusing specific performance, if the lease contained in fact covenants of an unusually restrictive character,—*e.g.*, to build on the land and thereafter to maintain houses of a value to command double the rent reserved by the lease (*o*); and misleading conditions of sale (*p*) are, and (in the case of a sale by trustees) depreciatory conditions of sale (*q*), used to be,—although they have now ceased to be (*r*),—a ground for refusing specific performance.

(2.) Mistake rendering specific performance a hardship.

(2.) Mistake is also a ground of defence,—for the court not only requires, that there must be an agreement binding at law, but that the contract must be free from fraud, surprise, or mistake; for otherwise there is not that consent which is essential to a contract in equity,—*non videntur qui errant, consentire* (*s*); and it is a settled rule of the court to admit parol evidence, not merely for the purpose of proving a mistake by way of defence to a suit for specific performance, but for the purpose also of

Parol evidence of mistake, admitted notwithstanding the statute.

(*m*) *Bascombe* v. *Beckwith*, L. R. 8 Eq. 100; *Henty* v. *Schröder*, 12 Ch. Div. 666.

(*n*) *Mullins* v. *Miller*, 22 Ch. Div. 134.

(*o*) *Andrew* v. *Aitken*, 22 Ch. Div. 218.

(*p*) *In re March and Lord Granville*, 24 Ch. Div. 11; *Sandbach and Edmundson's Contract*, 1891, 1 Ch. 99.

(*q*) *Dunn* v. *Flood*, 25 Ch. Div. 629.

(*r*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 14, as to sales subsequent to December 24, 1888.

(*s*) *Jones* v. *Clifford*, 3 Ch. Div. 779.

correcting the mistake,—*for the Statute of Frauds does not say that a written agreement, if signed, shall bind; but only says, that an unwritten agreement shall not bind* (*t*).

(3.) Therefore, where the defendant has been led into any error or mistake, the plaintiff cannot enforce the contract; and a professional man even has been relieved at his own suit from an error in a deed of his own drawing (*u*); and where an estate was purchased at an auction under a mistake as to the lot put up for sale, *and the mistake arose wholly through the carelessness of the defendant*, specific performance was not enforced,—*scil.* because in cases of specific performance the court exercises a discretion, knowing that a party may always have such compensation in the shape of damages as a jury will award him in an action at law (*v*); but note, that the defence of a want of *assensus ad idem*, if such defence is made out, is a defence not only to the decree for specific performance (*x*), but also to the legal claim for damages,—*scil.* because, without such an assent, there is *no contract* at all. And when some error or mistake is pleaded by way of defence against the specific performance of a written agreement, the following distinctions are taken,—namely, (*a.*) Where the mistake consists in this, that, after the parties to the contract had mutually agreed with each other, an error occurred *in the reduction of the agreement into writing*,—if it appears that the written agreement, varied according to the defendant's contention, represents the true contract between the parties, the court will

(3.) Error of defendant, although attributable to defendant's own negligence.

Damages and specific performance,—distinguished.

Effect of mistake, where a parol variation is set up as a defence.

(*a.*) Where the error arose in the reduction of the agreement into writing, specific performance decreed with parol variation

(*t*) *Clinan* v. *Cooke*, 1 Sch. & Lef. 39.

(*u*) *Ball* v. *Storie*, 1 S. & S. 210; *Malins* v. *Freeman*, 2 Keen, 25, 34; *Tamplin* v. *James*, 15 Ch. Div. 215.

(*v*) *Manser* v. *Back*, 6 Hare, 443; *Alvanley* v. *Kinnaird*, 2 Mac. & G. 7; *Baxendale* v. *Jeale*, 19 Beav. 601; *Wood* v. *Scarth*, 2 K. & J. 33.

(*x*) *Marshall* v. *Berridge*, 19 Ch. Div. 233; *May* v. *Thompson*, 20 Ch. Div. 705.

set up by the defendant;

enforce specific performance of the contract as so varied,—*e.g.*, where a bill was brought for the specific performance of a written agreement to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the written agreement (as it had been of the parol agreement), that the plaintiff should pay the taxes, —Lord Hardwicke granted specific performance, and directed that the terms of the verbal agreement should be carried out by the covenants to be inserted in the lease (*y*). On the other hand, a plaintiff seeking to enforce specific performance cannot, in the general case, go into evidence to show, that, by fraud, accident, or mistake, the written agreement does not express the real terms of the prior verbal agreement, so as to obtain specific performance of the written agreement with the variation (*z*); but if the variation is *in favour of the defendant*, the court may enforce specific performance of the written agreement with such variation,—*e.g.*, where the defendant agreed in writing to grant the plaintiff a lease at a specified rent and for a specified term, and the plaintiff filed a bill for specific performance, stating the above agreement, *and that it was farther agreed that he, the plaintiff, should pay a premium of £200, which by his claim he offered to do*,—the court specifically performed the agreement, seeing that the plaintiff consented to the performance of the omitted term (*a*); and the court will sometimes even reform the contract and enforce it (*b*), and may (the case being otherwise proper) do so in one and the same action (*c*). But, (*b.*) Where the mistake set up by the defendant is not a mere mistake in the reduction of

but not by the plaintiff,—

unless the parol variation be in favour of the defendant.

(*b.*) Where a misunderstanding as

(*y*) *Joynes* v. *Statham*, 3 Atk. 388.
(*z*) *Townshend* v. *Stangroom*, 6 Ves. 328; *Smith* v. *Wheatcroft*, 9 Ch. Div. 223.
(*a*) *Martyn* v. *Pycroft*, 2 De G. M. & G. 785.
(*b*) *Henker* v. *Roy. Ex. Ass. Co.*, 1 Ves. Sr. 317.
(*c*) *Olley* v. *Fisher*, 34 Ch. Div. 367.

the contract into writing, but one party understood one thing, and the other another, there is in such a case no contract at all,—for want of the necessary *assensus ad idem;* and the plaintiff's bill is consequently dismissed (*d*); but where the agreement is in writing, a mere ambiguity in the construction thereof, or of some clause contained therein, will not preclude the existence of the contract; and the plaintiff may, in such a case, waive the construction which he has hitherto insisted on and obtain specific performance according to (what the defendant admits is) the true construction (*e*). And again, where the mistake which the plaintiff or defendant seeks to set up is in fact a further term agreed to in parol between the parties subsequently to the written agreement, the case in nowise comes within the equitable doctrine of mistake, and such parol variation is inadmissible,—except, possibly, in cases where the refusal to perform it might amount to fraud (*f*), or there have been such acts of part-performance as would justify a decree in the absence of writing altogether (*g*).

to terms of agreement,—no specific performance;

(*c*.) Nor where the parol variation is subsequent to the contract.

(4.) Another common ground of defence to an action for specific performance is, that, by a misdescription of the property, the defendant has purchased what he never intended to purchase; but, in considering this defence, it is necessary to distinguish according as the misdescription is of a substantial character, or is of such a character as fairly to admit of compensation. For, Firstly, in cases of substantial misdescription,—*e.g.*, where the property is sold as copyhold, but turns out to be partly freehold,—the

(4.) Misdescription,—according as it is substantial or not.

Where the misdescription is of a substantial character, it is a good defence.

(*d*) *Legal* v. *Miller*, 2 Ves. Sr. 299; *Marshall* v. *Berridge*, 19 Ch. Div. 233.
(*e*) *Preston* v. *Luck*, 27 Ch. Div. 497; *Stewart* v. *Kennedy*, 15 App. Ca. 108.
(*f*) *Goss* v. *Nugent*, 5 B. & Ad. 58; *Price* v. *Dyer*, 17 Ves. 364.
(*g*) *Van* v. *Corpe*, 3 My. & K. 269, 277.

Purchaser not compelled to take,—(a.) Freehold instead of copyhold;

vendor cannot compel specific performance; and in such a case, it is useless to insist that freehold is better than copyhold,—"for it is unnecessary for a "man who has contracted to purchase one thing to "explain why he refuses to accept another" (*h*); and in cases of this sort, even an express condition of sale purporting to provide that any misdescription should not annul the sale, would not cure the purchaser's objection,—*scil.* because such a condition refers to the physical condition of the property sold, and not to the tenure thereof or the title thereto (*i*).

(*b.*) Nor an underlease instead of original lease.

So also, and for the same reason, a purchaser is not compelled to take an underlease instead of an original lease (*k*); and where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was refused (*l*); and in the case of the sale of a residence and four acres of land, where it turned out that there was no title to a slip of ground of about a quarter of an acre between the house and the highroad, so that people in passing could look in at the windows, specific performance was refused (*m*). On the other hand, Secondly, in cases where the misdescription is not substantial, but is a proper subject for compensation, the court will enforce the contract at the suit of the vendor, compelling him only to make compensation to the purchaser,—*e.g.*, where there was an objection to the title to six acres out of a large estate, and these six acres did not appear material to the enjoyment of the rest (*n*), specific performance was decreed; and

Where the difference is slight, and a proper subject for compensation, the contract will be enforced with compensation,—as where acreage is deficient.

(*h*) *Ayles* v. *Cox*, 16 Beav. 23; *Knatchbull* v. *Grueber*, 3 Mer. 146; *Hart* v. *Swaine*, 7 Ch. Div. 42.
(*i*) *In re Beyfus and Masters' Contract*, 39 Ch. Div. 110.
(*k*) *Madeley* v. *Booth*, 2 De G. & Sm. 718.
(*l*) *Peers* v. *Lambert*, 8 Beav. 546.
(*m*) *Perkins* v. *Ede*, 16 Beav. 193.
(*n*) *M'Queen* v. *Farquhar*, 11 Ven. 467; *Shackleton* v. *Sutcliffe*, 1 De G. & Sm. 609.

where fourteen acres were sold as water-meadow, and twelve only answered that description, the misdescription was held to be only matter for compensation (*o*),—for generally, where the purchaser seeks specific performance, and there has been a misrepresentation as to the quantity, "*the right of the purchaser* "*is to have what the vendor can give, with an abatement* "*out of the purchase-money* for so much as the quantity "falls short of the representation" (*p*); also, where a vendor having only a partial estate in a property, enters into a contract to sell the property for the whole fee-simple estate, "it is not competent to him "afterwards to say he has not the entirety,—*and if* "*the purchaser chooses to take as much as he can have,* "*he has a right to that, and to an abatement*" (*q*). And, *nota bene*, that after conveyance of the estate, a claim for compensation can be maintained (*r*), unless there is (as there should be) a condition expressly limiting the compensation to errors or misdescriptions discovered before the date of the completion, and not afterwards,—for the compensation recoverable by the purchaser for a misdescription is often of very considerable amount (*s*). But the principle of granting compensation in lieu of rescinding the contract, in case of any error or misstatement, will never be applied where there has been fraud or wilful misrepresentation (*t*); also, where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation, although this is an objection which the courts are very unwilling to entertain (*u*). It is to

Purchaser can compel specific performance, and may at the same time insist on an abatement.

Vendor must sell what interest he has, if purchaser elect.

No compensation where there has been fraud;

nor where the compensation cannot be estimated.

(*o*) *Scott* v. *Hanson*, 1 R. & My. 128.
(*p*) *Hill* v. *Buckley*, 17 Ves. 401; *Horrock* v. *Rigby*, 9 Ch. Div. 180.
(*q*) *Mortlock* v. *Buller*, 10 Ves. 315; *Barker* v. *Cox*, 4 Ch. Div. 464; *M'Kenzie* v. *Hesketh*, 7 Ch. Div. 675.
(*r*) *Jolliffe* v. *Baker*, 11 Q. B. D. 255; *Palmer* v. *Johnston*, 13 Q. B. D. 351; *Clayton* v. *Leech*, 41 Ch. Div. 103.
(*s*) *Royal Bristol Society* v. *Bomash*, 35 Ch. Div. 390.
(*t*) *Price* v. *Macaulay*, 2 De G. M. & G. 339, 344.
(*u*) *Brooke* v. *Rounthwaite*, 5 Hare, 298.

Partial performance, not compelled where unreasonable or prejudicial to third parties.

be noted also, that the court will not, at the suit of a purchaser, compel partial performance of the contract, —where that would be unreasonable or prejudicial to third parties interested in the property (*v*); or where the deficiency as to the extent or duration of an interest contracted to be sold does not admit of compensation (*x*),—*e.g.*, where a husband and his wife contracted to convey the wife's fee-simple lands, and the wife refused to complete, the court refused to enforce the contract against the husband to the extent of his estate (*y*).

(5.) Lapse of time.

(5.) Another ground of defence to an action for specific performance is lapse of time,—in other words, that the plaintiff has not performed his part of the contract at the time specified. Formerly, time was always of the essence of the contract at law (*z*); and although a court of equity discriminated between those terms of a contract which were formal and those which were of the substance and essence of the agreement (*a*), and applying to contracts those principles which had governed its interference in relation to mortgages (*b*), held time to be *primâ facie* non-essential, and in cases where the element of time was clearly not of consequence, granted specific performance of agreements after the time for their performance had passed,—still, even in equity, there were cases where lapse of time was a bar to relief. For either (1) The time for the completion of the contract may have been originally of the essence of the contract,—and that either by the express agree-

At law, time always of the essence of the contract.

Equity guided by the nature of the case as to time.

When lapse of time a bar in equity.

(*v*) *Thomas* v. *Dering*, 1 Keen, 729; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.
(*x*) *Balmanno* v. *Lumley*, 1 V. & B. 225; *Ridgeway* v. *Gray*, 1 Mac. & G. 109.
(*y*) *Castle* v. *Wilkinson*, L. R. 5 Ch. App. 534.
(*z*) *Stowell* v. *Robinson*, 3 Bing. N. C. 928.
(*a*) *Parkin* v. *Thorold*, 16 Beav. 59.
(*b*) *Seton* v. *Slade*, 7 Ves. 273.

ment of the parties (*c*), or from the nature of the subject-matter, as in the case of reversionary interests (*d*); or (2) The time, though not originally of the essence of the contract, may have been made so by subsequent notice (*e*), such notice being reasonable (*f*); or again (3) The delay may have been so great as to evidence an abandonment of the contract, irrespectively of any express stipulations as to time (*g*),—but in none of the cases has a delay under twelve months been held, when unaccompanied by other circumstances, to amount to evidence of abandonment; and, of course, the rules of equity as to when time is or is not of the essence of the contract now prevail at law also (*h*).

Law and equity now agree.

(6.) Where there is reason to believe that a contract is tainted with fraud, the court will refuse relief (*i*),—therefore, if there has been any positive misrepresentation (*k*), or any fraudulent suppression (*l*), or if there are misleading particulars or conditions (*m*), or (in the case of sales by trustees) depreciatory conditions (*n*), equity will refuse to enforce specific performance; and the person defrauded or prejudiced may, in such cases, even

(6.) Where the plaintiff has not "clean hands," but has been tricky or fraudulent.

(*c*) *Honeyman* v. *Marryat*, 21 Beav. 24.
(*d*) *Withy* v. *Cottle*, T. & R. 78; *Walker* v. *Jeffreys*, 1 Hare, 341.
(*e*) *Taylor* v. *Brown*, 2 Beav. 180; *Macbryde* v. *Weekes*, 22 Beav. 533.
(*f*) *Crawford* v. *Toogood*, 13 Ch. Div. 153; *Hatten* v. *Russell*, 38 Ch. Div. 334.
(*g*) *Eads* v. *Williams*, 4 De G. M. & G. 691; *Mills* v. *Haywood*, 6 Ch. Div. 196.
(*h*) *Noble* v. *Edwards*, 5 Ch. Div. 378.
(*i*) *Reynell* v. *Sprye*, 1 De G. M. & G. 660; *Post* v. *Marsh*, 16 Ch. Div. 395.
(*k*) *Higgins* v. *Samels*, 2 J. & H. 460; *Farebrother* v. *Gibson*, 1 De G. & Jo. 602.
(*l*) *Drysdale* v. *Mace*, 5 De G. M. & G. 103; *Shirley* v. *Stratton*, 1 Bro. C. C. 440.
(*m*) *Brewer* v. *Brown*, 28 Ch. Div. 309.
(*n*) *Dance* v. *Goldingham*, L. R. 8 Ch. App. 902; *Dunn* v. *Flood*, 28 Ch. Div. 586.

Depreciatory conditions,—equity principles, how affected by Trustee Act, 1893.

rescind the contract (*o*). But as regards depreciatory conditions, the purchaser is not now concerned therewith after the completion of his purchase,—unless he was acting in collusion with the trustees at the date of the contract of sale; also, trustees are not now liable in any way for alleged depreciatory conditions,—unless these conditions in fact rendered the consideration for the sale inadequate; moreover, the purchaser is expressly deprived of the right of making any requisition on the ground of the conditions of sale being or appearing to be depreciatory (*p*).

(7.) Great hardship in the contract.

(7.) Although, as a general rule, inadequacy of consideration was not, except in cases of sales of reversionary interests (*q*),—and is not, except where fraud or imposition is presumed,—a ground for refusing specific performance (*r*), still, as the aid of equity in such cases is discretionary, a contract which would work a great hardship will not be enforced, but the plaintiff will be left to his remedy at law (*s*),—*scil.* for damages.

(8.) The contract involves the doing of an unlawful act, or a breach of trust.

(8.) So again, specific performance of an agreement to perform an unlawful act (*t*),—or which would involve the breach of any prior contract (*u*), or a breach of trust (*v*),—will not be enforced.

(9.) The contract is not established, because some term wanting,

(9.) Also, if the alleged contract is no contract,—that is, if it is not a complete contract as such, but is incomplete as a contract simply,—*e.g.*, for the

(*o*) *Broad* v. *Munton*, 12 Ch. Div. 131.
(*p*) 56 & 57 Vict. c. 53, s. 14.
(*q*) *Playford* v. *Playford*, 4 Hare, 546.
(*r*) *Sullivan* v. *Jacob*, 1 Moll. 477.
(*s*) *Wedgwood* v. *Adams*, 8 Beav. 103; *In re G. N. Ry. Co. and Sanderson*, 25 Ch. Div. 788.
(*t*) *Howe* v. *Hunt*, 31 Beav. 420.
(*u*) *Willmot* v. *Barber*, 15 Ch. Div. 96.
(*v*) *Sneesby* v. *Thorne*, 7 De G. M. & G. 399.

want of authority in either party to enter into it (*x*), or because it rests in negotiation merely (*y*), or (when the contract is by offer and acceptance) because the acceptance was constituted a condition, and is not an absolute or simple acceptance (*z*), or because of some condition precedent not having been performed (*a*), or from any other cause whatever (*b*), —in any of these cases, the court will not enforce specific performance of it,—because that would first be to make the contract (*c*); but a contract is, in general, not the less a contract because the parties have intended (and even stipulated) that a formal contract shall be drawn up (*d*),—unless the drawing up of such formal contract is clearly made a condition precedent to the contract becoming effective as such (*e*). Also, a mere uncertainty in the amount of the land agreed to be sold, if that uncertainty is removable upon an inquiry, will not bar the right to specific performance (*f*),—for *id certum est quod certum reddi potest;* and as regards the parties to the contract, there must of course be a sufficient certainty as to these; but the vendor is sufficiently described by being called "the proprietor" (*g*), although not if he is merely called "the vendor" (*h*); also, the contract may be made by an agent, although without authority at the time, provided there be afterwards

or some condition not fulfilled.

(*x*) *Hawksley* v. *Outram*, 1892, 3 Ch. 359.
(*y*) *Bristol Bread Co.* v. *Maggs*, 44 Ch. Div. 616; *Bellamy* v. *Debenham*, 1891, 1 Ch. 412.
(*z*) *Simpson* v. *Hughes*, W. N. 1896, p. 179; 1897, p. 26.
(*a*) *Lloyd* v. *Nowell*, 1895, 2 Ch. 744.
(*b*) *Pattle* v. *Hornibrook*, 1897, 1 Ch. 25.
(*c*) *Rossiter* v. *Miller*, 3 App. Ca. 1124; *Coombe* v. *Wilkes*, 1891, 3 Ch. 77.
(*d*) *Filby* v. *Hounsell*, 1896, 2 Ch. 744.
(*e*) *Lloyd* v. *Nowell*, supra.
(*f*) *Chattock* v. *Muller*, 8 Ch. Div. 177; *Swain* v. *Ayres*, 21 Q. B. D. 289.
(*g*) *Rossiter* v. *Miller*, supra.
(*h*) *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Jarret* v. *Hunter*, 34 Ch. Div. 182.

ratification by the principal (*i*),—the ratification coming of course in due time (*k*).

(10.) The vendor cannot make a title; or can make only a doubtful title.

And finally, (10.) If the contract relates to or comprises property to which the vendor is unable to make out his title, no decree for specific performance will, in general, be made (*l*); or if the title which he purports to make is too doubtful to be forced on a purchaser (*m*),—as used often to be (but is not now) the case when the root of title was (or is) a voluntary settlement (*n*); or if his own title to the property is dependent upon the performance by him of some condition precedent, and he has not performed same (*o*), or has even incapacitated himself from performing same or from completing (*p*); or where the validity of the vendor's title depends upon proof that full value was paid by some predecessor in title of his on the occasion of the latter's purchase (*q*). But upon the sale of a public-house with the licences attached thereto, it is sufficient if the licences are valid at the time appointed for completion (*r*); also, when the vendor is (or makes title through) an undischarged bankrupt, and the property comprised in the contract of sale is after-acquired property of the bankrupt, it appears, that, if the trustee in the bankruptcy has not yet intervened to claim the property, then, if the property is of leasehold tenure (*s*),

(*i*) *Dickinson* v. *Dodds*, 2 Ch. Div. 463; *Bolton Partners* v. *Lambert*, 41 Ch. Div. 295; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.
(*k*) *Bell* v. *Balls*, 1897, 1 Ch. 663.
(*l*) *Lawrie* v. *Lees*, 7 App. Ca. 19; *Brewer* v. *Broadwood*, 22 Ch. Div. 105.
(*m*) *Pyrke* v. *Waddingham*, 10 Ha. 1; *Sear* v. *House Property and Investment Society*, 16 Ch. Div. 387.
(*n*) *In re Briggs and Spicer's Contract*, 1891, 2 Ch. 127; *In re Carter and Kenderdine's Contract*, 1897, 1 Ch. 776.
(*o*) *Williams* v. *Brisco*, 22 Ch. Div. 441; *Nicholson* v. *Smith*, 22 Ch. Div. 640.
(*p*) *Hipgrove* v. *Case*, 28 Ch. Div. 356.
(*q*) *In re Maskell and Goldfinch's Contract*, 1895, 2 Ch. 525.
(*r*) *Tadcaster Brewery Co.* v. *Wilson*, 1897, 1 Ch. 705.
(*s*) *In re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.

or is pure personal estate (*t*), the title may be accepted,—but not if the property is of freehold tenure (*u*). However, in all cases where the defect is simply one of conveyance, and not of title, and the time fixed for completion is not of the essence of the contract, the purchaser must first have given the vendor a reasonable notice to remove the defect, before he will be justified in repudiating the contract (*v*). Moreover, the title which the purchaser may require is usually only such a title as the conditions of the sale entitle him to; but a misleading condition will not be permitted to prejudice the purchaser in this respect (*x*); and a purchaser will not be compelled to take a title which depends upon proof of the seller not having had notice of an incumbrance or restrictive covenant affecting the property sold,—for although the title may, in such a case, be really a "good holding title," still it involves,—and may result in the purchaser being embarrassed with,—a Chancery suit, and it might be very difficult for the purchaser to show in that suit that his immediate vendor had no notice of the incumbrance or restrictive covenant at the time of completing his own purchase (*y*). And where property is sold in lots to different purchasers, each lot being sold subject to covenants entered into by the purchasers restricting the use of the land, the intention, and in fact the contract, of the parties is, that each of the purchasers shall have the right of enforcing such covenants against the other purchasers; and each purchaser may sue to enforce the

"Good holding titles" and "marketable titles,"—distinguished.

A "good holding title" not forced on a purchaser.

Restrictive covenants,—non-disclosure of, effect of.

(*t*) *Cohen* v. *Mitchell*, 25 Q. B. D. 262; *Herbert* v. *Sayer*, 5 Q. B. 956; *Hunt* v. *Fripp*, W. N. 1897, p. 158; and see *In re Clark, ex parte Beardmore*, 1894, 2 Q. B. 393, explaining *Ex parte Ford*, 1 Ch. Div. 521.

(*u*) *In re New Land Co. and Gray*, 1892, 2 Ch. 138.

(*v*) *Hatten* v. *Russell*, 38 Ch. Div. 334.

(*x*) *In re Hall-Dare's Contract*, 21 Ch. Div. 41; *De Burgh Lawson* v. *De Burgh Lawson*, 41 Ch. Div. 568.

(*y*) *Nottingham Co.* v. *Butler*, 16 Q. B. D. 778.

covenants accordingly (*z*); therefore, where a subsequent purchaser from one of the original purchasers contracts for a fee-simple estate free from incumbrances, he may, on discovering the existence of the covenant, not only reject the title, but also recover back his deposit (*a*),—*scil.*, before completion.

Conditions excluding compensation for a deficiency of acreage,—construction of.

In contracts for the sale of land, it is not unusual to insert a condition that the lots are believed to be correctly described as to quantity, and that no compensation shall be either paid or received for or in respect of any discrepancy in the acreage; and in such a case, if a very considerable deficiency in the acreage is discovered before completion, the purchaser sometimes insists upon compensation for the deficiency notwithstanding the condition, and at other times seeks to repudiate the contract altogether on the ground of the deficiency,—alleging that the condition was intended to refer merely to slight discrepancies of acreage, and that the condition, if it should be held to extend to cover a considerable deficiency, would be an engine of fraud (*b*). In such cases, the rule of the court appears to be, that the purchaser cannot enforce specific performance with compensation; and on the other hand, that the vendor cannot enforce specific performance without compensation (*c*), but may (under the usual condition in that behalf) annul the contract,—for otherwise, in a great many cases (the discrepancy, although considerable, not affecting the real value of the property), the purchaser would himself be making use of the principles of the court to effect a fraud on the vendor (*d*).

(*z*) *Collins* v. *Castle*, 36 Ch. Div. 243; *Re Cox and Neave's Contract*, 1891, 2 Ch. 109; *Re Allday's Contract*, 1893, 1 Ch. 342.

(*a*) *Reeve* v. *Berridge*, 20 Q. B. D. 523; *In re White and Smith's Contract*, 1896, 1 Ch. 637.

(*b*) *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603.

(*c*) *In re Terry and White's Contract*, 32 Ch. Div. 14; *In re Fawcett and Holmes's Contract*, 42 Ch. Div. 150.

(*d*) *Whittemore* v. *Whittemore*, supra.

When the court has decreed specific performance, it will direct the conveyance in execution of the contract to be settled in chambers, in case the parties should differ as to the same, or as to any open clause therein (*e*),—but any such open clause, if sufficiently in issue on the pleadings, will be decided by the court itself at the trial of the action. Also, possession is not usually given pending a suit for specific performance; and the vendor, remaining in possession until completion, is (to some extent at least) a trustee for the purchaser, and must preserve the estate (*f*); and if the purchaser has obtained possession before the suit commenced, he is then (in the ordinary case) given his option either to go out of possession or to pay the purchase-money into court (*g*); but, under special circumstances, he will not be allowed this option,—*e.g.*, if he has, while in possession, diminished the value of the property (*h*); and in such a case, he will be required to pay the agreed purchase-money into court (*i*). But possession may always be given upon terms (*k*); and a public company, by pursuing the terms prescribed by the Lands Clauses Act, 1845, may always obtain immediate possession of the land comprised in their notice; but if the company do not pursue those terms, but contract for the purchase in the ordinary way, they will be in the same position as any other purchaser, and will not be entitled (save upon agreed terms) to have possession given to them pending the vendor's action for specific performance (*l*). And regarding the effect of taking possession, it may be stated generally, that (subject to anything to the

Conveyance,—when to be settled by the court.

Possession not usually given, pending suit for specific performance.

On what terms given.

Possession,—effect of taking, pend-

(*e*) *Hart* v. *Hart*, 18 Ch. Div. 670.
(*f*) *Clarke* v. *Ramuz*, 1891, 2 Q. B. 456.
(*g*) *Greenwood* v. *Turner*, 1891, 2 Ch. 144.
(*h*) *Pope* v. *Great Eastern Railway Company*, L. R. 3 Eq. 171.
(*i*) *Lewis* v. *James*, 32 Ch. Div. 326.
(*k*) *Cook* v. *Andrews*, 1897, 1 Ch. 266.
(*l*) *Bygrave* v. *Metropolitan Board of Works*, 32 Ch. Div. 147.

ing completion of contract.

contrary in the conditions of sale, or in the special terms agreed on) the purchaser becomes liable to all outgoings,—*e.g.*, charges for street improvements (*m*); and, unless there has been wilful default by the vendor (*n*), he must pay interest on his unpaid purchase-money, even although the property should be untenanted or otherwise producing no rent (*o*); and such taking of possession, unless otherwise specially guarded, amounts to an acceptance of the title; and under a sale by the court, the taking of possession is always an implied acceptance of the title (*p*).

Repudiation of contract by purchaser,—effect of.

The purchaser may, in a proper case, repudiate the contract for sufficient cause,—and in general on any one of the grounds above particularised for resisting the specific performance thereof (*q*); and the purchaser will, in such a case, be entitled in general to the return of his deposit (*r*); but if the purchaser should repudiate the contract without any sufficient cause, he will be liable to the vendor in damages (assuming that the vendor should prefer such damages to enforcing specific performance); and the purchaser's deposit will, in such latter case, be also forfeited,—whether the repudiation be express, or be only implied from the purchaser's conduct (*e.g.*, his long delay), and although the contract should not expressly provide for such forfeiture, or should provide in the usual way that the deposit shall be in part payment of the purchase-money (*s*). On the

(*m*) *Midgeley* v. *Coppock*, 4 Exch. Div. 309; *Tubbs* v. *Wynne*, 1897, 1 Q. B. 74.

(*n*) *Re Helling and Merton's Contract*, 1893, 3 Ch. 269; *Re Mayor of London and Tubbs' Contract*, 1894, 2 Ch. 524; *Re Wilson and Stevens' Contract*, 1894, 3 Ch. 546.

(*o*) *Ballard* v. *Strutt*, 15 Ch. Div. 122.

(*p*) *In re Gloag and Miller's Contract*, 23 Ch. Div. 320.

(*q*) *Brewer* v. *Brown*, 28 Ch. Div. 309.

(*r*) *In re Terry and White's Contract*, 32 Ch. Div. 14.

(*s*) *Howie* v. *Smith*, 27 Ch. Div. 89; *Soper* v. *Arnold*, 14 App. Ca. 429.

Rescission of contract by vendor,—right of.

other hand, a vendor occasionally (and in fact usually) reserves to himself, by express condition of sale in that behalf, a right to rescind the contract, in case the purchaser takes any objection or makes any requisition which the vendor is either unable or unwilling to comply with; and the vendor is justified in inserting such a condition of sale in the contract; and he may or may not make the exercise of his right of rescission dependent upon the purchaser's withdrawing or not the objection or requisition (*t*); he may not, however, under such a condition, "play fast and loose,"—as, *e.g.*, by holding his right of rescission in suspense, while negotiating with some third person for the sale (*u*); nor may he rescind, under such a clause, after judgment on summons under the Vendor and Purchaser Act, 1874, to be presently mentioned (*v*); and a mere difference between the vendor and the purchaser as to the form of the conveyance is not a ground for rescission,—where, at all events, the condition of sale does not expressly give the right in such a case (*x*); and it would not be proper to make any such condition, at least as a general rule (*y*).

Rescission, or compensation, —at suit of purchaser.

For discovery of a defect in title, when the defect consists of restrictive covenants and conditions affecting the user of the land, the purchaser's obvious remedy is to rescind the contract (*z*); but he may,—or at all events, he sometimes may,—have specific performance together with an abatement of his purchase-money (*a*),—for he would, after completion of his

(*t*) *In re Dames and Wood's Contract*, 29 Ch. Div. 626; *Ashburner* v. *Sewell*, 1891, 3 Ch. 405.
(*u*) *Smith* v. *Wallace*, 1895, 1 Ch. 385.
(*v*) *Arbib and Class's Contract*, 1891, 1 Ch. 601.
(*x*) *In re Monckton and Gilzean*, 27 Ch. Div. 555.
(*y*) *Hardman* v. *Child*, 28 Ch. Div. 712.
(*z*) *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159; *In re Davis and Carey*, 40 Ch. Div. 601.
(*a*) *Westmacott* v. *Robins*, 4 De G. F. & Jo. 390; and see *Nelthorpe* v. *Holgate*, 1 Coll. 203.

contract, be entitled in the general case to damages (*b*); and allowing an abatement of the purchase-money is merely giving the damages beforehand.

The Companies Act, 1862, s. 100,—remedy under.

Occasionally the remedy of specific performance may be obtained without the delay and expense of an action; for, under the 100th section of the Companies Act, 1862, relief that is substantially specific performance may be obtained on a mere summons, where the company is in liquidation (*c*); also, by the Vendor and Purchaser Act, 1874 (*d*), s. 9, upon a sale of real or leasehold estate, the vendor or the purchaser (or their representatives) may apply (on summons in the Chancery Division) regarding any requisitions on, or objections to, the title to the property sold, or regarding any claim to compensation, or generally regarding any other question arising out of or connected with the contract,—not being a question affecting the existence or *initial* validity (*e*) of the contract; and the judge may, on the hearing of the summons, make such order "as to him shall appear just;" and under these provisions, the court has power not only to answer and decide the specific question or questions submitted to it (*f*), but to direct such things to be done as are the natural consequences of that decision; therefore, when the court decides that the vendor has not shown a good title, it can go on and direct the vendor to return to the purchaser his deposit (*g*), with interest thereon (*h*), and also to pay the pur-

The Vendor and Purchaser Act, 1874, s. 9,—remedial jurisdiction under, and extent thereof.

(*b*) *Gray* v. *Briscoe*, Noy, 142.
(*c*) *In re Oakwell Collieries Co.*, 7 Ch. Div. 706.
(*d*) 37 & 38 Vict. c. 78.
(*e*) *In re Jackson and Woodburn's Contract*, 37 Ch. Div. 44.
(*f*) *In re Ebsworth and Tidy's Contract*, 42 Ch. Div. 23.
(*g*) *In re Hargreaves and Thomson's Contract*, 32 Ch. Div. 454; *Bryant and Barningham's Contract*, 44 Ch. Div. 218; *Thompson and Holt's Contract*, ib. 492.
(*h*) *In re Riley and Streatfield's Contract*, 34 Ch. Div. 386.

chaser's costs (*i*) of investigating the title,—*scil.* where the conditions of sale do not otherwise provide (*k*); and the court may also apparently rescind the contract on the ground of some partial defect in the title, where that is determined on the hearing of the summons (*l*),—*scil.* unless the conditions of sale expressly exclude this right (*m*); and where the court is not able to rescind on such latter ground,—the conditions of sale having excluded the right,—then the court may (in an action for specific performance) refuse to decree specific performance at the suit of the vendor (*n*). However, the court cannot, on a vendor and purchaser's summons,—but only (if at all) in an action properly instituted,—award damages, properly so called, for breach of the contract (*o*).

(*i*) *In re Higgins and Percival's Contract*, W. N. 1888, p. 172; *Pearl Life* v. *Buttenshaw*, W. N. 1893, p. 123.

(*k*) *Bowman* v. *Hyland*, 8 Ch. Div. 588; *In re Higgins and Hitchman's Contract*, 21 Ch. Div. 95; *In re N. P. Bank and Marsh*, 1895, 1 Ch. 190; *In re Scott and Alvarez's Contract*, 1895, 2 Ch. 603.

(*l*) *Stone* v. *Smith*, 35 Ch. Div. 188; *Kingdon* v. *Kirk*, 37 Ch. Div. 141; *In re Lander and Bagley's Contract*, 1892, 3 Ch. 41.

(*m*) *In re Scott and Alvarez's Contract*, supra.

(*n*) *In re Scott and Alvarez's Contract*, supra.

(*o*) *In re Wilson* v. *Stevens*, 1894, 3 Ch. 546.

CHAPTER X.

INJUNCTION.

Definition.

AN injunction is an order (and used to be a writ issuing under an order) of a court of law or equity, —an order (or writ) remedial, the general purpose of which is, to restrain the commission or continuance of some wrongful act of the party enjoined,—the writ (or order) being generally preventive and protective rather than restorative; although it may also, in exceptional cases, be restorative or mandatory (*a*), and that even on an interlocutory application (*b*),—*e.g.*, when the wrongful act has been done hurriedly, after due warning and in anticipation of the injunction (*c*); and this writ was, and the order in the nature of such writ still is, peculiarly an instrument of the Chancery Division, though there were some few cases where courts of law, even before the Judicature Acts, were accustomed to exercise analogous powers,—as by the writs of prohibition and of estrepement in cases of waste (*d*). The cases, however, to which these common law processes were applicable were so few, that the jurisdiction at law fell practically into disuse; and the jurisdiction in equity to grant an injunction came to be so well established, that the suitor who made out his right to an injunction could not (it was said) be compelled to accept

Its object is preventive rather than restorative.

Jurisdiction of equity arose from want of adequate remedy at law.

(*a*) *Shiel* v. *Godfrey*, W. N. 1893, p. 115; *Allinson* v. *General Medical Council*, 1894, 1 Q. B. 750.
(*b*) *Daniel* v. *Ferguson*, 1891, 2 Ch. 27.
(*c*) *Van Joel* v. *Hornsey*, 1895, 2 Ch. 774.
(*d*) *Jefferson* v. *Bishop of Durham*, 1 Bos. & P. 105.

of damages instead (*e*),—a matter to be more particularly referred to hereafter.

Two classes of injunctions prior to Judicature Acts.

The cases in which equity interfered by injunction were usually classed under two heads, as being either (1.) Cases of injunction to prevent the inequitable institution or continuance of judicial proceedings; or (2.) Cases of injunction to restrain wrongful acts unconnected with judicial proceedings; but now, under the Judicature Act, 1873 (*f*), sect. 24, sub-sect. 5, no cause or proceeding pending in the High Court of Justice or before the Court of Appeal shall be restrained by injunction, excepting in a winding-up proceeding after order made (*g*),—and the Court of Bankruptcy, being now a division of the High Court, can no longer restrain any such action or proceeding (*h*); but every matter of equity, which would formerly have been a ground for an injunction, either absolute or conditional, may now be pleaded as a defence to the action; and the court or division before which the action is pending may direct a stay of proceedings in the action, either general or interim, or may make such other order, by injunction (*i*) or otherwise, as shall appear to be just. However, an action not pending but only contemplated in the High Court (*k*), or pending in a foreign court (*l*), may still, the case being otherwise proper, be prevented or stopped by injunction. And by the same Act, sect. 25, sub-sect. 8, an injunction may be granted, by an interlocutory order of the court, in all cases in which it shall appear to the court to be "*just or convenient*" that such order should be made;

Judicature Acts, the changes effected by.

Continuing powers of court to grant injunctions against legal proceedings;

(*e*) *Krehl* v. *Burrell*, 11 Ch. Div. 146; *Martin* v. *Price*, 1894, 1 Ch. 276.
(*f*) 36 & 37 Vict. c. 66.
(*g*) *In re Landore Siemens Steel Co.*, 10 Ch. Div. 489.
(*h*) *In re Barnett*, 15 Q. B. D. 169; Bankruptcy Act, 1883, s. 93.
(*i*) *Newton* v. *Newton*, 1896, p. 36.
(*k*) *Cercle Restaurant* v. *Lavery*, 18 Ch. Div. 555.
(*l*) *In re Hermann Loog*, 36 Ch. Div. 502.

and the order may be either with or without any conditions,—and either before, or at, or after, the trial of the action,—against any threatened or apprehended waste or trespass (*m*), and whether or not the person enjoined is in possession under any claim of title or otherwise, or (not being in possession) claims the right merely to do the act in question, and irrespectively of the circumstance of the estates of the parties, or of any or either of them being legal or equitable. And, accordingly, an injunction will now be granted, although a *mandamus* (*e.g.*) or a *quo warranto* would be more appropriate (*n*). But the Act has not given power to issue an injunction in a case where, prior to the Act, no court had any jurisdiction in that behalf; therefore, the court has no jurisdiction, to restrain (*e.g.*) a party from proceeding with an arbitration *in a matter beyond the agreement to refer*, although such an arbitration may (by reason of the defect in question) be futile and vexatious (*o*); and the court has not even jurisdiction, to restrain a party from proceeding without any authority whatever in an arbitration in the name of another (*p*),—*scil.* because the objection may be taken, and much more conveniently taken (*q*), in an action or other proceeding in court to enforce the award; but it would (or might) be different if the agreement of reference itself was impeached (*r*).

also, continuing limits to such powers.

Instead of injunction of first class, an order now to

In consequence of these provisions of the Judicature Act, 1873, injunctions properly so called now fall for the most part under one head only, that is

(*m*) *Foxwell* v. *Van Grutten*, 1897, 1 Ch. 64,—*Earl Talbot* v. *Hope-Scott*, 4 K. & J. 96, having now ceased to be law.

(*n*) *Aslatt* v. *Southampton (Corporation)*, 16 Ch. Div. 143; *Richardson* v. *Methley School Board*, 1893, 3 Ch. 510.

(*o*) *North London Railway Co.* v. *G. N. Railway Co.*, 11 Q. B. D. 30.

(*p*) *London and Blackwall Railway Co.* v. *Cross*, 31 Ch. Div. 354; *Farrar* v. *Cooper*, 44 Ch. Div. 323.

(*q*) *Day* v. *Brownrigg*, 10 Ch. Div. 294.

(*r*) *Kitts* v. *Moore*, 1895, 1 Ch. 253.

to say, the second of the two heads above mentioned; and all orders in the nature of an injunction against proceedings pending in the common law courts, which prior to the Act fell under the first of these two heads, would now be orders staying proceedings merely,—or such other orders or judgments as the court of equity would itself have made if it had had the cognisance of the actions (*s*). And having premised that much, we propose to state, Firstly, the cases in which formerly an injunction would have issued, but now only a stay of proceedings or some other like remedial order will be made: and, Secondly, the cases in which an injunction properly so called may still issue; but before entering upon the details of the matter, it should be stated, that a court of equity, in granting an injunction against proceedings in a court of common law, was in no sense restraining those courts in the exercise of their jurisdiction,—the injunction being directed *only to the parties*, and being granted on the sole ground that, from certain equitable circumstances of which the court of law had not cognisance, it was against conscience that the party inhibited should proceed in the cause; and upon the same principle, although the courts of one country have no authority to stay proceedings in the courts of another country, yet where the parties are within the jurisdiction, a court of equity will, in a proper case, restrain either party from proceeding in the foreign suit,—not pretending to direct or control the foreign court, but considering the equities between the parties, and decreeing *in personam* according to those equities, and also enforcing obedience to the decree by process *in personam* (*t*).

stay proceedings, or for transfer, or other remedial order.

The old injunction in equity did not interfere with the jurisdiction of the common law courts.

Courts of equity might restrain proceedings in a foreign court, if the parties were within their jurisdiction and still may do so.

(*s*) *Wright* v. *Redgrave*, 11 Ch. Div. 24.

(*t*) *Earl of Oxford's Case*, 2 L. C. 548; *Portarlington* v. *Soulby*, 3 My. & K. 106; *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416–437; *De Sousa* v. *British South Africa Co.*, 1892, 2 Q. B. 358.

1. Injunctions for which a stay of proceedings, or other remedial order, now substituted.

Firstly, Injunctions to restrain legal proceedings,—and in which (at the present day) a stay of proceedings or other like remedial order would be made in the action.

(1.) Equity restrained proceedings on an instrument obtained by fraud or undue influence; and now a stay of proceedings may be directed in such a case, or other relief given.

(1.) Where an instrument had been obtained by fraud or undue influence, the court of equity would restrain proceedings at law on it. Thus, where a young man, an officer in the army, soon after coming of age, became liable upon bills of exchange, for the accommodation of his superior officer, to the defendant, a money-lender by profession; and upon negotiations for getting in the bills, the defendant agreed to postpone them for twelve months, and induced the plaintiff, upon representations of his trouble and expense in procuring the postponement of the bills, to give him a further promissory-note,—the court, not finding in the answer a satisfactory explanation of these transactions, sustained an injunction against the defendant proceeding at law upon his securities (*u*); and in such a case, the High Court would now entertain the equitable defence. Again, (2.) If an executor or administrator had been in possession of abundant assets to pay all the debts of the deceased, and by an accidental fire or by a robbery, *without any default on his part*, a great portion of them was destroyed, so that the estate became insolvent,—in such a case, the executor might have been sued by a creditor at law, and would have had no defence,—for when he once became chargeable with the assets at law, he was for ever chargeable, notwithstanding any intervening casualties; but courts of equity would have restrained proceedings at law in cases of this sort, upon the purest principles of justice (*v*); and now the Queen's Bench Division also would, in

(2.) Where assets had been lost by an executor or administrator without his default, equity restrained proceedings at law by creditors; and now a stay of proceedings, or a transfer, may be directed in such a case.

(*u*) *Lloyd* v. *Clarke*, 6 Beav. 309; *Tyler* v. *Yates*, L. R. 11 Eq. 265.
(*v*) *Crosse* v. *Smith*, 7 East. 258; *Croft* v. *Lyndsey*, Freem. Ch. 1.

such a case, either stay the proceedings, or give judgment for the plaintiff to the extent only of the assets not destroyed (*x*). So again, (3.) Where any party had the full equitable title, a plaintiff who had a dry legal title would have been restrained from pursuing that dry legal title in a court of common law; therefore, where, as in *Newlands* v. *Paynter* (*y*), personal chattels were bequeathed to a single woman for her separate use, and upon her subsequent marriage,—the effect of which was to vest the legal estate in the husband,—the chattels were taken in execution for a debt of the husband, as being the legal owner,—an injunction was issued to restrain any sale under the execution (*z*); and now a court of law would itself stay the execution against the wife's property, or would limit the scope of the execution to what was the husband's own beneficial property. (4.) Where there had been a decree (upon a creditor's bill) for the administration of an estate, inasmuch as that decree was in equity a judgment for all the creditors, if a bond creditor should thereafter have sued at law, the court of equity would have restrained him from proceeding in his suit (*a*); and now the court of law would probably stay the action, or else direct it to be transferred into the Chancery Division (*b*); and the Chancery Division could itself direct the transfer (*c*). (5.) A party would not have been permitted to sue for the same thing and for the same purpose in equity as well as in another court, but would have been put to his election to

(3.) A party who had only an equitable title, protected against one who had a bare legal title.

(4.) Injunction on a creditor's action for administration.

(5.) A party cannot bring several suits for one and the same purpose.

(*x*) *Job* v. *Job*, 6 Ch. Div. 562; *Mayer* v. *Murray*, 8 Ch. Div. 424.
(*y*) 4 My. & Cr. 408; *Ex parte Whitehouse*, 32 Ch. Div. 512.
(*z*) *Langton* v. *Horton*, 3 Beav. 464; *Ex parte Whitehead*, 14 Q. B. D. 419.
(*a*) *Morrice* v. *Bank of England*, Cas. t. Talb. 217; *Burles* v. *Popplewell*, 10 Sim. 383.
(*b*) Disting. *Crowle* v. *Russell*, 4 C. P. Div. 186; and see *In re Boyse*, *Crofton* v. *Crofton*, 15 Ch. Div. 591.
(*c*) Order xlix. Rule 5 (1883); *Etheridge* v. *Womersley*, 29 Ch. Div. 557.

(6.) Equity protected its own officers, who executed the processes of the court.

sue in one or the other (*d*). (6.) Courts of equity would have granted an injunction to protect their own officers, who executed their processes, against any suits brought against them for acts done under or by virtue of such processes,—the ground for this assertion of the jurisdiction being, that courts of equity would not suffer their processes to be examined by any other courts; for if the processes were irregular, it was the duty of the courts of equity themselves to apply the proper remedy (*e*); and the courts of law would always have done the like,—so that, as regards this matter, law and equity already agreed before the Judicature Acts were passed.

In what cases equity would not stay proceedings at law.

(1.) In criminal matters, or in matters not *purely civil.*

There were, however, cases in which courts of equity would not have exercised any jurisdiction by way of injunction to stay proceedings at law; for they would not have interfered to stay proceedings in any criminal matter, or in cases not strictly of a civil nature; and they would not, as a general rule, have restrained actions of libel,—*for these were, in fact, actions exclusively appropriate to the courts of common law, where a jury could be had* (*f*). But if the parties seeking redress by criminal proceedings were also the plaintiffs in equity, the court would have restrained them from proceeding with the criminal prosecution (*g*); and when a petition has been presented for the winding up of a company, all criminal proceedings against the company may be restrained by injunction (*h*). Further, a court of equity had no jurisdiction, to relieve a plaintiff against a judgment at law where the case in equity rested upon a ground

(2.) Where the ground of defence was equally available at law,

(*d*) *Vaughan* v. *Welsh*, Mos. 210; *Gedge* v. *Montrose*, 5 W. R. 537.
(*e*) *May* v. *Hook*, 2 Dick, 619; *Walker* v. *Micklethwait*, 1 Dr. & Sm. 49; *Re James Campbell*, 3 De G. M. & G. 585.
(*f*) *Prudential Assurance Co.* v. *Knott*, L. R. 10 Ch. App. 142.
(*g*) *Mayor of York* v. *Pilkington*, 2 Atk. 302; *Hedley* v. *Bates*, 13 Ch. Div. 498; *Maynard* v. *East London Waterworks*, 28 Ch. Div. 138.
(*h*) *In re Briton Medical and General*, 32 Ch. Div. 503.

equally available at law and in equity,—unless the plaintiff could establish some special equitable ground for relief (*i*); and after equitable defences could be pleaded at common law under the Common Law Procedure Act, 1854, still less would equity in such cases have given relief (*k*),—for it was no ground for equitable interference, that a party had not effectually availed himself of a defence of law, or that a court of law had erroneously decided a point of law (*l*); and, as observed by Lord Redesdale (*m*),—"If "a matter has already been investigated in a court "of justice, according to the common and ordinary "rules of investigation, a court of equity cannot take "on itself to enter into it again." However, inasmuch as under the Common Law Procedure Act, 1854 (*n*), the equitable plea, in order to be admissible at all, must have amounted to a complete defence on the merits, therefore, where the defendant would have been only entitled to some modified relief, he had still to resort to equity,—for, as observed by Blackburn, J. (*o*), "Under the Common Law Pro-"cedure Act, 1854, although we have jurisdiction "to entertain equitable defences, we can only allow "such pleas to be pleaded as, if proved, would be a "*simple bar* to the action, and would entitle the "defendant to the common law judgment, 'that the "plaintiff take nothing by his writ, and that the "defendant go thereof without day,'—*which would in "effect be equivalent to a perpetual injunction in a court "of equity.*" Moreover, even in cases where there was an equitable defence at law, the defendant could not have been compelled to plead it, but might at once

and had not been taken or maintained there.

As a rule, a matter duly adjudicated on by a common law court could not be reopened in equity.

Equitable defences allowed at common law, under Common Law Procedure Act, 1854; but only in cases in which courts of equity would have granted an unconditional and perpetual injunction.

Defendant could not be compelled to

(*i*) *Harrison* v. *Nettleship*, 2 My. & K. 423.
(*k*) *Farebrother* v. *Welchman*, 3 Drew. 122.
(*l*) *Simpson* v. *Howden*, 3 My. & Cr. 108; *Ware* v. *Horwood*, 14 Ves. 31.
(*m*) *Bateman* v. *Willes*, 1 Sch. & Lef. 204.
(*n*) 17 & 18 Vict. c. 125, s. 83.
(*o*) *Jeffs* v. *Day*, L. R. 1 Q. B. 374.

plead an equitable defence at law.

have come into equity for an injunction to restrain the action,—for the Common Law Procedure Act, 1854, was only permissive (*p*); but since the Judicature Acts, this option is (in effect) taken away; and the defendant at law may now plead equitable defences of every kind and degree of weight; and he *must*, in fact, do so if he would avail himself of them at all,—and certainly he cannot now come into equity to restrain the action on any such grounds. Also, when there has been an agreement to refer to arbitration, and such agreement is still subsisting (*q*), an order staying the action may now be made in a proper case (*r*), section 11 of the Common Law Procedure Act, 1854, requiring (and section 4 of the Arbitration Act, 1889, authorising) the court to stay the action in such a case. Moreover, a statute referring matters to arbitration is sometimes imperative, and not merely directory; and in such a case, the ordinary jurisdiction is excluded (*s*); but where the statute is not imperative,—or in the absence of any statute bearing upon the matter, and, of course, also where the dispute is paramount to the statute or to the submission (*t*),—the ordinary jurisdiction of the court is not ousted by the agreement to refer (*u*); and the statute referring matters to arbitration may itself contain an express exception of certain matters, it having been provided, *e.g.*, in the case of Building Societies, by the Building Societies Act, 1884 (47 & 48 Vict. c. 42),—a statute which has since been amended by the Building Societies Act, 1894 (57 & 58 Vict. c. 47),—that the agreements of all such societies with

References,—when and when not substituted for actions.

The reference, when by particular statute, may, or may not, be imperative.

(*p*) *Gompertz* v. *Pooley*, 4 Drew. 453.
(*q*) *Deutsche Gesellschaft* v. *Briscoe*, 20 Q. B. D. 177.
(*r*) *Willesford* v. *Watson*, L. R. 14 Eq. 572; *Lyon* v. *Johnson*, 40 Ch. Div. 579; *Turnock* v. *Sartoris*, 43 Ch. Div. 150; *Pini* v. *Roncoroni*, 1892, 1 Ch. 633; *Ives* v. *Willans*, 1894, 2 Ch. 478.
(*s*) *Caledonian R. C.* v. *Greenock R. C.*, L. R. 2 Ho. Lo. Sc. 347; *Norton* v. *C. C. Building Society*, 1895, 1 Q. B. 246.
(*t*) *Willis* v. *Wells*, 1892, 2 Q. B. 225.
(*u*) *Street* v. *Rigby*, 6 Ves. 821; *Barnes* v. *Youngs*, 1898, W. N. p. 11.

their own members to submit disputes to arbitration shall be in force *only as between such members in their capacity of members and the society*, and shall not (unless the rules of the society expressly so provide) extend to disputes affecting either members or third parties as to the construction or effect of mortgages, deeds, and contracts—regarding all which latter disputes, the jurisdiction of the ordinary tribunals is to be available at the option of the member or third party (*v*).

2. Injunctions against wrongful acts of a special nature.

Secondly, Injunctions to restrain wrongful acts unconnected with judicial proceedings, and being either (1.) Injunctions to enforce a contract (express or implied), or to forbid a breach thereof; or (2). Injunctions to prevent a tort, that is to say, a wrong independent of contract. And (1.) With reference to injunctions to enforce a contract or to forbid a breach thereof, the jurisdiction of equity may be said to be co-extensive with its power to compel specific performance,—for whatever duty a court of equity will compel a party to perform, it will restrain him from neglecting to perform; and conversely, if the contract is not specifically enforceable, the court will not by injunction restrain the breach thereof (*x*). And yet in many cases where, from the nature of the subject-matter, the court does not decree specific performance, it will grant an injunction to restrain the doing of an act contrary to the tenor of the contract,—*e.g.*, where, as in *Catt* v. *Tourle* (*y*), the plaintiff, a brewer, sold a piece of land to the trustees of a freehold land

(1.) Injunction in cases of contract.

Supplemental to the jurisdiction to compel specific performance.

(*v*) *Western Suburban Building Society* v. *Martin*, 17 Q. B. D. 609; *Municipal Society* v. *Richards*, 39 Ch. Div. 372; *Christie* v. *Northern Counties Building Society*, 43 Ch. Div. 62; *In re Knight and Tabernacle Building Society*, 1891, 2 Q. B. 63.

(*x*) *Davies* v. *Makuna*, 29 Ch. Div. 596.

(*y*) L. R. 4 Ch. App. 654; *Tulk* v. *Moxhay*, 2 Phill. 774; *Spicer* v. *Martin*, 14 App. Ca. 12; *White* v. *Southend Hotel Co.*, 1897, 1 Ch. 767.

society, who covenanted that he should have the exclusive right of supplying beer to any public-house erected on the land so sold; and the defendant, who was a member of the society and a brewer, acquired a portion of the land, *with notice of the covenant*, and erected on it a public-house, which he supplied with his own beer,—on a bill filed to restrain the defendant from supplying his own beer, *the court held, that the covenant, though in terms positive, was in substance negative, and granted an injunction accordingly* (*z*); and such injunction will, in a proper case, be granted even against a mere occupier (*a*). For note, that in all this class of cases, the notice obtained prior to the completion of the purchase binds the purchaser to observe the restrictive covenant (*b*); and for this purpose constructive notice is sufficient; and the purchaser of a lease containing restrictive covenants (*c*), or an intending sub-lessee deriving his term under the original lease (*d*),—although, if before signing his agreement for the purchase or sub-lease, he has not had an opportunity of reading the lease, he will not be compellable to complete his purchase or to accept the sub-lease (*e*),—still, if he do in fact complete his purchase or accept the sub-lease, he will become bound by all the restrictive covenants, *scil.* because, *quoad* the person or persons entitled to enforce such covenants, he is taken to have had notice of the covenants. But restrictive covenants of the character which would usually be enforced by injunction may have been, and frequently are, discharged,—by, *e.g.*, a per-

Restrictive covenants, notice of,—effect of, before and after completion of contract.

Restrictive covenants,—may have been discharged;

(*z*) *Edwick* v. *Hawkes*, 18 Ch. Div. 199; *Werderman* v. *Société Générale d'Electricité*, 19 Ch. Div. 246; *Austerberry* v. *Oldham (Corporation)*, 29 Ch. Div. 750; *Fily* v. *Ilcs*, 1893, 1 Ch. 77; *White* v. *Southend Hotel Co.*, 1897, 1 Ch. 767.

(*a*) *Mander* v. *Falcke*, 1891, 2 Ch. 554.

(*b*) *In re White and Smith's Contract*, 1896, 1 Ch. 627.

(*c*) *Reeve* v. *Berridge*, 20 Q. B. D. 523.

(*d*) *Hyde* v. *Warden*, 3 Exch. Div. 72; and see *Knight* v. *Simmonds*, 1896, 1 Ch. 653; 2 Ch. 294.

(*e*) *In re White and Smith's Contract*, supra.

manent alteration in the character of the property or of the neighbourhood (*a*); but the restrictive covenants, if suspended only, may be afterwards revived, and an injunction obtained against their subsequent breach (*b*); but it rather appears, that restrictive covenants are discharged altogether, where the land subject thereto is acquired (whether compulsorily or by agreement) by public bodies (*e.g.*, by a school board) under the provisions of the Lands Clauses Consolidation Act, 1845 (*c*),—compensation for the injurious affection being substituted in such a case. There are also cases in which the restrictive covenants have never attached to a particular property,—the circumstances attending the original acquisition of such property showing that it was not to be bound thereby,—*e.g.*, the restrictive conditions applicable generally to the plots into which a building estate in process of development has been divided on the estate plan, may not in the particular case be applicable (*d*); and sometimes the owner of such an estate expressly reserves to himself the right of relaxing these conditions in particular instances,—which is a highly salutary precaution; and, of course, no injunction would be obtainable in such latter cases.

or may never have attached.

It is evident, that where a contract capable of being enforced in equity is a negative contract, the most natural mode of its enforcement is by means of an injunction (*e*); and where, as in *Martin* v. *Nutkin* (*f*), an agreement was entered into between

Injunction a mode of specific performance of negative agreements.

(*a*) *Bedford* (*Duke*) v. *British Museum*, 2 My. & K. 552; *Sayers* v. *Collyer*, 28 Ch. Div. 103; *Knight* v. *Simmonds*, supra.
(*b*) *Bird* v. *Eggleton*, 29 Ch. Div. 1012; *Tendring Union* v. *Dowton*, 1891, 3 Ch. 265.
(*c*) *Kirby* v. *Harrogate School Board*, 1896, 1 Ch. 437.
(*d*) *Master* v. *Hansard*, 4 Ch. Div. 718; *Tucker* v. *Vowles*, 1893, 1 Ch. 195.
(*e*) *Lumley* v. *Wagner*, 1 De G. M. & G. 615; *Lybbe* v. *Hart*, 29 Ch. Div. 8; *Hunt* v. *Hunt*, 1897, 2 Q. B. 304.
(*f*) 2 P. Wms. 266.

the plaintiffs (who resided very near the parish church of Hammersmith) of the one part, and the parsons, churchwardens, overseers, and certain inhabitants of the parish, of the other part,—by which the plaintiffs covenanted to erect a new cupola, clock, and bell to the church; and the parties of the second part covenanted, that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung at that hour during the lives of the plaintiffs and the life of the survivor of them,—the agreement was specifically enforced against the parish authorities by means of an injunction against ringing the bell in breach of the agreement. And the inability of equity to compel the specific performance of one part of an agreement is not *per se* a ground for its refusing to grant an injunction against the breach of another part of the same agreement; therefore, in *Lumley* v. *Wagner* (*g*), where J. W. agreed with W. L. to sing at B. L.'s theatre during a certain period of time, *and not to sing elsewhere* (*h*), during that period, without his written authority, the court granted an injunction against J. W. singing at a rival theatre,—the Lord Chancellor observing (in effect), that to the affirmative agreement on J. W.'s part "to sing," there was superadded a negative "stipulation on her part to abstain from the com-"mission of any act which would break in upon her "affirmative covenant; and although I have not "the means of compelling her to sing, still she has "no cause of complaint, if I compel her to abstain "from a breach of her negative engagement; and "possibly I may in that way cause her to fulfil her "positive engagement." But where the terms of a contract are such that the court cannot superintend

Court of equity may restrain the breach of part of an agreement, though it cannot compel specific performance of the rest;

and so may "starve" the party into performing her negative contract.

No injunction, where court cannot secure

(*g*) 1 De G. M. & G. 616.

(*h*) *Whitwood Chemical Co.* v. *Hardman*, 1891, 2 Ch. 416; *Ryan* v. *Mutual Tontine Association*, 1893, 1 Ch. 116.

its performance, it will not decree the performance thereof *in specie* by means of an injunction,—*scil.* because in such a case the court could not effectively enforce the injunction by committal of the party; and generally, even where the court might, in the case of an *express* negative covenant, feel itself both called upon and competent to enforce a performance of the contract *in specie*, it will not be astute to *imply* such a negative covenant in what is simply an affirmative one (*i*),—by splitting such single affirmative covenant into a positive and a negative part (*j*); and the court will not restrain an infant from breaking his negative contract (*k*), —unless where such negative contract is contained in his contract for necessaries (*l*); and a wife will not be restrained merely by reason of her husband's contract (*m*).

performance by the plaintiff;

or where the negative element in covenant not apparent.

It must not be supposed, however, that it is only in the case of *express* contracts of the kinds above illustrated that equity interposes by injunction; for the court will also, if the case is otherwise a proper one (*n*), interpose by injunction in the case of an *implied* contract resulting from the acts or representations of the parties (*o*); and such a contract may also be implied from a recital in the express contract (*p*). It is also a very old principle of equity, that if a person makes a representation to another, and the latter acts upon the faith of that representation,

Injunction, although the contract is *implied* only.

If a representation is made inducing another to do

(*i*) *Davis* v. *Freeman*, 1894, 3 Ch. 654.
(*j*) *Whitwood Chemical Co.* v. *Hardman*, supra; *Grimston* v. *Cunningham*, 1894, 1 Q. B. 125.
(*k*) *De Francesco* v. *Barnum*, 43 Ch. Div. 165.
(*l*) *Evans* v. *Ware*, 1872, 3 Ch. 502.
(*m*) *Smith* v. *Hancock*, 1894, 2 Ch. 377.
(*n*) *Merryweather* v. *Moore*, 1892, 2 Ch. 518.
(*o*) *Murrell* v. *Goodyear*, 1 De G. F. & Jo. 432 (the case of an attempted unfair use of a flaw discovered in abstract of title); and *Pollard* v. *Photographic Co.*, 40 Ch. Div. 345 (the case of an unfair use of *negatives*).
(*p*) *Mackenzie* v. *Childers*, 43 Ch. Div. 265.

an act, equity restrains the contrary.

the former shall make good his representation (*q*); and where A., the lessee of a building lease, in which there was a covenant to erect houses on three plots of land in a specified manner, sold and sub-demised one of the houses to B. the plaintiff's predecessor in title, representing to B. that he (A.) was restricted from building so as to obstruct the sea view; and, in the sub-lease, A. covenanted to observe the lessee's covenants in the original lease, but subsequently surrendered the old lease to his lessor, and obtained the grant of a new lease without the restrictive covenant, and thereupon commenced building contrary to the original covenant,—it was held, that the plaintiff was entitled to an injunction (*r*),—*because, of course, the surrender of the old lease was subject to the plaintiff's acquired rights* (*s*). And upon similar principles, it has been held, that where a person claiming a title in himself is privy to the fact that another party is dealing with the property as his own, he will be restrained from asserting his own title against a title created by such other person, although he derives no benefit from the transaction (*t*); and the same doctrine is applicable, where a person having a title to an estate stands by and suffers a person ignorant of that title to expend money upon the estate,—for in such cases the person who has so expended money will in equity, on eviction by the real owner, be indemnified for his expenditure (*u*).

A party claiming a title in himself, and standing by while another deals with the property as his own, restrained.

The court will also interpose by injunction, the

(*q*) *Gale* v. *Lindo*, 1 Vern. 475; *West London Commercial Bank* v. *Kitson*, 13 Q. B. D. 360.

(*r*) *Piggott* v. *Stratton*, 1 De G. F. & Jo. 33; *Martin* v. *Spicer*, 14 App. Ca. 12; *Hudson* v. *Cripps*, 1896, 1 Ch. 265.

(*s*) *Smalley* v. *Hardinge*, 7 Q. B. D. 524.

(*t*) *Nicholson* v. *Hooper*, 4 My. & Cr. 186; *Scaife* v. *Jardine*, 7 App. Ca. 345.

(*u*) *Neesom* v. *Clarkson*, 4 Hare, 97; *Dann* v. *Spurrier*, 7 Ves. 235; and disting. *Ramsden* v. *Dyson*, L. R. 1 Ho. Lo. 129.

case being otherwise proper, to stay the breach of a statutory contract; as, *e.g.*, where a railway company is exceeding, or threatening to exceed, its statutory powers,—or is neglecting to observe the preliminary proceedings which are a condition precedent to the right to exercise these powers (*v*); and in such a case, the Attorney-General may be the applicant for the injunction, the act of the railway company being illegal; and it is not necessary, in such a case, to show actual positive damage (*x*), but a tendency to produce serious public mischief or damage will be sufficient (*y*); and a shareholder in the company suing as plaintiff need not show any damage at all,—for an injunction will always issue, the case being otherwise proper, to restrain the breach of any contract (whether statutory or not), without proof of damage, where the applicant is one of the contracting parties (*z*).

Statutory contracts,—breach of, restrained by injunction, without proof of actual damage.

And (2.) With reference to injunctions to prevent a tort, *i.e.*, a wrong independent of contract,—It may be laid down as a general rule, that wherever a right cognisable at law exists, a violation of that right will be prohibited (*a*),—unless, of course, considerations of expediency or of convenience intervene to prevent the court from granting the injunction (*b*). Therefore, in the case of waste, a court of equity will in general interfere; and the jurisdiction of equity in this matter is said to have arisen from the incompleteness of the common law remedy, the Statutes

(2.) Injunctions against torts.

(1.) Waste.

(*v*) *Farmer* v. *Waterloo and City R. C.*, 1895, 1 Ch. 527.
(*x*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 Ch. Div. 752.
(*y*) *Att.-Gen.* v. *Great Eastern R. Co.*, 11 Ch. Div. 449.
(*z*) *Todd-Heatley* v. *Benham*, 40 Ch. Div. 80; *Herron's Case*, 1892, A. C. 498.
(*a*) *Gas Light and Coke Co.* v. *St. Mary Abbott's (Vestry)*, 15 Q. B. D. 1.
(*b*) *Batten* v. *Gedge*, 41 Ch. Div. 507; *Reichel* v. *Oxford (Bishop)*, 14 App. Ca. 259.

Common law jurisdiction over waste.

of Marlebridge (*c*), Gloucester (*d*), and Westminster (*e*), having given the remedy by a writ of waste, only to him who had the *immediate* estate of *inheritance* in reversion or remainder; and to tenants in common and joint-tenants, but not to *co-parceners* (*f*). Accordingly, the court extended its jurisdiction,—(1.) To cases where the titles of the parties were of a purely equitable nature; (2.) To cases of equitable waste (*g*), *i.e.*, to waste which was deemed waste only in courts of equity; and (3.) To cases where no waste had been actually committed, but was only meditated or apprehended. Also, (4.) Where there was a tenant for life, remainder for life, remainder in fee, equity would restrain the tenant for life in possession from committing waste,—and would do so either at the suit of the remainderman for life, although he had not the *inheritance*, or at the suit of the remainderman in fee, notwithstanding the *interposed* life-estate (*h*); and in particular (5.) Where a person was tenant for life without impeachment of waste, and in the purported exercise of his legal rights to fell timber, open new mines, and have full property in the produce (*i*), he was guilty of malicious, extravagant, or capricious waste,—such as pulling down and dismantling a mansion-house (*k*), or felling timber planted or left standing for the ornament or shelter of a mansion-house or grounds (*l*),—equity would restrain him; and the same rule applied to a tenant in tail after possibility of issue extinct,—for he had the same legal right, neither more nor less, to commit waste

Equity jurisdiction over waste.

(*c*) 52 Hen. III.
(*d*) 6 Edw. I. c. 5.
(*e*) 13 Edw. I. c. 22.
(*f*) *Jefferson* v. *Bishop of Durham*, 1 Bos. & Pull. 120.
(*g*) *Downshire* v. *Sandys*, 6 Ves. 109, 110.
(*h*) *Garth* v. *Cotton*, 1 L. C. 751.
(*i*) *Lewis Bowles's Case*, 11 Co. 79 *b*.
(*k*) *Vane* v. *Barnard*, 2 Vern. 738.
(*l*) *Morris* v. *Morris*, 15 Sim. 505; *Micklethwaite* v. *Micklethwaite*, 1 De G. & J. 519.

that a tenant for life without impeachment of waste had (*m*). Also, (6.) In the cases of mortgages, if the mortgagor, being in possession, should fell timber on the estate, a court of equity would restrain him, if thereby the security would become insufficient, but not otherwise (*n*); and conversely, a mortgagee in possession would, unless the security was insufficient, have been restrained from felling timber (*o*). But courts of equity never extended their jurisdiction, to cases of permissive waste by a legal tenant for life (*p*), —who might therefore with impunity have neglected the necessary repairs to houses (*q*); but the legal liability of such a tenant in an action at law for damages for such permissive waste appears now to be established (*r*). And as regards that species of waste which has sometimes been called *ameliorative* waste, and which consists of an alteration in the character of the property,—*e.g.*, by the conversion of warehouse property into residential property, more calculated to let and otherwise more valuable,—although courts of equity did at one time assume to interfere by injunction to stay such so-called waste (*s*), they have latterly declined to do so, in the ordinary case (*t*). And finally, it is to be observed, that what is apparent waste may not be real waste,—for the "*usage of the estate*" may enable a tenant for life who is impeachable for waste to cut timber according to such usage (*u*). Also, it may be, that the trustees are compellable (out of moneys in their hands) to execute the *necessary* repairs,—in relief of any duty

Waste,—on mortgaged estates.

Permissive waste not remediable in equity.

Ameliorative waste,—not now restrained in equity.

Waste, sanctioned by "usage of estate."

(*m*) *Abrahall* v. *Bubb*, 2 Swanst. 172.
(*n*) *Robinson* v. *Litton*, 3 Atk. 209; *King* v. *Smith*, 2 Hare, 239.
(*o*) *Withrington* v. *Banks*, Sel. Ch. Ca. 31.
(*p*) *Powys* v. *Blagrave*, 4 De G. M. & G. 448.
(*q*) *In re Cartwright*, *Avis* v. *Newman*, 41 Ch. Div. 532; *Tomlinson* v. *Andrew*, 1898, 1 Ch. Div. 232.
(*r*) *Yellowly* v. *Gower*, 11 Exch. 274; *Davies* v. *Davies*, 38 Ch. Div. 499.
(*s*) *Smyth* v. *Carter*, 18 Beav. 78.
(*t*) *Doherty* v. *Allman*, 3 App. Ca. 709.
(*u*) *Dashwood* v. *Magniac*, 1891, 3 Ch. 306.

upon the tenant for life to do so; and that would be so, *e.g.*, where the trustees lawfully invested the trust funds in the purchase of a property which (at the date of the purchase) was in a condition demanding that the repairs should be executed (*v*).

(2.) Nuisances. Public nuisances abated by indictment, but sometimes also by an injunction on information filed.

(2.) In the case of nuisances,—If the nuisance is a public nuisance, properly so called, an indictment or a criminal information lay and lies to punish the offender; but a civil information also lay and lies in equity to redress the grievance by way of injunction,—*e.g.*, against a public nuisance occasioned by stopping up a highway (*x*); and, as a general rule, a suit of this nature was and is instituted by the Attorney-General, or he is made a party, as representing the public. Also,

Public nuisance causing special damage,—ground for civil action,—

when a private person suffers a special and peculiar injury distinct from that of the public in general, in consequence of any public nuisances, he will be entitled individually and in respect of such special or peculiar injury (*y*), to apply for an injunction in equity; and in such a case the Attorney-General is not a necessary (although a usual) party to the action (*z*); and a public body suing in respect of a public nuisance is like a private individual so suing, and must therefore show special damage (*a*), although

unless legalised by statute.

the Attorney-General need not do so. But if the nuisance should be legalised by statute, then neither an indictment nor an information nor an action will lie therefor (*b*); but the courts will in general

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(*v*) *In re Freeman, Dimond* v. *Newburn*, W. N. 1897, p. 159.

(*x*) *Att.-Gen.* v. *Cleaver*, 18 Ves. 217; *Ripon* v. *Hobart*, 3 My. & K. 169, 179; *Saddler's Case*, 23 Q. B. D. 17.

(*y*) *Wallasey Local Board* v. *Graccy*, 36 Ch. Div. 593.

(*z*) *Wood* v. *Sutcliffe*, 2 Sim. N. S. 163; *Vernon* v. *Vestry of St. James's Westminster*, 16 Ch. Div. 449; *Att.-Gen.* v. *Todd-Heatley*, 1897, 1 Ch. 560.

(*a*) *Tottenham District Council* v. *Williamson*, 1896, 2 Q. B. 353.

(*b*) *London and Brighton Railway Co.* v. *Truman*, 11 App. Ca. 45; *National Telephone* v. *Baker*, 1893, 2 Ch. 186; *Rapier's Case*, 1893, 2 Ch. 588.

struggle against such a result (*c*),—unless where the nuisance be purely temporary (*d*); and the statute will be strictly construed,—so that, *e.g.*, if it authorises a nuisance in the first execution of the works, it will not be read as authorising the continuance of the nuisance after the works have been completed (*e*). On the other hand, if the nuisance is a private nuisance, it may, firstly, be of such a character as that the party may by his own act abate it (*f*),—doing so without any breach of the peace; or, secondly, the nuisance may be of too slight a character for the court of equity to interfere,—*scil.* because the court interferes upon the ground of restraining *irreparable* mischief, or of suppressing vexatious and *interminable* litigation; and it is not therefore every nuisance that will justify the interposition of the court; for there must in general be such an injury as from its nature is not susceptible of being adequately compensated in damages at law, or such as, from its continuance and permanently or increasingly mischievous character, must occasion a constantly recurring grievance (*g*). Therefore, a mere common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary,—unless there is a claim of right to do the act; which claim of right is always a sufficient ground for an injunction (*h*); but a prescriptive right to cause the nuisance (*e.g.*, to cause a vibration) would, of course, justify the claim of right (*i*). So

Nuisance,—abatement of, by the party.

Nuisances and common trespasses,—when and when not equity will restrain.

(*c*) *Metropolitan Asylums* v. *Hill*, 6 App. Ca. 163; *Sadler* v. *South Staffordshire Trams*, 23 Q. B. D. 17.

(*d*) *Harrison* v. *Southwark and Vauxhall Water Co.*, 1891, 2 Ch. 409.

(*e*) *Meux* v. *City Electric Lighting Co.*, 1895, 1 Q. B. 287; *Ogsdon* v. *Aberdeen Tramways*, 1897, A. C. 111.

(*f*) *Jones* v. *Williams*, 11 Mee. & W. 176; *Lemmon* v. *Webb*, 1895, A. C. 1.

(*g*) *St. Helen's Smelting Co.* v. *Tipping*, 11 Ho. Lo. Ca. 653; *Fleming* v. *Hislop*, 11 App. Ca. 686.

(*h*) *Pennington* v. *Brinsop Hall Coal Co.*, 5 Ch. Div. 769.

(*i*) *Sturges* v. *Bridgeman*, 11 Ch. Div. 852.

a mere fanciful diminution of the value of property by a nuisance, without irreparable mischief, and without any claim of right to do the act, will not furnish any foundation for an injunction (*j*); nor will an injunction be granted to restrain the ordinary use of premises for purposes not in themselves noxious, although damage may result to a neighbour from such use (*k*). But in all cases where the injury is *irreparable*,—as where loss of health (*l*), loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act,—in every such case courts of equity will interfere by injunction (*m*). Also, where a party builds so near the house of another party as to darken his windows,—against the clear right of the latter, either by contract (*n*) or by ancient possession (*o*),—courts of equity will interfere by injunction to prevent the nuisance, as well as to remedy it, if already recently completed; but where damages for the continuance of the nuisance would in any case furnish substantial compensation, the court will give the plaintiff damages simply, and not an injunction (*p*); and what has been stated as regards light applies also to the access of air (*q*),—*scil.* through and to a defined aperture (*r*), but not otherwise. Also, continuing nuisances will be restrained,—the continuance being deemed a repetition of the nuisance (*s*);

Darkening ancient lights.

Obstructing access of air.

(*j*) *Att.-Gen.* v. *Nichol*, 16 Ves. 342.
(*k*) *Robinson* v. *Kilvert*, 41 Ch. Div. 88.
(*l*) *Walter* v. *Selfe*, 20 L. J. Ch. 433; *Christie* v. *Davey*, 1893, 1 Ch. 316.
(*m*) *Broadbent* v. *Imp. Gas Co.*, 7 De G. M. & G. 436; *Cooper* v. *Crabtree*, 20 Ch. Div. 567.
(*n*) *Russell* v. *Watts*, 10 App. Ca. 590; *Presland* v. *Bingham*, 41 Ch. Div. 268; *Wilson* v. *Queen's Club*, 1891, 3 Ch. 522; *Broomfield* v. *Williams*, 1897, 1 Ch. 602.
(*o*) *Lazarus* v. *A. P. Co.*, 1897, 2 Ch. 214.
(*p*) *Theed* v. *Debenham*, 2 Ch. Div. 165; *Parker* v. *First Avenue Hotel Co.*, 24 Ch. Div. 252; *Martin* v. *Price*, 1894, 1 Ch. 276.
(*q*) *Aldin* v. *Latimer*, 1894, 2 Ch. 437.
(*r*) *Chastey* v. *Ackland*, 1895, 2 Ch. 389.
(*s*) *Woodhouse* v. *Walker*, 5 Q. B. D. 404; *Jenks* v. *Clifden*, 1897, 1 Ch. 694.

and the owner of land lying vacant and unoccupied is answerable for a continuing nuisance thereon (*t*). And again, a landowner having a right, independently of prescription, to the lateral support of his neighbour's land to sustain the soil of his own land in its natural state,—and having, after twenty years' enjoyment, a right by prescription to lateral support also for the buildings erected on his land (*u*),—an injunction will issue in maintenance of such rights. Similarly, a landowner will be protected against the flooding of his own lands by his neighbour (*v*); and equity will interfere to prevent the pollution of streams, causing injury to the riparian owners,—*scil.* at the suit of such owners (*x*),—and in one and the same action against all the polluting owners (*y*),—or (it may be) against any one of them, where the wrongful omission of the other or others is no excuse to the defendant (*z*),—and even without any proof of injury, in cases where the right to pollute is claimed or the continuance of the pollution would or might grow into a right. And (it has been said) the reason is stronger in the case of the pollution of streams than it is in the case of ancient lights, —"for if the plaintiff finds the river so polluted as "to be a continuous injury to him; if, in order to "assert his right, he would be obliged to bring a "series of actions, one every day of his life, in re- "spect of every additional injury or additional annoy- "ance, . . . then the court will grant an injunction, "to relieve him from the necessity of bringing a "series of actions, in order to obtain the damages to

Right to lateral support of soil;

and of the buildings on it.

Pollution and further pollution of streams.

(*t*) *Att.-Gen.* v. *Todd-Heatley*, 1897, 1 Ch. 560.
(*u*) *Hunt* v. *Peake*, Johns. 705.
(*v*) *Evans* v. *Manchester and Sheffield Rail. Co.*, 36 Ch. Div. 626.
(*x*) *Kensit* v. *Great Eastern Rail. Co.*, 27 Ch. Div. 122.
(*y*) *Cowan* v. *Buccleuch* (*Duke*), 2 App. Ca. 344; *Lambton* v. *Mellish*, 1894, 3 Ch. 163.
(*z*) *Ogsdon* v. *Aberdeen Tramways*, 1897, A. C. 111; and see *Sadler* v. *Great Western Rail. Co.*, 1896, A. C. 450.

"which such continual annoyances entitle him" (*a*). And, of course, equity will also interfere by injunction to prevent the further pollution of a stream that is already comparatively polluted (*b*),—such further pollution being, of course, sensible, and not merely fanciful; and an injunction may also issue against the pollution or further pollution of underground water (*c*), or against any other wrongful interference with it (*d*). Where the property from which the nuisance proceeds is in lease, the reversioner on such lease may or may not be liable therefor equally with the occupying tenant, and would or would not be restrained by injunction accordingly (*e*). And although, for matters done under the powers of the Public Health Act, 1875 (*f*), and which occasion injury to the plaintiff, he may obtain compensation under sect. 308 of the Act (*g*),—first giving notice to the defendant board under sect. 264 of the Act; still, when the matter is not one for compensation under sect. 308, but is a nuisance, the plaintiff may have an injunction against the continuance of the nuisance (*h*),—and that without first giving the defendant board notice of his intention to bring his action (*i*); and the like rules apply substantially in the case of injuries—*e.g.*, to ancient lights—done under the provisions of the Artisans' Dwellings Improve-

Injunctions against Local Boards,—when obtainable; and when the injury is only one for compensation.

(*a*) *Att.-Gen.* v. *Birmingham* (*Borough*), 4 K. & J. 546, *per* Wood, V.C.

(*b*) *Crossley* v. *Lightowler*, L. R. 2 Ch. App. 478.

(*c*) *Ballard* v. *Tomlinson*, 29 Ch. Div. 115.

(*d*) *Bradford Corporation* v. *Pickles*, 1895, 1 Ch. 145.

(*e*) *Gandy* v. *Jubber*, 9 B. & S. 15; *Sandford* v. *Clarke*, 21 Q. B. D. 398; *Bowen* v. *Anderson*, 1894, 1 Q. B. 164.

(*f*) 38 & 39 Vict. c. 55; 53 & 54 Vict. c. 59; *Att.-Gen.* v. *Dorking Union*, 20 Ch. Div. 595; *Att.-Gen.* v. *Acton Local Board*, 22 Ch. Div. 221; *Att.-Gen.* v. *Clerkenwell Vestry*, 1891, 3 Ch. 527; *Stretton's Brewery* v. *Derby* (*Corporation*), 1894, 1 Ch. 431; *Yorkshire* v. *Holmfrith*, 1894, 2 Q. B. 842.

(*g*) *Durrant* v. *Branksome District Council*, 1897, 2 Ch. 291.

(*h*) *Sellors* v. *Matlock Bath* (*Local Board*), 14 Q. B. D. 928.

(*i*) *Flower* v. *Low Leyton* (*Local Board*), 5 Ch. Div. 347; *Foat* v. *Margate* (*Mayor*), 11 Q. B. D. 299; *Chapman* v. *Auckland Union*, 23 Q. B. D. 294.

ment Acts (*k*). And note, that for the *omission* of a statutory duty by, *e.g.*, a local authority, the specific remedy (if any) in that behalf prescribed by the statute which creates the duty (*e.g.*, the complaint to the Local Government Board prescribed by sect. 299 of the Public Health Act, 1875) may be the only remedy,—neither an injunction (*l*) nor a mandamus (*m*) being in that case available.

Libel, slander, &c.,—injunction to restrain the utterance or repetition of.

(3.) In the case of libels, slanders, &c.,—Since the Judicature Acts, the courts have increasingly interposed to restrain by injunction the utterance or repetition of libels, slanders, injurious trade circulars or notices, and the like (*n*),—not being the mere puffs of rival traders (*o*); and the courts will, in some cases of such injurious publications, even grant a mandatory injunction ordering the defendant to withdraw the injurious notices (*p*). Generally, also, all breaches of good faith may be restrained by injunction (*q*); and, by the 58 & 59 Vict. c. 40, s. 3, false and libellous statements (the repetition thereof at parliamentary elections) may be restrained by injunction. As regards a trade conspiracy, as boycotting, it appears that the court will occasionally interfere by injunction in such cases,—but only when the damage would be irreparable (*r*); and the court must always see its way to enforcing compliance with the injunction, if granted (*s*). As regards the expulsion of a member from his club, the court will grant

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(*k*) *Wigram* v. *Fryer*, 39 Ch. Div. 87.
(*l*) *Robinson* v. *Workington Corporation*, 1897, 1 Q. B. 619.
(*m*) *Peebles* v. *Oswaldthwistle District Council*, 1897, 1 Q. B. 625.
(*n*) *Thorley's Cattle Food Co.* v. *Massam*, 14 Ch. Div. 763; *Bonnard* v. *Perryman*, 1891, 2 Ch. 269; *Collard* v. *Marshall*, 1892, 1 Ch. 571; *Monson* v. *Tussaud*, 1894, 1 Q. B. 671.
(*o*) *Mellin* v. *White*, 1895, A. C. 154.
(*p*) *Herman Loog* v. *Bean*, 26 Ch. Div. 306.
(*q*) *Robb* v. *Green*, 1895, 2 Q. B. 1.
(*r*) *Mogul SS. Co.* v. *Macgregor*, 1892, A. C. 25.
(*s*) *Lyons* v. *Wilkins*, 1896, 1 Ch. 811; *Trollope* v. *London Building Trades*, W. N. 1895, p. 45.

an injunction against such expulsion, if the member has not had an opportunity of being heard (*t*); but the court will not, *semble*, interpose in this way if the club is a proprietary one (*u*). And under the Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 Vict. c. 57), s. 32, any person alleging himself to be a patentee, who by circular or otherwise threatens with legal proceedings, as for an infringement of such patent, any other person, must forthwith commence and duly prosecute an action for the alleged infringement; otherwise the threatened party may have an injunction against the continued issue of the circular, and generally against the continuance of the threats (*v*). Moreover, an injunction having been once duly granted, will afterwards be enforced (by committal for contempt or otherwise) against not only the parties enjoined, but also against all others knowingly abetting them in their breach of the injunction (*x*).

Injunction against trade circular, unless action commenced forthwith.

Patents, copyrights, and trade-marks.

(4.) In the case of patents, copyrights, and trade-marks,—In order to prevent irreparable mischief, or to suppress multiplicity of suits and vexatious litigation, courts of equity have interfered by injunction to secure the rights of the inventor, manufacturer, or author,—for if no other remedy was given in these cases than an action at law for damages, the inventor, manufacturer, or author might be ruined by perpetual litigation (*y*). Therefore, the jurisdiction by injunction will be exercised,—in all cases where there is a clear *primâ facie* title, founded upon long

Jurisdiction, when exercised.

(*t*) *Rigby* v. *Connol*, 14 Ch. Div. 482; *Fisher* v. *Jackson*, 1891, 2 Ch. 692.

(*u*) *Baird* v. *Wells*, 44 Ch. Div. 661.

(*v*) *Driffield Co.* v. *Waterloo Co.*, 31 Ch. Div. 638; *Colley* v. *Hart*, 44 Ch. Div. 179; *Johnson* v. *Edge*, 1892, 2 Ch. 1; *Skinner & Co.* v. *Shew & Co.*, 1893, 1 Ch. 413; 1894, 2 Ch. 581.

(*x*) *Wellesley* v. *Mornington*, 11 Beav. 180; *Seaward* v. *Paterson*, 1867, 1 Ch. 545.

(*y*) *Hogg* v. *Kirby*, 8 Ves. 223.

possession of the right; and even an equitable interest, or an interest limited in point of time or of extent, is sufficient; but a mere agent to sell has not such an interest as will entitle him to apply for an injunction (*z*). The law regarding patents and trade-marks, and also the law regarding copyright in designs (but not of copyright generally), has been recently simplified and collected together by the Patents, Designs, and Trade-Marks Act, 1883 (*a*); but there is nothing in that Act, or in the rules of December 1883 and subsequent rules for carrying the provisions of the Act into effect, that interferes at all with the jurisdiction in equity (*b*).

Patents, Designs, &c., Act, 1883,—effect of.

Therefore, (A.) In the case of Patents,—If the patent has been but recently granted, and its validity has not been ascertained by a trial at law or otherwise established, the court will not generally grant an immediate interim injunction, but will require the validity of the patent, if denied or put in doubt (*c*), to be first ascertained or established; on the other hand, if the patent has been granted for some length of time, and the patentee has put the invention into public use, and has had an exclusive possession under his patent for a period of time which fairly creates the presumption of an exclusive right, the court will ordinarily interfere at once by way of injunction; and in all cases, the court will now determine for itself, or procure to be determined by a jury, the preliminary question of the validity of the patent, and will grant all other consequential relief in one and the same action (*d*). The infringement may

(A.) Patents. Injunction is not a matter of course; depends on circumstances.

(*z*) *Nicol* v. *Stockdale*, 3 Swanst. 687.
(*a*) 46 & 47 Vict. c. 57, amended by 48 & 49 Vict. c. 63, 49 & 50 Vict. c. 37, and 51 & 52 Vict. c. 50.
(*b*) *Le May* v. *Welch*, 28 Ch. Div. 24; *Tuck* v. *Priester*, 19 Q. B. D. 48, 629; *Warne* v. *Seebohm*, 39 Ch. Div. 73.
(*c*) *Martin* v. *Wright*, 6 Sim. 297; *Wren* v. *Weild*, L. R. 4 Q. B. 730.
(*d*) *Badische* v. *Levenstein*, 12 App. Ca. 710.

consist in the mere importation of the patented articles (*e*),—and although the same are used only for experiments with pupils (*f*). And it is here to be observed, that in a patent case, upon motion for an interlocutory injunction, several courses are open to the court to adopt, namely,—(1.) The court may at once grant the injunction *simpliciter*, without more, but never does so where the defendant *bonâ fide* disputes the validity of the plaintiff's patent; or (2.) The court may follow the more usual practice of granting an interim injunction, and at the same time requiring the plaintiff to give an undertaking as to damages (*g*),—the crown or the Attorney-General not being required to give such an undertaking (*h*); or (3.) The court will withhold the injunction until the trial, requiring the defendant in the meantime to keep an account (*i*). And at the trial of the action, if an injunction is asked for to restrain an alleged infringement of the patent, it will be necessary, of course, for the plaintiff to prove his patent and the validity thereof, and also that the defendant has infringed same; and not only the validity, but the fact of infringement, are matters of the greatest difficulty to make out; and therefore to facilitate the progress of the action, the court requires on the one hand the defendant to deliver "particulars of his objections" to the patent, and on the other hand the plaintiff to deliver "particulars of the breaches" of his patent which he alleges the defendant has committed. The usual objections to the plaintiff's patent are want of novelty, want of utility, or insufficiency, or other error in the specification (*k*); and prior

Three courses open upon an interlocutory application. (*a.*) Injunction *simpliciter*.

(*b.*) Interim injunction, plaintiff undertaking as to damages.

(*c.*) Motion for, directed to stand over until trial, defendant keeping an account.

"Particulars of objections;" also, "Particulars of breaches."

(*e*) *Nobel's Explosives Co.* v. *Jones*, 8 App. Ca. 5.
(*f*) *United Telephone Co.* v. *Sharples*, 29 Ch. Div. 164.
(*g*) *Dreyfus* v. *Peruvian Guano Co.*, 1892, A. C. 166; *East Molesey* v. *Lambeth Waterworks*, 1892, 3 Ch. 289.
(*h*) *Att.-Gen.* v. *Albany Hotel Co.*, 1896, 2 Ch. 696.
(*i*) *Bacon* v. *Jones*, 4 My. & Cr. 433, 436.
(*k*) *United Telephone Co.* v. *Harrison*, 21 Ch. Div. 720; *Nobel's Explosives* v. *Jones*, 8 App. Ca. 5; *Badische* v. *Levenstein*, supra.

publication is also a good objection (*l*). And what has been above stated as to patents applies substantially to *designs* also (*m*). An infringement may, or may not, be complete by the mere importation of the articles from abroad (*n*).

Designs,—are like patents.

(B.) In the case of Copyrights,—The plaintiff must in the first place make out his title to the copyright, by registration and otherwise (*o*); and he can have no copyright in any work of a clearly irreligious, immoral, libellous, or obscene description or tendency (*p*),—or in the publication of "*racing finals*" (*q*),—but, subject to these qualifications, there may be copyright not only in books, but also in music, engraving, sculpture, painting, photography, and generally in all ornamental or useful designs, the copyright being the creation of statute in every case (*r*),—and even (under special circumstances) in unpublished information, at least for the purpose of restraining the piracy thereof (*s*). In all cases of copyright, the action is usually brought for an alleged infringement of the copyright, and claims an injunction, and either damages or an account of profits (*t*); and in these actions,—assuming that the right to the copyright exists, and exists in the plaintiff (*u*),—the principal question at the trial is,

(B.) Copyrights,—no copyright in irreligious, immoral, or libellous works.

(*l*) *Blank* v. *Footman, Pretty & Co.*, 39 Ch. Div. 678.
(*m*) *Le May* v. *Welch*, 28 Ch. Div. 24; *In re Clarke's Design*, 1896, 2 Ch. 38; *Harper & Co.* v. *Wright & Co.*, 1896, 1 Ch. 143; and see *Cooper* v. *Stevens*, 1895, 1 Ch. 567.
(*n*) *Badische Anilin* v. *Johnson*, 1897, 2 Ch. 322; 1898, A. C. 200.
(*o*) *Coote* v. *Judd*, 23 Ch. Div. 727; *Thomas* v. *Turner*, 33 Ch. Div. 292; *Johnson* v. *Newnes*, 1894, 3 Ch. 663.
(*p*) *Lawrence* v. *Smith*, Jac. 472; *Walcot* v. *Walker*, 7 Ves. 1.
(*q*) *Chilton* v. *Progress Co.*, 1895, 2 Ch. 29.
(*r*) *Tuck* v. *Priester*, supra; *Warne* v. *Seebohm*, supra.
(*s*) *Exchange Telegraph Co.* v. *Gregory & Co.*, 1896, 1 Q. B. 147; *Exchange Telegraph Co.* v. *Central News*, 1897, 2 Ch. 48.
(*t*) *Muddock* v. *Blackwood*, 1898, 1 Ch. 58.
(*u*) *Petty* v. *Taylor*, 1897, 1 Ch. 465; and see *Stevens* v. *Benning*, 1 K. & J. 168; *Hole* v. *Bradbury*, 12 Ch. Div. 886; *London Alliance* v. *Cox*, 1891, 3 Ch. 291; and *Griffith* v. *Tower Co.*, 1897, 1 Ch. 21.

What is an infringement of copyright?

Bonâ fide quotations, a *bonâ fide* abridgment or *bonâ fide* use of common materials, not an infringement.

whether there has been in fact an infringement. Now it is clearly settled not to be an infringement of the copyright in a book to make *bonâ fide* quotations or extracts from it, or to make a *bonâ fide* abridgment of it, or to make a *bonâ fide* use of the same common materials in the composition of another work; but what constitutes a *bonâ fide* use of extracts, or a *bonâ fide* abridgment, or a *bonâ fide* use of common materials, is often a matter of most embarrassing inquiry,—the question being, whether there has been a legitimate and fair exercise of mental ability, industry, and discrimination resulting in the production of a new work (*v*). Therefore, as regards copyright in books, if, instead of searching into the common sources in an independent and critical manner, and deriving therefrom the materials which he chooses to appropriate, an author should quietly and servilely avail himself of the labour of his predecessor, and adopt his arrangement,—or do it with only colourable variations,—that would not be a *bonâ fide* use of the common materials, but would be an infringement; but, subject always to his complying with the above distinctions, it is no infringement where an author has been led by an earlier writer to consult authorities referred to by him,—even though he may quote the same passages from those authorities which were used by the earlier writer (*x*); neither is it an infringement, if nothing material is taken (*y*); *secus*, if material parts are taken (*z*). And as regards copyright in maps, road-books, calendars, chronological and other tables, the materials being equally open to all, and the result also necessarily showing a certain identity or similitude, there is a difficulty not

Maps, calendars, tables, &c.,—what is an infringement of copyright in.

(*v*) *Campbell* v. *Scott*, 11 Sim. 31; *Lewis* v. *Fullerton*, 2 Beav. 6.
(*x*) *Pike* v. *Nicholas*, L. R. 5 Ch. App. 251.
(*y*) *Chatterton* v. *Cave*, 3 App. Ca. 483.
(*z*) *Ager* v. *Peninsular and Oriental Co.*, 25 Ch. Div. 637; *Trade Auxiliary Co.* v. *Middlesborough*, 40 Ch. Div. 425; *Cate* v. *Devon, &c. Co.*, ib. 500; *Brooks* v. *Religious Tract Society*, W. N. 1897, p. 25.

only in distinguishing the difference in the result, but also in detecting an unfair use of a prior existing copyright; wherefore the fact of copy or no copy has generally to be ascertained, by *the appearance in the alleged copy of the same inaccuracies or blunders (if any) that are to be found in the first published work;* but even this mode of proof must be applied with caution (*a*). As regards oral lectures, persons admitted as pupils or otherwise to hear them cannot publish them for profit, and would be restrained by injunction from so doing (*b*). And it appears, that there may be,—or that practically there may be,—a valid copyright in the mere title to a book, *e.g.*, in the title "Trial and Friendship" (*c*); but this has been recently questioned (*d*), and is perhaps only true under special circumstances; and certainly the mere registration of such title does not confer any copyright in it (*e*). There may also be,—or there may practically be,—copyright in the mere external appearance of a newspaper, *e.g.*, *The Times* (*f*); also, in the "illustrations" published by tradesmen in their catalogues (*g*); and in the "headings" in a trade directory (*h*), although the entire catalogue or entire directory has not been copyrighted. And as regards copyright as distinguished from patent, it has been said, that copyright is in *the description*, and not in the thing described, while patent is in *the thing described* (*i*); also, sketches of *tableaux vivants*

Copyright in lectures.

Copyright in title of book;

and in illustrations, headings, &c.

Copyright and patent,—distinguished.

(*a*) *Longman* v. *Winchester*, 16 Ves. 269; *Dicks* v. *Brooks*, 15 Ch. Div. 52; *Leslie* v. *Young & Sons*, 1894, A. C. 335.
(*b*) *Abernethy* v. *Hutchinson*, 3 L. J. Ch. 209; *Nicols* v. *Pitman*, 26 Ch. Div. 374; *Caird* v. *Sime*, 12 App. Ca. 326.
(*c*) *Weldon* v. *Dicks*, 10 Ch. Div. 247.
(*d*) *Dicks* v. *Yates*, 18 Ch. Div. 76; *Schove* v. *Schmincke*, 33 Ch. Div. 546.
(*e*) *Licensed Victuallers* v. *Bingham*, 38 Ch. Div. 139.
(*f*) *Walter* v. *Howe*, 17 Ch. Div. 708; *Walter* v. *Steinkopff*, 1892, 3 Ch. 489.
(*g*) *Maple's Case*, 21 Ch. Div. 369.
(*h*) *Lamb* v. *Evans*, 1893, 1 Ch. 218.
(*i*) *Hollinrake* v. *Truswell*, 1894, 3 Ch. 420.

(with explanatory letterpress), the *tableaux vivants* being representations of pictures in which the plaintiff has copyright, are no infringement of the plaintiff's copyright (*k*); nor are the living pictures themselves an infringement of the plaintiff's copyright (*l*),—but the background may be so (*m*); and the drawings (*i.e.*, the illustrations) in a book may or may not form (but usually do not form) part of the copyright in the book,—so far as regards an action for an infringement of such copyright (*n*). As regards private letters, whether on literary subjects or on matters of private business, personal friendship, or family concerns, a learned writer (*o*) lays it down,—(1.) That the writer of private letters has such a qualified right of property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (*p*); (2.) That the party written to has such a qualified right of property in the letters written to him as will entitle him or his personal representatives to restrain the publication of them by a stranger (*q*); but (3.) That such qualified right may in either case be displaced by sufficient reasons of public policy, or by some personal equity (*r*). And as regards an unpublished manuscript, an injunction will, in a proper case, be granted to restrain the publication thereof (*s*); and copies (even manuscript copies) of a tale may not lawfully be made for the otherwise lawful purpose of dramatising it (*t*). And note, that in case the first

Copyright in letters on literary subjects or private matters.

1. The writer may restrain their publication.

2. The party written to may also restrain their publication by a stranger.

3. Publication permitted on grounds of public policy.

Injunction against publication of an unpublished manuscript.

(*k*) *Hanfstaengl* v. *Newnes*, 1894, 3 Ch. 109.
(*l*) *Hanfstaengl* v. *Empire Palace*, 1894, 3 Ch. 109; W. N. 1894, p. 220.
(*m*) *Hanfstaengl* v. *Empire Palace*, W. N. 1895, p. 76.
(*n*) *Petty* v. *Taylor*, 1887, 1 Ch. 465.
(*o*) Drew. on Inj., 208, 209.
(*p*) *Pope* v. *Curl*, 2 Atk. 342; *Gee* v. *Pritchard*, 2 Swanst. 402.
(*q*) *Thompson* v. *Stanhope*, Amb. 737.
(*r*) *Perceval* v. *Phipps*, 2 V. & B. 19.
(*s*) *Duke of Queensberry* v. *Shebbeare*, 2 Eden. 329; *Prince Albert Strange*, 1 Mac. & G. 25.
(*t*) *Warne* v. *Seebohm*, 39 Ch. Div. 73.

edition of an alleged piratical work is not considered by the proprietor of a prior existing copyright to be of a sufficiently piratical and injurious character to justify him in commencing at once an action for the infringement of his copyright, he will not, by this apparent but justifiable neglect, be afterwards prejudiced in commencing an action for the infringement, if the second or other subsequent edition shows greater marks of piracy (*u*).

Successive editions, — growing piracy in.

(C.) In the case of Trade-marks,—As regards the use of trade-marks, and generally the enjoyment of particular trade-names, the right to protection prior to the Trade-Marks Registration Acts, 1875–76, did not depend upon any property in them, but on the principle that *the court would not allow fraud to be practised upon private individuals or upon the public;* "and in cases to which these last-mentioned Acts "did not apply, or the parties had not chosen to "avail themselves of the benefit of the Acts, the "foundation of the jurisdiction in equity to restrain "a piracy remained the same (*v*). For [apart from "these Acts, and from the Patents, Designs, and "Trade-Marks Act, 1883, which has repealed them "and re-enacted and amended their provisions] the "right to a trade-mark or trade-name cannot properly "be described as a copyright,—it is, in fact, the right "which any person, designating his wares or commo-"dities by a particular trade-mark, has to prevent "others from selling wares which are not his, marked "with that trade-mark *in order to mislead the public*, "and so incidentally to injure the person who is "owner of the trade-mark" (*w*). But now, if the

(C.) Trade-marks. Injunction against use of trade-marks did not depend on property, but because equity would not permit fraud.

(*u*) *Hogg* v. *Scott*, L. R. 18 Eq. 444.

(*v*) *Mitchell* v. *Henry*, 15 Ch. Div. 181; *National Starch* v. *Mann*, 1894, A. C. 275.

(*w*) *Farina* v. *Silverlock*, 6 De G. M. & G. 217; *Singer Manuf. Co.* v. *Loog*, 8 App. Ca. 15; *Reddaway* v. *Bentham*, 1892, 2 Q. B. 639; *Reddaway* v. *Banham*, 1896, A. C. 199; *Saxlehner* v. *Apollinaris Co.*, 1897, 1 Ch. 893; *Parsons* v. *Gillespie*, 1898, A. C. 239.

May now depend on property.

trade-mark or trade-name, being a proper subject for registration, has been duly registered under these Acts, the owner has,—to the extent that his trade-mark has been or is used in connection with goods (*x*), but not further (*y*),—a true property in it, and may restrain the piratical use of it by others without proving any fraudulent intent (*z*),—so that even an innocent user would be an infringement (*a*). And with regard to the registration of single words as trade-marks, it appears, that if they have been used before 1875, they may be registered; and by section 64 of the Act of 1883, any "fancy word" might have been so registered (*b*), provided it was used as a distinctive word, and not for a fraudulent purpose (*c*); and now, by the 10th section of the Patents, Designs, and Trade-Marks Act, 1888, repealing sect. 64 of the Act of 1883, the "fancy word" is required to be an "*invented word*," or a *word having no reference "to the character or quality of the goods*, and *not being "a geographical name*,"—*e.g.*, "Mazawattee" for tea (*d*), "Trilby" for ladies' hosiery (*e*), and "Bovril" for beef-extract (*f*); also, the "*portrait*" of the maker is a distinctive device for cough-lozenges; also, a 'flower" (*e.g.*, the Magnolia flower) may be a good trade-mark (*g*); and as regards the use of the "royal arms" (*h*), these may, *semble*, be validly used, provided they are more or less modified (*i*).

"Fancy words,"—registration of.

(*x*) *Hart* v. *Colley*, 44 Ch. Div. 198.
(*y*) *Hargreave* v. *Freeman*, 1891, 3 Ch. 39; *Magnolia Metal Co.'s Trade-Marks*, 1897, 2 Ch. 371; *In re Anderson's Trade-Mark*, 26 Ch. Div. 409.
(*z*) *Orr Ewing* v. *Johnston*, 7 App. Ca. 219.
(*a*) *Upmann* v. *Forester*, 2 Ch. Div. 231.
(*b*) *In re Trade-Mark "Alpine,"* 29 Ch. Div. 877; *Wood* v. *Lambert*, 32 Ch. Div. 247.
(*c*) *In re Lyndon's Trade-Mark*, 32 Ch. Div. 109; *In re Van Duzer's Trade-Mark*, 34 Ch. Div. 623; *Eno* v. *Dunn*, 15 App. Ca. 252.
(*d*) *In re Densham's Trade-Mark*, 1895, 2 Ch. 176.
(*e*) *In re Holt & Co.'s Trade-Mark*, 1896, 1 Ch. 711.
(*f*) *In re Trade-Mark "Bovril,"* 1896, 2 Ch. 600.
(*g*) *Magnolia Metal Co.'s Trade-Marks*, 1897, 2 Ch. 371.
(*h*) *In re Rowland's Trade-Mark*, 1897, 1 Ch. 71.
(*i*) *In re König's Application*, 1896, 2 Ch. 236.

The distinctions above taken may be illustrated by the following cases:—In *Burgess* v. *Burgess* (*k*), where a father had for many years exclusively sold an article under the title of "Burgess's Essence of Anchovies," the court would not restrain his son from selling a similar article under that name, *no fraud being proved*, Knight Bruce, L.J., saying: "All "the Queen's subjects have a right, if they will, to "manufacture and sell pickles and sauces, and not "the less that their fathers had done so before them. "All the Queen's subjects have a right to sell these "articles *in their own names*, and not the less so that "they bear the same names as their fathers. This "defendant follows the same trade as his father follows, "and carries on the trade in his own name, and sells "his essence of anchovies as 'Burgess's Essence of "Anchovies,'—which, in truth, it is. *If any circum-* "*stance of fraud accompanied the case, it would stand very* "*differently* (*l*); but the whole ground of complaint "is the great celebrity which, during many years, "has been possessed by the elder Burgess's essence of "anchovies, and that does not give him such an ex- "clusive right, such a monopoly, such a privilege, as to "prevent the son from making essence of anchovies, "and selling it under his own name" (*m*). But in *Cocks* v. *Chandler* (*n*), where the bill was filed by the successor in title of the inventor of a sauce known as "Reading Sauce," to restrain a rival manufacturer from selling his preparation under the name of "The *Original* Reading Sauce,"—on proof by the plaintiff that he alone was entitled to the *original* receipt, and that on that ground his sauce had attained a high reputation in the market, an injunction was granted

Burgess v. *Burgess*,—a man cannot be restrained from using his own name as vendor of an article;

if there be no fraud on his part.

Cocks v. *Chandler*,—use of word "Original" restrained as a fraud on public.

(*k*) 3 De G. M. & G. 897; *Goodfellow* v. *Prince*, 35 Ch. Div. 709.
(*l*) *Pinèt* v. *Maison Pinèt*, 1898, 1 Ch. 179.
(*m*) *Turton* v. *Turton*, 42 Ch. Div. 128; *Saunders* v. *Sun Life of Canada*, 1894, 1 Ch. 537.
(*n*) L. R. 11 Eq. 446.

against the use by the defendant of the word "original," *as being a device to mislead the public* (*o*). So also, and for the like reason, the use of the words "*Yorkshire Relish*" (*p*), and of the words "*Camel Hair Belting*" (*q*), unless duly qualified so as to prevent the deception, has been restrained. Also, the use of "wrappers," enclosing packets of goods will be restrained, if their tendency (and apparent object) is to deceive (*r*).

Lord Cairns's Act. Equity may give damages, where it has jurisdiction to grant injunction or specific performance.

By Lord Cairns's Act (*s*), it was enacted, that *in all cases in which a court of equity had jurisdiction to* entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, in all these cases it should be lawful for the same court, if it should think fit, to award damages to the party injured, *either in addition to, or in substitution for*, such injunction, and such damages might be assessed in such manner as the court should direct; and by subsequent sections of the Act, provision was made, for the assessment of damages, and for the trial of questions of fact,—either by a jury before the court itself, or by the court alone; also, for the assessment of damages, by a jury before any judge of one of the superior courts of common law at *nisi prius*, or at the assizes, or before a sheriff, as is usual upon writs of inquiry at common law (*t*). And under that statute, although the jurisdiction of the court was not thereby ex-

May assess damages, with or without a jury, or direct an issue.

(*o*) *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Cheavin* v. *Walker*, 5 Ch. Div. 850; *Braham* v. *Brachim*, 7 Ch. Div. 848.

(*p*) *Powell* v. *Birmingham* (*Yorkshire Relish Case*), 1894, 3 Ch. 449; 1896, 2 Ch. 54; 1897, A. C. 710; and see *Cochrane* v. *M'Nish* (the "club-soda" case), 1896, A. C. 225.

(*q*) *Reddaway* v. *Banham*, 1896, A. C. 199.

(*r*) *Knott* v. *Marshall*, W. N. 1894, p. 214.

(*s*) 21 & 22 Vict. c. 27.

(*t*) *Jacques* v. *Millar*, 6 Ch. Div. 153.

tended to cases where there was a plain common law remedy, and where, before the statute, the court would not have interfered (*u*), — so that in cases where a plaintiff came to the court for the specific performance of a contract which could not be specifically performed at all, there damages could not be given in lieu of specific performance (*v*), and there could be no relief in a court of equity "where the bill was filed for damages, and damages only" (*x*), —still the court would give damages, as a general rule, where the damages were *incidental* to the relief by specific performance or injunction, and also where the evidence was insufficient to support a case for an injunction (*y*); nevertheless, the court could not, in its discretion, give damages in lieu of an injunction, where the plaintiff made out his right to an injunction (*z*),—more especially in the case of a continuing nuisance (*a*). Also, where the court had jurisdiction to compel specific performance of *part* of the contract, it had power under the statute to award damages also for the breach of *another part* of that contract, in respect of which it could not have compelled specific performance,—*e.g.*, in a case where the plaintiff had agreed to grant a lease to the defendant when and so soon as he (the defendant) should have built a new house on the land; and the defendant agreed to accept such lease when required, and to pull down an old house then standing on the land, and to build a new one on the site thereof,—it was held, that the plaintiff was entitled to damages for the non-building of the house,

Damages not given where the contract could not be performed at all.

Injunction, and not damages,—right to.

(*u*) *Wicks* v. *Hunt*, Johnson, 380.
(*v*) *Rogers* v. *Challis*, 27 Beav. 175; *Scott* v. *Rayment*, L. R. 7 Eq. 112.
(*x*) *Middleton* v. *Magnay*, 2 H. & M. 237; *Lewers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270.
(*y*) *City of London Brewery Company* v. *Tennant*, L. R. 9 Ch. App. 212; *Holland* v. *Worley*, 26 Ch. Div. 578.
(*z*) *Krehl* v. *Burrell*, 10 Ch. Div. 146; *Greenwood* v. *Hornsey*, 33 Ch. Div. 471; *Martin* v. *Price*, 1894, 1 Ch. 276.
(*a*) *Meux* v. *City Electric Lighting Co.*, 1895, 1 Ch. 287.

and to specific performance of the contract to accept the lease,—Wood, V.C., saying: "The defendant has "agreed to accept a lease when required, and the "court has therefore jurisdiction. . . . *The court, having "therefore acquired jurisdiction, may give damages either "in addition to, or in substitution for, specific per-"formance.* The meaning of the statute can only be, "that where the court has jurisdiction in the suit, "it may award damages in substitution for specific "performance" (*b*); and note, that when damages are given, they are now given down to the date of assessment (*c*). But, of course, if the remedy by specific performance or for an injunction is altogether lost,—*e.g.*, through lapse of time,—the court cannot even give damages (*d*). Lord Cairns's Act, ss. 3, 4, 6, and 7, it may be observed generally, has been repealed by the Statute Law Revision Act, 1881 (44 & 45 Vict. c. 59); but the repeal is expressed to be "without prejudice to any jurisdiction or principle "or rule of law or equity established or confirmed" by the repealed enactment; and consequently, the right to give damages in addition to or in lieu of an injunction, when that would be proper, is a jurisdiction still preserved to the Chancery Division (*e*).

Repeal of Lord Cairns's Act,—the jurisdiction saved.

Sir John Rolt's Act,—determination of legal questions.

By Rolt's Act (*f*), it was enacted, that in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery was sought in any Chancery cause or matter, whether the title to such relief or remedy was or was not incidental to, or dependent upon, a legal right, every question of law or fact cognisable in a court of common law on the determination of which the title to such relief or remedy depended, should be determined by or before the

(*b*) *Soames* v. *Edge*, John. 669.
(*c*) *Hole* v. *Chard Union*, 1894, 1 Ch. 293.
(*d*) *Lavery* v. *Pursell*, 39 Ch. Div. 508.
(*e*) *Krehl* v. *Burrell*, supra; *Martin* v. *Price*, supra.
(*f*) 25 & 26 Vict. c. 42.

same court,—or, where more convenient, an issue or issues might be directed to be tried at the assizes,—but, in all cases, subject to the court's being of opinion, in a matter of concurrent jurisdiction, that the case was properly brought into equity (*g*).

Injunction under Common Law Procedure Act, 1854.

By the Common Law Procedure Act, 1854 (*h*), s. 79, it was enacted, that in all cases of breach of contract or other injury, where the party injured was entitled to maintain *and had brought an action*, he might, in like case and manner as thereinbefore provided with respect to mandamus, claim a writ of injunction, against the repetition or continuance of such breach of contract or other injury, or against the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right; and he might, in the same action, include a claim for damages or other redress (*i*).

Judicature Acts,—general effect of.

Of course, now, under the Judicature Acts, the Chancery Division and the Queen's Bench Division are in all respects upon a level, each having its own original jurisdiction, and also all the original jurisdiction of the other, as regards all matters calling for an injunction, with or without damages or profits.

(*g*) *Durell* v. *Pritchard*, L. R. 1 Ch. App. 244.
(*h*) 17 & 18 Vict. c. 125.
(*i*) *Mayell* v. *Higbey*, 31 L. J. Exch. 329; *Jessel* v. *Chaplin*, 2 Jur. N. S. 931.

CHAPTER XI.

PARTITION.

Origin of jurisdiction.

THE ground of the equity jurisdiction in partition has been thus stated by Lord Redesdale:—"In the case "of the partition of an estate, if the titles of the parties "are in any degree complicated, the difficulties which "have occurred in proceeding at the common law "have led to applications to courts of equity for par- "titions, which are effected by first ascertaining the "rights (*scil.* the undivided shares) of the several "persons interested, and then issuing a commission to "make the partition required; and upon return of the "commission, and confirmation of that return by the "court, the partition is finally completed by mutual "conveyances of the allotments made to the several "parties" (*a*).

Writ of partition at law, inadequate.

The common law always allowed co-parceners to compel a partition; and the statutes 31 Hen. VIII. c. 1, and 32 Hen. VIII. c. 32, gave the like right at the common law to other co-tenants,—*scil.* to joint tenants and to tenants in common (*b*); but the common law remedy, which was by writ of partition, was early found to be inadequate and incomplete,—on account of the various and complicated interests which arose in the ownership of real estate, and because the courts of law were incapable of effectuating in fact the partition by directing mutual conveyances; and for these

(*a*) Mitford on Pleading, 120.
(*b*) *Mayfair Property Co.* v. *Johnston*, 1894, 1 Ch. 508.

reasons, coupled with the necessity for the discovery of titles and of making all appropriate compensatory adjustments, the courts of equity assumed a general concurrent jurisdiction with the courts of law in all cases of partition (*c*), and also extended their jurisdiction to cases where a partition would not have been directed at law, as where an equitable title was set up (*d*); and latterly, the common law remedy by writ of partition was abolished altogether (*e*), although the right to a partition given by the old statutes still remained (*f*).

Cases in which partition directed or not.

A suit for partition might have been, and may be, maintained by any freehold tenant in possession, whether entitled in fee-simple or in fee-tail (*g*), or for life (*h*), or for any other freehold estate (*i*),—and apparently even when the co-owners are entitled only for a term of years (*k*),—provided only they are in possession; and the decree or judgment would have been, and would be, binding on the remaindermen and reversioners (*l*). But a suit for partition could not have been, and cannot be, maintained by a person interested as a co-tenant entitled only in remainder or reversion,—for it would be unreasonable, that a remainderman or reversioner should disturb the existing state of things, during the possession of the tenant for life or other prior tenant (*m*). Also, a partition will not be granted, when there is an overriding power or trust,—during the continuance of such power or trust (*n*);

(*c*) *Agar* v. *Fairfax*, L. R. 2 Eq. 440.
(*d*) *Wills* v. *Slade*, 6 Ves. 498; *Cartwright* v. *Pulteney*, 2 Atk. 380.
(*e*) 3 & 4 Will. IV. c. 27, s. 36.
(*f*) *Mayfair Property Co.* v. *Johnston*, supra.
(*g*) *Brook* v. *Hartford*, 2 P. Wms. 518.
(*h*) *Gaskell* v. *Gaskell*, 6 Sim. 643.
(*i*) *Hobson* v. *Sherwood*, 4 Beav. 184.
(*k*) *Baring* v. *Nash*, 1 V. & B. 551.
(*l*) *Gaskell* v. *Gaskell*, supra.
(*m*) *Evans* v. *Bayshaw*, L. R. 5 Ch. App. 340.
(*n*) *Swaine* v. *Denby*, 14 Ch. Div. 326; *Biggs* v. *Peacock*, 22 Ch. Div. 284; *Boyd* v. *Allen*, 24 Ch. Div. 622.

and, of course, a bill or action for partition will not lie, where the purpose of the action is not partition but to prove the legal title (*o*); moreover, the titles of the parties must, in every partition action, have one common root (*p*). And as regards the properties of which a partition may be decreed, these include manors, and freehold corporeal estates generally (*q*); also, advowsons (*r*), and rent-charges (*s*); also, leaseholds for years (*t*); and [since the Copyhold Act, 1841 (4 & 5 Vict. c. 35), now repealed, but its provisions in this particular re-enacted, by the Copyhold Act, 1894] (*u*), copyhold hereditaments (*v*).

Properties of which a partition may be decreed.

In suits for partition, difficulties often arise from the incapacity of some or one of the persons interested in the property. It was accordingly provided, by the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 30, as regards judgments or decrees for a partition, and by the Partition Act, 1868 (31 & 32 Vict. c. 40), s. 7, as regards judgments for a sale in lieu of partition—a subject hereinafter treated of—and it has now been provided, by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 31, that the court may declare, that any of the parties to the suit are trustees of the land, or of any part thereof, within the meaning of the Trustee Act, 1893; or that the interests of unborn persons who might claim under any party to the suit, or by other ways mentioned in the Act, are the interests of persons who, upon coming into existence, will be trustees within the meaning of the Act; and thereupon, as to any lunatic or person of

Provisions of Trustee Act, 1850, and of Trustee Act, 1893, when persons interested are under incapacity.

(*o*) *Giffard* v. *Williams*, L. R. 5 Ch. App. 546; *Whetstone* v. *Dewis*, 1 Ch. Div. 99.
(*p*) *Miller* v. *Warmington*, 1 Jac. & W. 493.
(*q*) *Hanbury* v. *Hussey*, 14 Beav. 153.
(*r*) *Johnstone* v. *Baber*, 6 De G. M. & G. 439.
(*s*) *Rivis* v. *Watson*, 5 Mee. & W. 255.
(*t*) *Ames* v. *Comyns*, 16 W. R. 74.
(*u*) 57 & 58 Vict. c. 46, s. 87.
(*v*) *Clarke* v. *Clayton*, 2 Giff. 333.

unsound mind, the Lord Chancellor, intrusted by the sign manual with the care of the persons and estates of lunatics, may, by virtue of the Lunacy Act, 1890 (53 Vict. c. 5), s. 135,—and as to all others, the Chancery Division or any judge thereof may, by virtue of the Trustee Act, 1893, s. 31,—make such orders as to the estates, rights, and interests of such persons, born or unborn, as he or the court might, under the provisions of the Act, make concerning the estates, rights, and interests of trustees, born or unborn; and accordingly, if any of the persons interested are infants, lunatics, or persons of unsound mind, the proper court will carry into effect the decree for partition, or for a sale in lieu of partition, by making an order vesting their shares in, or directing a conveyance of their shares by, such persons as the court shall direct (*x*).

Lunacy Act, 1890,—provision of.

Formerly, a partition was usually made by a commission issued to inspect and apportion the estate among the several persons entitled; but where the property was small and the persons interested were many, the difficulties and inconveniences of a partition were often so great as to render the partition the reverse of beneficial,—*e.g.*, in one case (*y*), upon the partition of a house, the commissioners allotted to the plaintiff the whole stack of chimneys, all the fireplaces, the only staircase, and all the conveniences in the yard; and the Lord Chancellor said, *he did not know how to make a better partition.* But these inconveniences have now, in great measure, been removed by the Partition Act, 1868, amended by the Partition Act, 1876 (39 & 40 Vict. c. 17) (*z*), by which it is provided, that in a suit for partition,—being a suit in which a partition might be made,—

Difficulties, where property small, of carrying partition into effect.

Now remedied by sale under Partition Acts, 1868 and 1876.

(*x*) *Davis* v. *Ingram*, 1897, 1 Ch. 477.
(*y*) *Turner v. Morgan*, 8 Ves. 143; 11 Ves. 157.
(*z*) *Pragnell* v. *Batten*, 16 Ch. Div. 360.

the court may direct a sale in lieu of a partition, and a distribution of the proceeds of sale amongst the parties entitled according to their shares and interests; for, by the Partition Act, 1868, s. 4, if a moiety or upwards of the co-tenants request a sale, the court is to decree a sale,—unless the other co-tenants show reason to the contrary (*a*), the burden of proof being in this case upon the parties resisting a sale (*b*); and, by sects. 3 and 5, if one or more (less than a moiety) of the co-tenants request a sale, the court may in its discretion direct a sale,—by sect. 3, if it appears to the court that, by reason of the nature of the property or of the number of the parties interested or presumptively interested, or of the absence or disability of some of the parties, or of any other circumstances, a sale of the property and a distribution of the proceeds would be more beneficial than a partition, and notwithstanding the dissent or disability of any others (*c*); and by sect. 5, if any co-tenant requests a sale in lieu of a partition,—unless the parties resisting a sale, or some of them, undertake to purchase the share of the party requesting a sale; and in case of such undertaking being given, the court may, in its discretion, order a valuation of the share of the party requesting a sale (*d*), or may refuse to direct a sale (*e*).

(*a*.) Sect. 4,—a moiety or upwards.

(*b*.) Sects. 3 and 5,—less than a moiety.

Judgment for partition, or sale in lieu thereof,—form of, and mode of obtaining.

The decree or judgment directing a partition, or a sale in lieu thereof, is usually obtained on motion for judgment duly set down and taken as a short cause; and this practice is invariable, where the defendant (as he usually does) makes default in delivering a defence; but should the defendant deliver a defence,

(*a*) *Drinkwater* v. *Ratcliffe*, L. R. 20 Eq. 528.
(*b*) *Wilkinson* v. *Joberns*, L. R. 16 Eq. 14; *Porter* v. *Lopes*, 7 Ch. Div. 358.
(*c*) *Gilbert* v. *Smith*, 11 Ch. Div. 78.
(*d*) *Williams* v. *Eames*, L. R. 10 Ch. App. 204.
(*e*) *Richardson* v. *Feary*, 39 Ch. Div. 45.

and therein admit the plaintiff's title, the decree or judgment will be made on ordinary motion (*f*); and, in a proper case, the decree or judgment will order an account of the rents and profits for the six years last preceding the issue of the writ of summons in the action (*g*). In the general case, the judgment simply refers the action to Chambers for certain inquiries to be taken as to the persons entitled, and directs a sale only if it is certified that all such persons are parties or (in effect) parties to the action (*h*); but if (as will occasionally happen, where the property is small and the title simple) (*i*), the title is made out at the hearing or trial, an immediate sale will be directed by the judgment (*k*); and usually all the co-owners (other than the party having the conduct of the sale) have leave to bid (*l*); and an inquiry may sometimes be usefully added regarding incumbrances (*m*),—but the incumbrancers are not to be made parties to the action itself (*n*); and there may also be an inquiry as to occupation rent, when one of the co-tenants has been in possession of the property; but, *semble*, this occupation rent, being only a personal claim, will not hold good as against a mortgagee of the co-tenant (*o*). The sale is usually carried out under the direction of the court; but under Order li. Rule *a* (December 1885), the court may, with a view to avoiding expense or delay, or for other good reason, direct the sale to be carried out by proceedings altogether out of court, the proceeds of the sale being in that case usually

Sale,—mode of effectuating.

(*f*) *Burnell* v. *Burnell*, 11 Ch. Div. 213; Order xxxii. Rule 6 (1883).
(*g*) *Burnell* v. *Burnell*, supra.
(*h*) *Senior* v. *Hereford*, 4 Ch. Div. 494.
(*i*) *Wood* v. *Gregory*, 43 Ch. Div. 82.
(*k*) *Lees* v. *Coulton*, L. R. 20 Eq. 20.
(*l*) *Field* v. *Dracup*, 1894, 1 Ch. 59.
(*m*) *Fawthrop* v. *Stocks*, W. N. 1884, p. 118.
(*n*) *Sinclair* v. *James*, 1894, 3 Ch. 554.
(*o*) *Hill* v. *Hickin*, 1897, 2 Ch. 579.

brought into court; and this rule would apparently be applicable in all cases (*p*). The costs of all parties are provided for on further consideration (*q*),—only one set of costs being allowed in respect of each share (*r*).

Costs of the action.

(*p*) *Strugnell* v. *Strugnell*, 27 Ch. Div. 258.
(*q*) *Belcher* v. *Williams*, 45 Ch. Div. 510.
(*r*) *Catton* v. *Banks*, 1893, 2 Ch. 221; *Ancell* v. *Rolfe*, W. N. 1896, p. 9.

CHAPTER XII.

INTERPLEADER.

Interpleader in equity,—where two or more persons claim the same thing from a third person.

INTERPLEADER in equity was, where two or more persons, whose titles were connected (by reason either of one being derived from the other, or of both being derived from a common source), claimed the same thing from a third person, and he, not knowing to which of the claimants he ought of right to render it, feared he might be hurt by one or other of them; and in such a case, he exhibited a bill of interpleader against both, stating their several claims and his own position in regard to the matter, and *praying that the claimants might interplead*, so that the court might adjudge to which of them the thing belonged,—and if any action had been brought by either claimant against him concerning the subject-matter in dispute, he also prayed that such claimant might be restrained from proceeding with that action (*a*).

Interpleader at law, originally only in cases of joint-bailment.

The remedy of interpleader existed also at the common law; but (prior to the statutes 1 & 2 Will. IV. c. 58, and 23 & 24 Vict. c. 126) the remedy at law had a very narrow range of application, lying only in the case of a joint-bailment by the claimants (*b*); wherefore the jurisdiction in equity was more extensively available.

In order that a party might interplead in equity,

(*a*) *Jones* v. *Thomas*, 2 Sim. & Giff. 186; *Prudential Assurance Company* v. *Thomas*, L. R. 3 Ch. App. 74.
(*b*) *Crawshay* v. *Thornton*, 2 My. & Cr. 1, 21.

Mitchell v. *Hayne*,—plaintiff to a bill of interpleader must have had no personal interest in the subject-matter.

it was essential, that he should have no personal interest in the subject-matter; and in a case therefore where the plaintiff, an auctioneer, had sold an estate, and the purchaser subsequently commenced an action against him for the return of his deposit, and the plaintiff thereupon commenced his action of interpleader against the vendor and the purchaser, and prayed an interpleader and injunction, *offering to pay the deposit money into court after deducting his commission*,—the Vice-Chancellor refused the bill (*c*), saying: "Interpleader is where the plaintiff is *the* "*holder of a stake* which is equally contested by the "defendants, *and as to which the plaintiff is wholly* "*indifferent between the parties*, and the right to which "will be fully settled by the interpleader between "the defendants" (*d*). And in accordance with that decision, it has now been provided, by Order lvii. Rule 2 (1883), that the applicant for the interpleader summons provided by that order,—and who is invariably the defendant in the action,—must satisfy the court *that he claims no interest in the subject-matter in dispute other than for his costs or charges* (*e*), and that he is willing to pay or transfer the subject-matter into court, or to dispose of it as the court may direct. It is to be noticed, however, that when the dispute is between two rival (or competing) auctioneers,—one of whom claims (say, £35), for his commission in respect of the sale of a house, and sues the defendant (the owner of the house) for such commission, and the other of the two auctioneers claims (say, £25) for his commission in respect of the sale of the same house (for the defendant),—that is not a case in which the defendant may have an

Excepting (now) for his costs and charges.

(*c*) *Mitchell* v. *Hayne*, 2 Sim. & Stu. 63; and see Order lvii. Rule 2, 1883.
(*d*) *Attenborough* v. *St. Katherine Docks Co.*, 3 C. P. D. 373, 467.
(*e*) *Gebruder* v. *Ploton*, 25 Q. B. D. 13.

interpleader, the dispute not being in respect of one and the same subject-matter (*f*).

Crawshay v. *Thornton*,—plaintiff must have been under no personal liability.

Further, in the equitable interpleader, the plaintiff, besides having had no personal interest in the subject-matter, must also have been under no personal liability to either of the claimants; and therefore, in a case where A. deposited certain iron with B. & Co., who were wharfingers, and afterwards directed them to deliver it to C.; and C. applied to B. & Co. to know the particulars of the iron held by them on his account, and B. & Co. thereupon wrote a letter to C., saying that, in compliance with his request, they annexed a note of the landing weights of the iron transferred into his name by A., *and now held by them* (*B. & Co.*) *at his* (*C.'s*) *disposal;* and B. & Co. subsequently received notice from D. that the iron belonged to him (D.); and B. & Co. upon that filed a bill of interpleader against C. & D.,—it was held, that they could not maintain interpleader,—*for, after their letter to C.*, he (C.) had a right against them independently of the question whether D. was or was not entitled to the iron; in other words, the plaintiff had, by reason of that letter, come under "*a personal* "*obligation to C. independently of the question of pro-* "*perty*," and that personal obligation was not a right that could be disposed of on the interpleader (*g*).

Interpleader, where one title was legal and the other equitable.

It was sufficient to give to the Court of Equity jurisdiction in interpleader, if the title of one of the claimants was legal and the title of the other was equitable (*h*); and it was not necessary, that the titles of both claimants should be legal or should be equitable,—*e.g.*, if a debt had been assigned, and a controversy arose between the assignor and the

(*f*) *Greatorex* v. *Shackle*, 1895, 2 Q. B. 249
(*g*) *Crawshay* v. *Thornton*, 2 My. & Cr. 1, 19.
(*h*) *Paris* v. *Gilham*, Coop. 56; *Morgan* v. *Marsack*, 2 Mer. 107.

assignee respecting the title, a bill of interpleader might have been brought by the debtor to have the point settled to whom he should pay the debt (*i*); and in fact, where one of the claims was purely equitable, it was formerly indispensable to come into equity,—for in such a case there could have been no interpleader at law (*k*); but after the Common Law Procedure Act, 1860, courts of law would, on an interpleader issue, have taken into consideration the equitable rights of the parties (*l*). On the other hand, in the case of two adverse independent legal titles, the party holding the property was not entitled to interplead in equity,—for that would have been to assume the right to try merely legal questions (*m*). But all these distinctions have now become obsolete since the fusion of law and equity, it having been now provided generally, by Order lvii. Rule 1 (1883), that relief by way of interpleader may be granted, wherever the person seeking the relief (and who is usually called the applicant) is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more persons making adverse claims thereto (and who are usually called the claimants); and by rule 3, the applicant is not to be disentitled to relief, by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another.

No interpleader, formerly, in case of adverse independent legal titles.

Secus, now.

It was a settled rule of law, and of equity also, that an agent should not be allowed to dispute the title of his principal to property which he had received from or for his principal (*n*); and the

Agent could not have interpleader against his principal.

(*i*) *Wright* v. *Ward*, 4 Russ. 215.
(*k*) *Bolton* v. *Williams*, 4 Bro. C. C. 309.
(*l*) *Rusden* v. *Pope*, L. R. 3 Ex. 269.
(*m*) *Pearson* v. *Cardon*, 2 Russ. & M. 606, 610.
(*n*) *Dixon* v. *Hammond*, 2 B. & Ald. 313.

agent could not therefore in general interplead, although in exceptional cases he might do so,—*e.g.*, if the principal had created an interest in (or lien on) the fund or property in favour of a third person, and the nature and extent of that interest or lien was in controversy between the principal and such third person, then the agent might, for his own protection, have had interpleader, to compel the principal and such third person to litigate their respective titles to the fund or property (*o*). Also, a tenant could not in general have had interpleader against his landlord and a stranger claiming under a title adverse to the landlord,—for a bill of interpleader was, where two persons claimed of a third the *same* debt or the *same* duty, and in the case of an adverse claimant it was clear he could not be claiming the *same* debt,—for *the rent due upon the demise was a different demand from that which some other person might have upon the occupation of the premises* (*p*). But equity would, even in the case of a tenant, have granted relief by way of interpleader, if the persons claiming the *same* rent claimed in privity of contract or of tenure, as in the case of a mortgagor and a mortgagee, and as in the case of a trustee and a *cestui que trust;* or where an estate was settled to the separate use of a married woman, of which the tenant had notice, and the husband had been in receipt of the rents (*q*),—for in cases of this sort, the tenant did not in fact dispute the title of his landlord, but he affirmed that title, and the tenure and contract by which the rent was payable, *and put himself upon the mere uncertainty of the person to whom he was to pay the rent.*

Except where principal had created a lien in favour of a third party.

Tenant could not file a bill against his landlord and a stranger claiming by a paramount title.

Cases where a tenant might bring a bill of interpleader.

(*o*) *Smith* v. *Hammond*, 6 Sim. 10; *Wright* v. *Ward*, 4 Russ. 220.
(*p*) *Dungey* v. *Angove*, 2 Ves. Jr. 310; *Cook* v. *Rosslyn*, 1 Giff. 167.
(*q*) *Clarke* v. *Byne*, 13 Ves. 383; *Johnson* v. *Atkinson*, 3 Anst. 798.

Sheriff seizing goods could not have interpleader.

A bill of interpleader could not have been filed by a sheriff who had seized goods in execution against two or more persons putting forward adverse claims to the property,—*scil.* because interpleader lay "where "two persons claimed of a third the same debt or "the same duty," and by the seizure the sheriff (it was said), as to one of the defendants, admitted himself a wrong-doer (*r*); nevertheless, equity would have allowed interpleader by a sheriff, where there were conflicting equitable claims on the property which he had seized (*s*); and latterly, under the statute 1 & 2 Will. IV. c. 58, the benefit of interpleader was extended to the sheriff; and, by Order lvii. Rule 1 (1883), it has now been provided generally, that relief by way of interpleader may be granted, wherever the applicant in interpleader is the sheriff, or other officer charged with the execution of process by or under the authority of the court, and claim is made to any money, goods or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued.

Secus, now.

Affidavit of no collusion.

Moreover, the plaintiff in a bill of interpleader was required in all cases to satisfy the court, that he was not colluding with either of the claimants. Lord Redesdale (*t*) states the matter thus:—"As the "sole ground on which the jurisdiction of the court "in interpleader is supported is the danger of injury "to the plaintiff (*scil.* the applicant) from the doubt-"ful titles of the defendants (*scil.* claimants), the "court will not permit the proceedings to be used "collusively, to give an advantage to either party;

(*r*) *Slingsby* v. *Boulton*, 1 V. & B. 335.
(*s*) *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492; *Dutton* v. *Furness*, 35 Beav. 461.
(*t*) Mitford on Pleading, p. 49; *Errington* v. *Att.-Gen.*, 1 Jac. 205.

"nor will it permit the plaintiff (*scil.* applicant) to "delay the payment of money due from him, by "suggesting a doubt to whom it is due; therefore "to a bill of interpleader the plaintiff must annex "an affidavit, that there is no collusion between him "and any of the parties; and if any money is due "from him, he must bring it into court, or at least "offer to do so, by his bill;" and, under the present practice, an affidavit of no collusion is expressly required by Order lvii. Rule 2 (1883). And generally, under the present practice, and in particular under Order lvii. (1883), the application for an interpleader summons is made to a judge at Chambers; and if made by a defendant, it is made at any time after service of the writ in the action; and if made by the sheriff, it is made immediately after he has seized the goods in execution; and where the sheriff interpleads, the court may order a sale of the whole, or of any part of the goods, without prejudice to the question of the title thereto; and the question of title may be decided summarily,—but more often an issue of fact will be ordered to be tried, or an issue of law to be raised, on a special case stated between the claimants (*u*); or the whole matter may (in a proper case) be transferred into the County Court (*v*). When the Court orders a sale of the goods, it may also (and usually will) go on and direct the application of the sale-proceeds—"in such manner and upon such terms as shall be just (*x*).

Procedure on interpleader.

(*u*) *Burstall* v. *Bryant*, 12 Q. B. D. 103; *Robinson* v. *Tucker*, 14 Q. B. D. 371; *Dawson* v. *Fox*, ib. 377.

(*v*) Judicature Act, 1884 (47 & 48 Vict. c. 51), s. 17.

(*x*) Order lvii. Rule 12; *Forster* v. *Clowser*, 1897, 2 Q. B. 362; *Stern* v. *Tegner*, W. N. 1897, p. 154.

PART IV.

THE [NOW OBSOLETE] *AUXILIARY JURISDICTION.*

The Auxiliary Jurisdiction, *as such*, is now obsolete.

IN proceeding to treat of this branch of the jurisdiction in equity, it is to be observed, that it is now obsolete as a separate jurisdiction peculiar to equity; and its place is now supplied by much simpler and speedier modes of procedure in general; but this part, although obsolete, is retained,—because, for the due application of these substituted simpler processes, the principles herein expounded are still necessary to be known and understood. We propose discussing this now obsolete jurisdiction in the following sections:—

SECTION I.—*On Discovery.*

Discovery.

A bill of discovery was a bill which asked no relief, but simply discovery; and it was usually for discovery of facts resting in the knowledge of the defendant, or of deeds or writings in the possession or power of the defendant; and the object of the discovery was, to maintain some action or other proceeding in a court of law. In order to maintain a bill of discovery, the action must have been already commenced at law,—unless, indeed, the object of the discovery was to ascertain in fact who was the proper defendant at law (*a*); and the equitable jurisdiction to grant discovery arose from the inability

(*a*) *Angell* v. *Angell*, 1 Sim. & Stu. 83.

of the courts of common law to compel discovery by the parties to the suit, or to compel the production of material documents in the custody or power of the parties. A bill of discovery might have been resisted upon the following (among other grounds), namely:—(1.) That the subject was not cognisable in any court of justice; (2.) That the value of the suit was beneath the dignity of a court of equity; (3.) That the court would not order discovery for the particular court for which it was wanted; (4.) That the plaintiff, by reason of some personal disability, was disentitled to the discovery; (5.) That the plaintiff had no title to the character in which he sued, or (6.) had no interest in the subject-matter; (7.) That the defendant was not answerable to the plaintiff, but (if at all) to some other person; (8.) That the defendant was not bound to discover his own title, or (9.) was protected, and in fact, forbidden by the policy of the law, from making the discovery; (10.) That the defendant would or might, by the discovery, subject himself to some criminal prosecution, or to a penalty or forfeiture; (11.) That the defendant was a mere witness; and (12.) That the discovery was not material at the then stage of the action, or that the plaintiff's right to it depended upon the prior decision of some matter in dispute between himself and the defendant. And with comparatively slight modifications, all these defences are still open to either party to an action, as objections which he may take to discovery under the present practice,—whether sought to be obtained by interrogatories, affidavit of documents, or otherwise (*b*).

Jurisdiction in equity to grant discovery,—origin of,

Defences to a bill of discovery.

By way of illustrating some few of these various defences, it may be mentioned:—(1.) That an heir-

Illustrations.

(*b*) *Lyell* v. *Kennedy*, 8 App. Ca. 217; *Kennedy* v. *Lyell*, 9 App. Ca. 81; *Emmerson* v. *Ind*, 12 App. Ca. 300.

at-law could not, during the life of his ancestor, have obtained discovery of the title-deeds of the ancestor's estate,—for he (the heir) had no present title whatever; but an heir-in-tail was entitled to see the deed creating the estate-tail,—for, by reason of the statute *De Donis*, he (the heir-in-tail) had a present and existing title. (2.) If it clearly appeared, that the action was not maintainable at law, the discovery must have been useless, and therefore would have been refused (*c*); on the other hand, if the point was fairly open to doubt, the discovery, as it might prove useful in the action, would in general have been granted (*d*),—unless it was of a kind to be not material at the then stage of the action. But, (3.) No discovery would be granted for any action not purely civil, or where the effect of it would be a confiscation of the defendant's property (*e*); and it was also well established, that no discovery would be granted,—against a married woman to compel her to disclose facts which might charge her husband; or against a person standing in a relation of professional confidence, to disclose the secrets of his client; or against a public officer, to disclose the secrets of his department; and, of course, where the objection to the discovery was, that the defendant was a mere witness, and had no interest in the suit, he might be examined in the suit as a witness, and there was therefore no need for any discovery *in aid*. Also, courts of equity would not have granted discovery in aid of an action in another court, if the latter court was competent to give discovery, and had always been so competent; but courts of equity did not lose the jurisdiction to grant discovery in aid of an action at law, merely because the courts of common law, subsequently (*scil.* by the statutes 14

Discovery,—for what purposes refused.

(*c*) *Lord Kensington* v. *Mansell*, 13 Ves. 240.
(*d*) *Thomas* v. *Tyler*, 3 Younge & Col. Ex. 255.
(*e*) *United States of America* v. *M'Rae*, L. R. 3 Ch. App. 79.

& 15 Vict. c. 99, and 17 & 18 Vict. c. 126) acquired the like jurisdiction (*f*); and it was not, in fact, until the Judicature Acts, 1873–95, that the peculiar jurisdiction of equity (to grant discovery *in aid*) became obsolete and superfluous (*g*). So also courts of equity would not have granted discovery in aid of a voluntary arbitration (*h*), but would have done so in aid of a compulsory arbitration in an action (*i*). It seems, however, that a defendant may not now object (*k*), but formerly he might always have objected, to discovery, if he was a *bonâ fide* purchaser for value without notice of the plaintiff's claim (*l*).

No discovery in aid of arbitration,—unless arbitration compulsory.

Section Ia.—*On Bills to Perpetuate Testimony; and to take Evidence* De bene esse.

Bills to perpetuate testimony were a branch of the law of discovery in equity, the object of these bills being to preserve,—that is, to perpetuate,—evidence when it was in danger of being lost, before the matter to which it related could be made the subject of judicial investigation. The depositions taken under the decree or order made in such suits were not published until after the death of the witnesses; and for this reason chiefly, courts of equity did not generally entertain such bills,—unless where it was absolutely necessary to prevent a failure of justice (*m*), or unless where the preservation of the evidence would clearly tend to prevent future litigation (*n*), or to defeat such litigation if commenced (*o*). If,

(a.) Bills to perpetuate testimony,—object of.

(*f*) *British Emp. Shipping Co.* v. *Somes*, 3 K. & J. 433.
(*g*) *Orr* v. *Diaper*, 4 Ch. Div. 92.
(*h*) *Street* v. *Rigby*, 6 Ves. 821.
(*i*) *British Emp. Shipping Co.* v. *Somes*, 3 K. & J. 333.
(*k*) *Emmerson* v. *Ind*, 12 App. Ca. 300.
(*l*) *Stanhope* v. *Earl Verney*, 2 Eden, 81; *Willoughby* v. *Willoughby*, 1 T. R. 763.
(*m*) *Llanover* v. *Homfray*, 13 Ch. Div. 380.
(*n*) Mitford, Pl. 172, 173.
(*o*) *Brooking* v. *Maudslay*, 38 Ch. Div. 636.

If matter could be at once litigated, equity refused to perpetuate testimony.

therefore, it were possible that the matter in controversy could be made the subject of immediate judicial investigation by the party who sought to perpetuate the testimony, there was no reason for giving him the advantage of deferring his proceedings to a future time, and of substituting written depositions for *vivâ voce* evidence (*p*); but if the party who filed the bill could not bring the matter into immediate judicial investigation (which might have happened when his title was in remainder),—or if he himself was in actual possession of the property,—in either of these cases, equity would have entertained a suit to perpetuate the testimony (*q*).

But equity would not refuse, if the matter could not by any means be at once litigated.

Equity would not perpetuate evidence of a right which might be barred.

Formerly, also, the court declined to entertain a bill to perpetuate testimony, in support of a right which might be immediately barred,—as in the case of a remainderman filing a bill against the tenant-in-tail in possession (*r*); but, by the statute 5 & 6 Vict. c. 69, any person who would, under the circumstances alleged by him to exist, become entitled, *upon the happening of any future event*, to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which could not by him be brought to trial before the *happening of such event*, has now been enabled to file a bill in Chancery, to perpetuate any testimony which might be material for establishing such claim or right (*s*).

Under 5 & 6 Vict. c. 69, every species of right entitles a plaintiff to this remedy.

Before the statute, a mere expectancy or *spes successionis* was not enough.

Before this statute, a mere expectancy or *spes successionis*, as that of an heir-at-law, was not considered sufficient to sustain a bill to perpetuate testimony, though any interest, however small or remote, even though contingent, which the law would recognise, entitled a party to the relief (*t*).

(*p*) *Ellice* v. *Roupell* (No. 1), 32 Beav. 299.
(*q*) *Earl Spencer* v. *Peek*, L. R. 3 Eq. 415.
(*r*) *Dursley* v. *Fitzhardinge*, 6 Ves. 251.
(*s*) *Campbell* v. *Earl of Dalhousie*, L. R. 1 H. L. Sc. App. 462.
(*t*) *Dursley* v. *Fitzhardinge*, 6 Ves. 251.

Also, a bill to perpetuate testimony was formerly only allowed, where some right to *property*, as distinguished from an *office* or *dignity*, was involved (*u*); but now, under the Legitimacy Declaration Act, 1858 (*v*), the Probate and Divorce Division, or indeed any Division of the High Court, is empowered, on the petition of certain persons specially interested, to made decrees declaratory of the legitimacy or illegitimacy of any such petitioners or of the validity or invalidity of the marriages of the parents or grandparents of the petitioner, or of his own marriage, or of his right to be deemed a natural born subject (*x*); this statute does not, however, extend, *e.g.*, to a petitioner claiming to be declared entitled to an honour or baronetcy (*y*). And it may be stated generally, that since the Judicature Acts, which contain no specific provision on the matter, an action in the nature of a bill to perpetuate testimony may still lie, upon the grounds and under the circumstances upon and under which it previously lay (*z*).

And there must have been some right to property.

Legitimacy Declaration Act, 1858,—perpetuation of testimony under.

The Judicature Acts,—effect of.

Bills to take testimony *de bene esse*, and bills to take the testimony of persons resident abroad, *to be used in suits actually pending in the courts*, were another branch of the law of discovery in equity; and there was this broad distinction between bills of this sort and bills to perpetuate testimony, that the latter could be brought by persons only who were in possession *or* who could show title, and who could not for the time being sue at law; while bills to take testimony *de bene esse* might be brought, not only by persons who were in possession or who could show title, but also by persons who were out of

(*b.*) Bills to take testimony *de bene esse*.

How distinguished from bills to perpetuate testimony.

(*u*) *Townshend Peerage Case*, 10 Cl. & Fin. 289.
(*v*) 21 & 22 Vict. c. 93.
(*x*) *Frederick* v. *Att.-Gen.*, L. R. 3 P. & M. 270.
(*y*) *Frederick* v. *Att.-Gen.*, L. R. 3 P. & M. 196.
(*z*) *In re Stoer*, 13 Q. B. D. 120; *Bute* (*Marquess*) v. *James*, 33 Ch. Div. 157.

possession and who showed no title, or only the title in dispute, and who were then actually litigating the matter at law,—for bills *de bene esse* could be brought only when an action was then depending, and not before (*a*). Such bills would be entertained, where important witnesses were so old and infirm that they could not safely travel, or were in a precarious state of health, or were abroad at the time of trial,—or wherever, in fact, the justice of the case appeared to require it (*b*). But the equity jurisdiction, with reference to testimony *de bene esse*, and to take the evidence of persons resident abroad, became of considerably less practical importance, after the courts of Common Law were invested with ample powers for that purpose by the statutes 13 Geo. III. c. 63, s. 44, and 1 Will. IV. c. 22, s. 1; and, of course, under the Judicature Acts, in lieu of a bill or action to take evidence *de bene esse*, there would now be a mere order to examine *de bene esse*, obtained (under Order xxxvii. Rule 5) from the court or judge before whom the action or matter is proceeding, on a summary application in the pending cause or matter.

Grounds for exercising the jurisdiction.

The Judicature Acts,—effect of.

Section II.—*On Bills* Quia timet; *and Bills of Peace.*

(*a.*) Bills *quia timet.*

Bills *quia timet* were in the nature of writs of prevention or of precaution,—the plaintiff seeking the aid of the court, because he feared (*quia timet*) some future probable injury to his rights or interests, and not because an injury had already actually occurred to them which required relief (*c*). The nature of the relief given in such cases by courts of equity was dependent on circumstances; for these courts

(*a*) *Angell* v. *Angell*, 1 Sim. & Stu. 83.
(*b*) *Warner* v. *Mosses*, 16 Ch. Div. 100; *Llanover* v. *Homfray*, 19 Ch. Div. 224.
(*c*) *Hobbs* v. *Wayet*, 36 Ch. Div. 256.

interfered sometimes by the appointment of a receiver of the rents or other income,—sometimes by an order to pay a pecuniary fund into court,—sometimes by directing security to be given or money to be paid over, or a sufficient indemnity to be given,—and sometimes by the mere issuing of an injunction (*d*), or other remedial process,—the Courts in all cases adapting their relief to the precise nature of the particular case and the remedial justice required by it. And even since the Judicature Acts, an action in the nature of a bill *quia timet* may still be brought; but no such action will lie, unless the plaintiff is able to prove *imminent* danger of a *substantial* kind, or that the apprehended injury, if it does come, will be irreparable (*e*); and in general the action at the present day is not (although it may be) exclusively in the nature of the old bill *quia timet*, but seeks other substantive relief,—the preventive or precautionary relief being merely incidental to such other substantive relief.

Appointment of receivers.

Directing security to be given.

Granting injunctions.

Bills of peace bore some resemblance to bills *quia timet*; but although occasionally brought before any suit was instituted, they were most generally brought after the right had been tried at law. For, by a bill of peace, properly so called, was understood a bill brought by a person to establish and perpetuate a right which he claimed, and which, from its very nature, was or might be controverted by different persons in different actions, and justice required that the party should be quieted in the right,—if it was already sufficiently established, or if it should be sufficiently established under the direction of the court,—*Interest reipublicæ ut sit finis litium.* Thus,

Bills of peace, —their object.

(*d*) *Hendriks* v. *Montagu*, 17 Ch. Div. 638; *Tussaud* v. *Tussaud*, 44 Ch. Div. 678; *Att.-Gen.* v. *Manchester* (*Corporation*), 1893, 2 Ch. 87; *Martin* v. *Price*, 1894, 1 Ch. 276.

(*e*) *Fletcher* v. *Bealey*, 28 Ch. Div. 688; *Martin* v. *Price*, supra.

Bills of peace, —nature of cases for.

where there was one general right to be established against a great number of persons; or where one person claimed or defended a right against many; or where many claimed or defended a right against one (*f*),—in all these cases, the court of equity, having power to bring all the parties before it, would, in order to prevent a multiplicity of suits, proceed to ascertain the general right,—either by directing an action or issue at law to try the right, or by itself determining the right under Rolt's Act (*g*),—and would then make a decree finally binding on all the parties (*h*). And this has been done, for example, in an action by a lord against his tenants to recover an encroachment made under colour of a right of common; by a party interested, to establish his right to a toll, or to the profits of a fair; and where a party claimed to be in possession of a right of fishing for a considerable distance in a river, and the riparian proprietors set up several adverse rights, he might have had a bill of peace against all of them to establish his right and to quiet his possession (*i*). And so also, where the plaintiff had, after repeated trials, established his right at law, and yet was in danger of further obstruction to his right from new attempts to controvert it,—*e.g.*, in the case of *Earl of Bath* v. *Sherwin* (*k*), where the title to land had been five several times tried in an ejectment, and five several verdicts had been given in favour of the plaintiff,—the House of Lords granted a perpetual injunction, upon the ground that it was the only adequate means of suppressing vexatious litigation, the expense and continuance of which were doing irreparable mischief. It does not appear, that bills of peace are in the

Bills of peace, —instances of.

(*f*) *Sheffield Waterworks* v. *Yeomans*, L. R. 2 Ch. App. 8.
(*g*) 25 & 26 Vict. c. 42.
(*h*) *Warrick* v. *Queen's College, Oxford*, L. R. 6 Ch. App. 716.
(*i*) *Mayor of York* v. *Pilkington*, 1 Atk. 282.
(*k*) Prec. Ch. 261; 4 Bro. P. C. 373.

slightest degree affected by the Judicature Acts, or by the orders and rules thereunder,—excepting that they would now be called actions in the nature of bills of peace, and excepting that the High Court (either the Chancery Division or the Queen's Bench Division thereof) would both establish the right and grant the perpetual injunction, quieting the title thereto, in one and the same action and by one and the same judgment.

Judicature Acts,—effect of.

Section III.—*On the Cancelling, and Delivery up of Documents.*

The jurisdiction of courts of equity to direct the cancellation or delivery up of certain void or voidable instruments was of a protective or preventive character, analogous to the jurisdiction *quia timet*,—that is to say, for fear that such instruments might afterwards be vexatiously used, when the evidence to impeach them was lost, or because they were a cloud upon the title of the party (*l*). It was not usually a matter of absolute right in the plaintiff, but it was a matter of judicial discretion with the court, to grant or to refuse the relief prayed, according to the court's own notions of what was proper. For example, voluntary agreements, although free from fraud, were not enforceable in a court of equity, and yet they would not ordinarily be set aside by the court, being free from fraud,—for if a man would bind himself in a voluntary deed, and not reserve to himself a power of revocation, a court of equity would not loose the fetters he had put upon himself, but would leave him to lie down under his own folly (*m*); and even

Instrument ordered to be delivered up, when.

Granting of such a decree not a matter of right, but of judicial discretion in the court.

(*l*) *Williams* v. *Bull*, 32 Beav. 574; *Onions* v. *Cohen*, 2 H. & M. 354.

(*m*) *Bill* v. *Cureton*, 2 My. & K. 503; *Hall* v. *Hall*, L. R. 8 Ch. App. 430; *Henry* v. *Armstrong*, 18 Ch. Div. 668.

If court granted relief, it did so on terms.

in those cases in which the court would grant relief, it imposed such terms as it thought fit upon the plaintiff, upon the maxim, *He who seeks equity must do equity;* and if the plaintiff refused to comply with such terms, his bill was dismissed.

Where plaintiff had good defence to an instrument, in equity though not at law.

A party had a right to come into equity to have agreements, deeds, or securities cancelled, rescinded, or delivered up, where he had a defence to them good in equity, but not capable of being made available at law; and although there cannot now be any case in which a defence good in equity would not also be available and equally good at law, still the jurisdiction in equity remains practically exclusive (*n*), and will be exercised where the document ought to be wholly avoided and set aside (*o*). In a recent case (*p*), where, in contemplation of a marriage, the intended wife and her father executed the engrossment of a settlement (comprising property of the father and the present and after-acquired property of the intended wife), and the intended husband never executed the engrossment, and the marriage was not afterwards solemnised,—the engagement to marry having been broken off by agreement,—the court declared the engrossment void as a settlement, and directed the solicitors of the intended husband (who were in possession of it) to deliver it up.

The equity jurisdiction is still exercisable,—in what cases.

I. *Voidable instruments,*—(*a.*) When cancelled.

Courts of equity would also, in general, set aside and cancel agreements and securities which were voidable merely, and not void, under the following circumstances (*q*), that is to say: (1) On the ground of actual fraud in the defendant, in which the plaintiff had not participated; (2) On the ground of con-

(*n*) Judicature Act, 1873, s. 34.
(*o*) *Brooking* v. *Maudslay*, 38 Ch. Div. 636.
(*p*) *Bond* v. *Walford*, 32 Ch. Div. 238.
(*q*) *Brooking* v. *Maudslay*, supra.

structive fraud in the defendant, where the plaintiff had not participated therein,—and sometimes, although the plaintiff had participated therein,—*e.g.*, in the case of gaming securities, which would be decreed to be delivered up, notwithstanding both parties had participated in the fraud,—because public policy would be best served by such a course (*r*); or, *e.g.*, where the defendant had acted with oppression, or other undue influence, and the plaintiff was therefore not *in pari delicto* with the defendant. On the other hand, where the party seeking relief was the sole guilty party, or where he had participated equally and deliberately in the fraud,—or where the agreement which he wanted to set aside was founded on illegality, immorality, or some base or unconscionable conduct on his own part,—in such cases, courts of equity would leave him to the consequences of his own iniquity, and would decline to assist him to escape from the toils which he had studiously prepared for others, or whereby he had sought to violate with impunity the interests or the morals of society (*s*).

(*b.*) When not cancelled.

As regards instruments which were utterly void, and not merely voidable, there used to be some doubt among equity practitioners, whether, the instrument being utterly void and incapable of being enforced even at law, the remedial justice of courts of law to protect the party was not adequate and complete, so as to obviate the necessity of the interposition of courts of equity (*t*); but this doubt has been put to rest by the modern decisions, and the jurisdiction of equity to order a delivery up of void documents has been fully established, in all cases in

II. *Void instruments*,—difficulty with.

(*a.*) When delivered up, and upon what grounds.

(*r*) *Earl of Milltown* v. *Stewart*, 3 Mylne & Craig, 18.
(*s*) *St. John* v. *St. John*, 11 Ves. 535; *Benyon* v. *Nettlefield*, 3 Mac. & Gord. 100; *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275.
(*t*) *Ryan* v. *Mackmath*, 3 Bro. C. C. 16.

which the delivery up of the document might help to prevent the perpetration of some further wrong (*u*). Moreover, the jurisdiction in these cases has been put on the general principle of equity, that it is better to prevent than to relieve. If, therefore, an instrument was of such turpitude that it ought not to be used or enforced, it was against conscience for the party holding it to retain it, since he could only retain it for some sinister purpose; and if it was a negotiable instrument, it might also have been used for a fraudulent or improper purpose, to the injury of some one or other; or if it was a deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily had a tendency to throw a cloud upon the title; and if it was a written agreement, solemn or otherwise, it was always liable, while it existed, to be applied to improper purposes, and might be vexatiously litigated at a distance of time, when the proper evidence to repel the claim might have been lost or obscured (*v*); but where the document (*e.g.*, a policy of marine insurance) is not wholly void or voidable on the ground of fraud, but there is a good legal (or other) defence to any action thereon, the proper remedy is not to have the document cancelled, but (in case of need) to have the evidence which supports the defence to it perpetuated (*x*). Also, where the illegality of the instrument appeared upon the face of it, so that its nullity could admit of no doubt, and its capacity therefore to be made the means of perpetrating some further wrong was wholly paralysed, there was not the same reason for the interference of a court of equity to direct it to be cancelled or delivered up,—that is to say, there was no danger that the lapse of

(*b.*) When not delivered up, and upon what grounds.

(*u*) *Davies* v. *Duke of Marlborough*, 2 Swanst. 157; *Jones* v. *Merionethshire Building Society*, 1891, 2 Ch. 587.
(*v*) *Bromley* v. *Holland*, 7 Ves. 20, 21; *Kemp* v. *Prior*, 7 Ves. 248.
(*x*) *Brooking* v. *Maudslay*, 38 Ch. Div. 636.

time would deprive the party of his full means of defence; nor could such an instrument throw any cloud upon the title, or diminish any one's security, or be used as a means of vexatious litigation, or for any other or sensible injury,—and accordingly, it was fully established, that, in such cases, courts of equity would not order the delivery up of the void instrument (*y*).

Judicature Acts,—effect of.

Under the Judicature Acts, every ground of defence, and every variety of relief and of protection and prevention, being now equally available in, and equally procurable from, all the Divisions of the High Court of Justice, it is clear, that the jurisdiction in equity in such matters, so far as it survives, is no longer either *exclusive* or *auxiliary*, but is, strictly speaking, *concurrent*,—although (for reasons of convenience) it is by the Judicature Act, 1873 (*z*), assigned to the Chancery Division as portion of its *exclusive* jurisdiction; but the grounds of the jurisdiction in equity do not appear to be otherwise materially altered.

Section IV.—*On Bills to Establish Wills.*

Equity dealt with wills incidentally.

Although courts of equity had no general jurisdiction over wills,—the proper court having been, as regards personalty, the Ecclesiastical Court, and latterly the Court of Probate, its successor, and as regards realty, the Court of Common Pleas or of the Queen's Bench, and latterly (upon citation of the heir and devisee) the Court of Probate (*a*),—yet, whenever a will came incidentally into question before

(*y*) *Simpson* v. *Lord Howden*, 3 Mylne & Cr. 96; *Threfall* v. *Lunt*, 7 Sim. 627.
(*z*) Sect. 34, sub-sect. 3.
(*a*) 20 & 21 Vict. c. 77, ss. 61, 62.

courts of equity, as when these courts were called upon to execute the trusts of the will, they necessarily acquired *some jurisdiction* regarding wills (*b*). In such a case, if the validity of the will was admitted, or already established elsewhere, the courts of equity acted upon it to the fullest extent; but if the parties did not admit the validity of the will, and the same had not been established elsewhere, the court of equity in which the cause was depending would have caused the validity of the will to be established,—and for that purpose would either have directed an issue or issues to be tried at the assizes, and upon the finding, or ultimate finding, would have declared the will established, or would itself have tried the question and established the will on its own finding, which latter course was called proving the will in Chancery *per testes;* and if the will were once established, a perpetual injunction would have been decreed against the heir. But further, it was often the principal object of a suit in equity,—*e.g.*, when brought by the devisee or devisees,—to establish the validity of the will, being a will of real estate, and to obtain thereupon a perpetual injunction against the heir-at-law, to prevent him from contesting its validity in the future (*c*); and the jurisdiction was assumed in such a case by the court of equity, because the devisee had no present power to actively litigate the validity of the will at law, but was obliged to wait until the heir-at-law should (if he ever should) commence an ejectment at law; and accordingly, in the case of *Boyse* v. *Rossborough* (*d*), it was decided, that a devisee in possession was entitled to have the will established against the heir-at-law of the testator, although the heir had brought no action of ejectment against the devisee,

Devisee might come into equity to establish a will against heir-at-law.

Even though the heir-at-law had brought no ejectment.

(*b*) *Sheffield* v. *Duchess of Buckinghamshire*, 1 Atk. 630.
(*c*) *Bootle* v. *Blundell*, 19 Ves. 494, 509.
(*d*) 3 De G. M. & G. 817; 6 H. L. Cas. 1.

although no trusts were declared by the will, and although it was not necessary to administer the estate under the direction of the Court of Chancery; also, that the Court of Chancery had power to establish a will against parties claiming under a prior will, and disputing the plaintiff's claim, a devisee being entitled to have the will established and his title quieted, not only as against the heir, but against all persons setting up adverse rights (*e*), —the jurisdiction exercised by courts of equity in such cases being obviously analogous to that exercised in the case of bills *quia timet*, and being founded upon the like consideration of giving security and repose to titles while the evidence for them was abundant. On the other hand, the heir-at-law could not come into a court of equity (excepting by consent of the devisee) to have the validity of the will tried,— *scil.* because he had a *legal* remedy by ejectment; but if there were any impediments to the proper trial of the merits in such an ejectment, even the heir might have come into equity to have such impediments removed; and on a bill by such heir, praying an issue *devisavit vel non*, for the purpose of obtaining incidental relief, the court might, under Rolt's Act (*f*), s. 2, have determined the question itself, or (in its discretion) might have directed an issue to be tried at law,—in either of which cases, the heir was entitled, as of right, to a trial by jury (*g*).

Devisee might establish a will against all setting up an adverse right.

The heir-at-law could only come into equity by consent.

The facilities of proving a will in the Probate Division are now very great. When the will has the usual attestation clause, it is proved by the simple oath of the executor, that he believes the will to be the true last will; but when the will has not that attestation clause, then, in addition to the executor's

Proof of will in Court of Probate,— effect of.

(*e*) *Lovett* v. *Lovett*, 3 K. & J. 1.
(*f*) 25 & 26 Vict. c. 42.
(*g*) *Banks* v. *Goodfellow*, 40 L. J. Ch. 511.

oath to the effect aforesaid, there is required also from one of the subscribing witnesses an affidavit of due execution by the testator; and probate in either of these forms is called probate in common form. Probate in solemn form is, where both the attesting witnesses are sworn and examined, and other corroborative evidence is taken, in the presence of the widow and next of kin, including the heir. When the will has once been proved in solemn form, the probate is not only sufficient, but conclusive proof of the will (*h*); but when the probate has been in common form, and in some subsequent action affecting real estate it is necessary to establish the devise, the plaintiff gives to the defendant,—ten days at least before the trial,—notice that he intends using at the trial the probate, or an office copy thereof; and thereupon such probate or office copy becomes sufficient evidence, unless the defendant within four days after receiving the notice gives a counter-notice to the effect that he disputes the devise (*i*); and in that latter case, it would be necessary to prove the will as a substantive independent fact, in accordance with the ordinary rules of evidence.

(1.) When will is proved in solemn form.

(2.) When will is proved in common form.

Allen v. *M'Pherson*,—the facts of, and decision in.

And in connection with the jurisdiction in equity to establish wills, and the facilities that are now afforded in the Court of Probate for proving a will, reference should be made to the two cases of *Allen* v. *M'Pherson* (*j*) and *Meluish* v. *Milton* (*k*). In the former of these two cases, it appeared, that a testator by his will and certain codicils thereto gave R. A. large bequests, and by a final codicil revoked all these bequests and substituted for them a small weekly allowance for R. A.'s life only; and that the will and all the codicils were admitted to probate in the Ecclesiastical Court (being

(*h*) 20 & 21 Vict. c. 77, s. 62.
(*i*) 20 & 21 Vict. c. 77, s. 64.
(*j*) 1 H. L. Ca. 191.
(*k*) 3 Ch. Div. 27.

the then Court of Probate); and subsequently to such probate, R. A. filed his bill in the Court of Chancery, alleging that the testator had executed the last codicil under the undue influence of the residuary legatee, who had misrepresented R. A.'s character to the testator,—a ground of objection to the validity of that codicil which he (R. A.) said it had not been open to him in the Ecclesiastical Court to take; and he prayed, that the residuary legatee might, to the extent of the revoked bequest, be declared a trustee for him (R. A.),—but the court held, that it had no jurisdiction in the matter. And in the case of *Meluish* v. *Milton*, it appeared, that the testator had made a will giving all his property to the defendant (whom he described as his wife), and he had also appointed her sole executrix; and she had proved the will in the Court of Probate; and then subsequently, the heir-at-law (and sole next of kin) of the testator filed his bill against the defendant, alleging that the defendant was not the testator's lawful wife, and that she had obtained the property by fraudulently deceiving the testator on that head, and praying that she might be declared a trustee of the property for him,—but the court again held, that it had no jurisdiction to entertain the case, which was exclusively within the jurisdiction of the Court of Probate. Therefore, *semble*, the proper course, in such cases, would be to apply for a revocation of the probate (*l*),—or (if in time) to take the objection in the action for probate, having first lodged the necessary caveat.

Meluish v. *Milton*,—the facts of, and decision in.

The two last-mentioned cases appear to be conclusive against the jurisdiction of the Chancery Division of the High Court as regards wills and codicils dealing with personal estate (with or without real

The present jurisdiction of the Equity Division, as regards the establishing of wills;

(*l*) *Priestman* v. *Thomas*, 13 Q. B. D. 210; *Smart* v. *Tranter*, 43 Ch. Div. 587; *Rhodes* v. *Rhodes*, 7 App. Ca. 192.

estate), or containing even an appointment of an executor, although not otherwise purporting to deal with personal estate,—in all these cases, the Court of Probate has jurisdiction; and it is in that court (or the now corresponding division of the High Court) that all objections of the aforesaid character to wills or to parts of wills must now be taken, the decision of the Probate Division not being reversible by the Chancery Division (*m*). But (save under the Land Transfer Act, 1887 (*n*), and for the purposes of that Act) the Probate Court appears still to have no jurisdiction, even since the Judicature Acts (*o*), in the matter of wills not dealing with personal estate, and not containing any appointment of executors, but dealing with real estate only; consequently, in the case of a will of real estate only, the rules contained in *Boyse* v. *Rossborough*, *supra*, would appear still to hold good, and not to be affected by the cases of *Allen* v. *M'Pherson* and *Meluish* v. *Milton*, *supra*,—so that in that case, the Chancery Division (or, in fact, any Division) of the High Court would still have jurisdiction to establish wills (*p*); and it need hardly be observed, that the jurisdiction of the Chancery Division remains intact, as regards relieving against accident, mistake, and the like, in wills (*q*).

and as regards relieving against mistakes, &c., in wills.

SECTION V.—*On the Writ* "Ne exeat regno."

To prevent a person leaving the realm.

The writ of *ne exeat regno* was and is a prerogative writ, which issued and issues to prevent a person from leaving the realm. In its origin, it was only applied

(*m*) *Betts* v. *Doughty*, 5 P. D. 26; *Morrell* v. *Morell*, 7 P. D. 68.
(*n*) 60 & 61 Vict. c. 65.
(*o*) *Re Cubbon*, 11 Prob. Div. 169.
(*p*) *Pinney* v. *Hunt*, 6 Ch. Div. 101; *Bradford* v. *Young*, 26 Ch. Div. 656.
(*q*) *Redfern* v. *Bryning*, 6 Ch. Div. 133; *Salt* v. *Pym*, 28 Ch. Div. 153.

to great political objects and purposes of state, for the safety and benefit of the realm; and such having been the character of its origin, it is at the present day applied in favour of the subject, and his alleged private rights, with great caution and jealousy. The writ would not in general, and will not in general, be granted, unless in cases of equitable debts and claims; and it is, in fact, a kind of equitable bail to appear to, and to abide by the result of, the action (*r*); and therefore, if the debt was or is one demandable at law, the writ would and will be refused, the remedy at law by a *capias* being open to the party. Also, the equitable demand must have been and must be certain as to its nature, and actually payable and not contingent; and it should also have been and should be for some debt or pecuniary demand payable *in præsenti* (*s*),—for the writ would not and will not be issued in a case where the demand was or is of a general unliquidated nature, or was or is in the nature of damages, no definite amount being admitted by the defendant. But to the general rule that the writ of *ne exeat regno* lay and lies only in respect of equitable debts, there were and are two recognised exceptions; for (1.) Where alimony had or has been decreed to a wife, it would and will be enforced in a proper case against a husband by a writ of *ne exeat regno*,—provided the alimony have been actually decreed; and (2.) Where the defendant admitted a balance due by him to the plaintiff, but a larger sum was claimed by the plaintiff, the writ would be issued, for the uncertainty of the whole amount claimed did not matter in such a case,—there being an admitted certainty as to a sufficient part, and matters of account were always properly cognisable in the Court of Equity (*t*).

General rule, —granted only in cases of equitable debts.

Two exceptions,—

1. In cases of alimony decreed, where husband intends leaving the jurisdiction.

2. In cases where there is an admitted balance, but plaintiff claims a larger sum.

(*r*) *Drover* v. *Beyer*, 13 Ch. Div. 242.
(*s*) *Colverson* v. *Bloomfield*, 29 Ch. Div. 341.
(*t*) *Sobey* v. *Sobey*, L. R. 15 Eq. 200.

Arrest under Absconding Debtors Act, 1870.

Arrest under Bankruptcy Act, 1883.

Arrest under Debtors Act, 1869.

A writ of *ne exeat regno* might also issue summarily under the Absconding Debtors Act, 1870 (*u*),—where the debtor was going abroad after the issue of a debtor's summons against him under the Bankruptcy Act, 1869 (*v*); and under the Bankruptcy Act, 1883 (*x*), sect. 25, a debtor may be arrested,—if he is about to abscond after a bankruptcy notice has been issued, or a bankruptcy petition presented, against him; and generally, in all cases of a defendant being about to quit England in order to prejudice the plaintiff in his action, if the debt is £50 or more, the defendant may, under the Debtors Act, 1869, be arrested by way of bail to the action (*y*).

Judicature Acts,—effect of.

The Judicature Acts do not appear to have in any respect altered the equitable jurisdiction in respect of the writ *ne exeat regno*,—although it may be a question, whether the writ would not now issue for legal as well as for equitable debts (*z*), assuming that the simpler remedy by *capias* was, for any sufficient reason, deemed inapplicable.

(*u*) 33 & 34 Vict. c. 76

(*v*) *Lees* v. *Patterson*, 7 Ch. Div. 866; *Drover* v. *Beyer*, supra.

(*x*) 46 & 47 Vict. c. 52.

(*y*) Debtors Act, 1869, ss. 4, 6; Debtors Act, 1878 (41 & 42 Vict. c. 54); Order lxix. (1883); *Hands* v. *Andrews*, 1893, 2 Ch. 1.

(*z*) Judicature Act, 1873, s. 24, sub-sect. 7.

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Printed by BALLANTYNE, HANSON & Co.
Edinburgh & London