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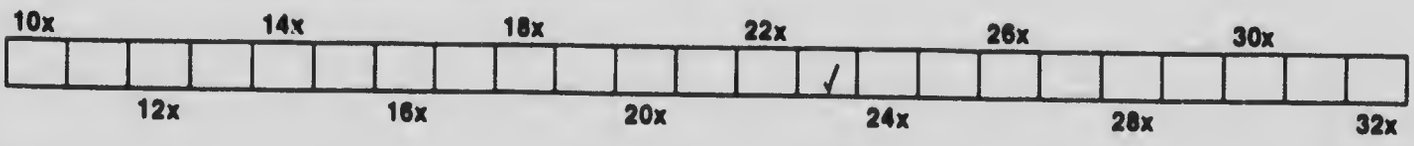

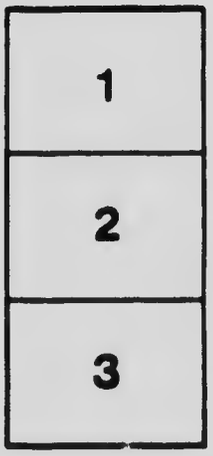

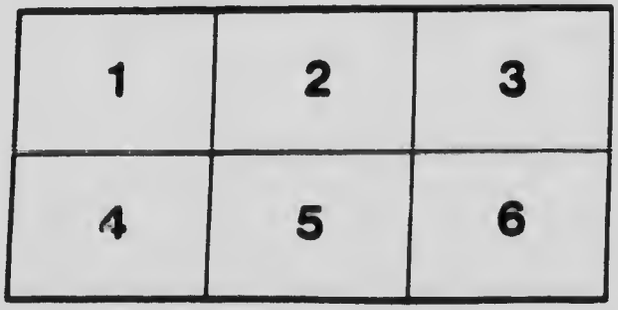

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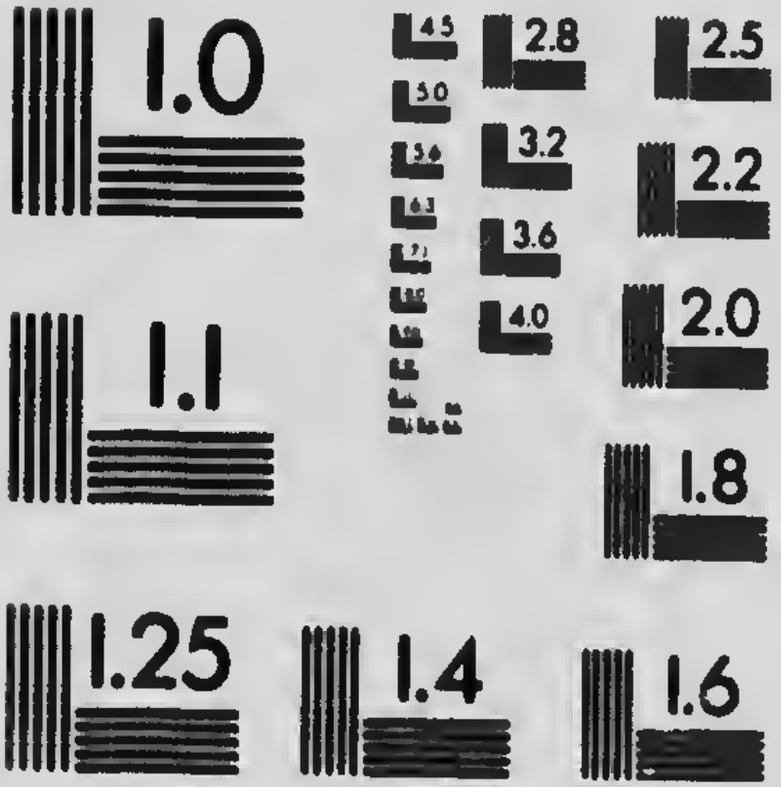

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PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY.

PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY,

INTENDED FOR

THE USE OF STUDENTS IN CONVEYANCING.

BY THE LATE

JOSHUA WILLIAMS

OF LINCOLN'S INN, SOMETIME ONE OF THE CONVEYANCING COUNSEL TO THE COURT OF CHANCERY, AND AFTERWARDS ONE OF HER LATE MAJESTY'S COUNSEL.

The Seventeenth Edition

BY HIS SON

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OF LINCOLN'S INN, BARRISTER-AT-LAW, LL.B.; ONE OF THE CONVEYANCING COUNSEL TO THE COURT

AUTHOR OF "A TREATISE ON THE LAW OF VENDOR AND PURCHASER," AND EDITOR OF "WILLIAMS ON REAL PROPERTY."

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PREFACE

TO THE SEVENTEENTH EDITION.

In this edition the alterations made in the law since the publication of the last edition have been incorporated, and the text has been revised throughout. The main statutory changes are those made by the Patents and Designs Act, 1907, the Copyright Act, 1911, the Trade Marks Act, 1905, the Companies Acts of 1907 and 1908, the Finance Act of 1910, and the Married Women's Property Act, 1907. The Bankruptcy Act, 1913, was passed too late to allow of its being incorporated in the text, but such of its provisions as affect the subject-matter of the book are noticed in the *Addenda*.

The law as to the liability of chattels to distress has been more fully stated than before (*a*), and a table of the things privileged from distress added. New paragraphs have been added on the priority of maritime liens as between themselves (*b*), and as to the seizure in execution and sale of growing crops (*c*). The law as to the assignment of rights

(*a*) Pp. 104—106.
(*b*) P. 129.
(*c*) P. 151.

of action in tort and in contract has been restated (*d*). The difference between legal and equitable assets in the order of payment of a dead man's debts has been more definitely stated (*e*). A table of the investments in which trustees may by law invest trust money has been added (*f*). The provisions of the various Statutes of Limitation as to choses in action have been restated (*g*). And the precedent in the Appendix of a marriage settlement has been revised (*h*).

7, Stone Buildings,
Lincoln's Inn,
28th August, 1913.

(*d*) Pp. 168—171, 199—201.
(*e*) Pp. 220—223.
(*f*) P. 417.
(*g*) Pp. 597—608.
(*h*) Appendix (C); p. 643.

PREFACE

TO THE FOURTEENTH EDITION.

In preparing the present edition, the editor has ventured to work with a free hand. While following the main design of the original book, he has not scrupled to rewrite, to add or to excise, wherever he has judged it expedient to do so; with the result that the book now contains a very large proportion of his own work. The main additions relate to the ownership of goods, and its history, and to the possession and alienation of goods, and the title thereto; and it is hoped that the consideration of these subjects at greater length than before will be justified by their importance. In other respects, the editor has done his utmost to restore the simplicity and brevity which were characteristic of the original text; and that he has not been altogether unsuccessful in the direction of brevity, is shown by the fact that, although the additional matter amounts to more than fifty pages, the whole book is shorter by fourteen pages than the previous edition. Nor does this fairly represent the whole gain; for a large amount of statute law now printed in type

uniform with the rest of the text, was printed in smaller type in the former edition. The editor has specially endeavoured to condense his statement of statute law, a peculiarly difficult and dangerous task. It may be mentioned, in particular, that the whole of the introductory chapter is new. For part of the substance of it, the editor is indebted to the learning contained in Professor AMES's articles on the Disseisin of Chattels in the *Harvard Law Review*; he also owes much to discussion of the subject with his friend Professor MAITLAND. With respect to other parts of the editor's own work, he desires to express his sense of obligation to the treatises of Mr. Justice O. W. HOLMES on the Common Law, of Sir FREDERICK POLLOCK and Mr. Justice WRIGHT on Possession, and of Sir FREDERICK POLLOCK and Sir WILLIAM ANSON on Contracts.

An entirely new index to the book and to the cases, year-books, and statutes cited, has been prepared by Mr. KENNETH F. WOOD, of Lincoln's Inn.

7, STONE BUILDINGS,
LINCOLN'S INN,
30th July, 1894.

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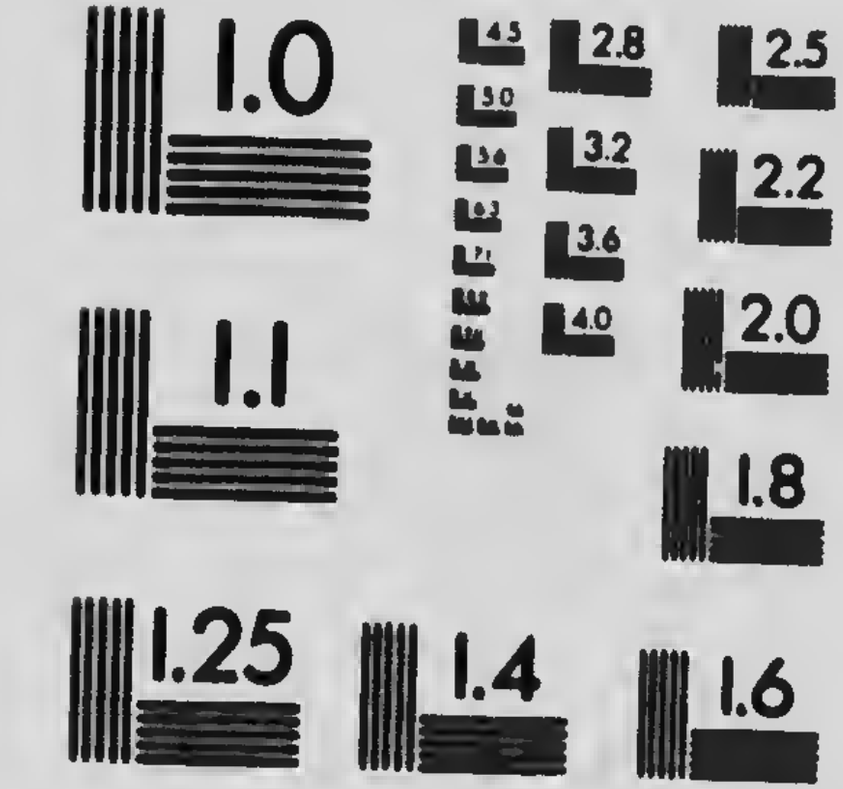

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ERRATA.

Page 15, note (*f*). For "*Hargrave*" read "*Hargreave*."
„ 133, note (*t*). For "next chapter" read "Part II. Chap. I."
„ 170, line 4. For "required" read "acquired."
„ 194, note (*e*). For "*Townend*" read "*Townsend*."

ADDENDA.

Page 25, note (*p*). See *Addenda* to page 588, lines 8—13.
„ 64, note (*p*). Add "*Dennis & Sons, Ld.* v. *Cork Steamship Co., Ld.*, 1913, 2 K. B. 393."
„ 105, note (*e*). Add "*Ecclesiastical Commrs.* v. *Upjohn*, 1913, 1 K. B. 501."
„ 107, note (*p*). Stat. 8 Anne, c. 18, s. 1, is amended by 3 & 4 Geo. V. c. 34, s. 18 (2), substituting six months' for one year's arrears, unless notice be served as therein provided.
„ 109, note (*c*). Stat. 53 & 54 Viet. c. 7, s. 1, is amended by 3 & 4 Geo. V. c. 34, s. 27, and Second Schedule.
„ 174, note (*m*). Add after "*Walter* v. *Everard*," "*Roberts* v. *Gray*, 1913, 1 K. B. 520."
„ 204, note (*b*). Add "see *M. T. Shaw & Co., Ld.* v. *Holland*, 1913, 2 K. B. 15."
„ 225. After line 4, insert "And so is the Railway and Canal Commission; stat. 51 & 52 Viet. c. 25, s. 2; *National Telephone Co., Ld.* v. *Postmaster-General*, 1913, 2 K. B. 614, 618."
„ 230, note (*e*). Stat. 46 & 47 Viet. c. 52, s. 103 (5), is amended by 3 & 4 Geo. V. c. 34, s. 41.
„ 244, table opposite (A). Stat. 46 & 47 Viet. c. 52, s. 42, is amended by 3 & 4 Geo. V. c. 34, s. 18.

Page 250. By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 14 (sub-s. 1), "Where a person engaged in any trade or business makes an assignment to any other person of his existing or future book debts or any class thereof, and is subsequently adjudicated bankrupt, the assignment shall be void against the trustee as regards any book debts which have not been paid at the commencement of the bankruptcy unless the assignment has been registered as if the assignment were a bill of sale given otherwise than by way of security for the payment of a sum of money, and the provisions of the Bills of Sale Act, 1878, with respect to the registration of bills of sale shall apply accordingly, subject to such necessary modifications as may be made by rules under that Act:

"Provided that nothing in this section shall have effect so as to render void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made *bonâ fide* and for value, or in any assignment of assets for the benefit of creditors generally."

(sub-s. 2) "For the purposes of this section, 'assignments' include assignments by way of security and other charges on book debts."

,, 252, note (*q*). Stat. 53 & 54 Vict. c. 71, s. 3, has been amended by 3 & 4 Geo. V. c. 34, s. 7.

Pages 261—264. The Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 Geo. V. c. 34), Part II. (ss. 28—40), contains many new provisions as to deeds of arrangement. By sect. 28, a deed of arrangement is to be void unless, before or within twenty-one days after the registration thereof, or within such extended time as therein mentioned, it has received the assent of a majority in number and value of the creditors of the debtor; and the trustee is required to file with the Registrar of Bills of Sale a statutory declaration of such assent. By sect. 29, the trustee under a deed of arrangement is required to give security as therein mentioned, unless the majority in number and value of the creditors dispense therewith, and he is required to bank all moneys received by him.

By sect. 31, if the trustee under a deed of arrangement serves in the prescribed manner on any creditor of the debtor notice in writing of the execution of the deed and of the filing of the certificate of creditors' assents, with an intimation that the creditor will not, after the expiration of one month from the service of the notice, be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed, or on any other act committed by him in the course or for the purpose of the proceedings preliminary to the execution of the deed, as an act of bankruptcy, that creditor shall not, after the expiration of that period (unless the deed becomes

void), be entitled to present a bankruptcy petition against the debtor founded on the execution of the deed, or on any act so committed by him, as an act of bankruptcy. But where a deed of arrangement has become void by virtue of the Deeds of Arrangement Act, 1887, or this Act, the fact that a creditor has assented to the deed shall not disentitle him to present a bankruptcy petition founded on the execution of the deed of arrangement as an act of bankruptcy.

By sect. 32, further provision for the trustee to render accounts and for their audit. By sect. 37, the Deeds of Arrangement Act, 1887, shall extend to any instrument of the classes mentioned in sect. 4 of that Act, made after the commencement of this Act by, for, or in respect of the affairs of a debtor who was insolvent at the date of the execution of the instrument for the benefit of any three or more creditors, in like manner as if such instrument had been made by, for, or in respect of the affairs of the debtor for the benefit of his creditors generally, but no such instrument (unless it is in fact for the benefit of creditors generally) shall be deemed to be a deed of arrangement within the meaning of the foregoing provisions of this Part of this Act, except such of those provisions as impose penalties on trustees for failure to transmit accounts. And for the purposes of this section, any two or more joint creditors shall be treated as a single creditor. Sects. 38 and 40 provide for the protection in certain respects of the trustee of a void deed of arrangement as against the debtor's trustee in bankruptcy.

Page 262, note (*r*). Stat. 53 & 54 Vict. c. 71, s. 25 (2, b), is amended by 3 & 4 Geo. V. c. 34, s. 27, and Second Schedule.

,, 267, and notes (*k*), (*l*). By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), s. 8, the expression "a debtor" in that Act and in the Bankruptcy Acts, 1883 and 1890, unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him, (*a*) was personally present in England, (*b*) or ordinarily resided or had a place of residence in England, or (*c*) was carrying on business in England personally, or by means of an agent or manager, or (*d*) was a member of a firm or partnership which carried on business in England.

,, 267, lines 10—17. By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 12 (sub-s. 1), "Every married woman who carries on a trade or business, whether separate from her husband or not, shall be subject to the bankruptcy laws as if she were a *feme sole*."

(sub-s. 2) "Where a married woman carries on a trade or business and a final judgment or order has been obtained against her, whether or not expressed to be payable out of her separate property, for any amount, that judgment or order shall be available for bankruptcy proceedings against her by a bank-

ruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid."

(sub-s. 3) "Where a married woman who has been adjudged bankrupt has separate property the income of which is subject to a restraint on anticipation, the court shall have power, on the application of the trustee, to order that during such time as the court may order the whole or some part of such income be paid to the trustee for distribution among the creditors, and in the exercise of such power the court shall have regard to the means of subsistence available for such woman and her children."

(sub-s. 4) "Where a married woman has been adjudged bankrupt, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by him to his wife for the purposes of her trade or business until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied."

Page 269, note (*f*). Stat. 53 & 54 Vict. c. 71, s. 1, is amended by 3 & 4 Geo. V. c. 34, s. 27, and Second Schedule.

,, 270, paragraph (*g*). Sect. 4 (1, *c*) of the Bankruptcy Act, 1883, is amended in certain particulars by the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), s. 16.

,, 273, lines 15—19 By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 9—"for paragraph (*d*) of sub-section (1) of section six of the principal Act (which relates to the conditions on which a creditor may present a bankruptcy petition), the following paragraph shall be substituted:—

'(*d*) The debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided, or had a dwelling-house or place of business, in England, or (except in the case of a person domiciled in Scotland or Ireland or a firm or partnership having its principal place of business in Scotland or Ireland) has carried on business in England, personally or by means of an agent or manager, or (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners, or an agent or manager.'"

,, 276, line 11. The words "accepted or" in stat. 46 & 47 Vict. c. 52, s. 20 (1), were repealed by 3 & 4 Geo. V. c. 34, s. 27, and Second Schedule.

,, 279, note (*p*). Stat. 46 & 47 Vict. c. 52, s. 22, is amended by 3 & 4 Geo. V. c. 34, s. 17.

,, 281, note (*z*). See now stat. 3 & 4 Geo. V. c. 34, s. 19 (2).

,, 285, lines 19—22. Stat. 46 & 47 Vict. c. 52, s. 74, is amended by 3 & 4 Geo. V. c. 34, s. 20.

Page 286, line 18. See now the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), s. 19, as to the removal of a trustee by the Board of Trade.

„ 288 and notes (*d*), (*e*). Stat. 46 & 47 Vict. c. 52, s. 42, is amended by 3 & 4 Geo. V. c. 34, s. 18.

„ 291, note (*s*). Stat. 53 & 54 Vict. c. 71, s. 23, is amended by 3 & 4 Geo. V. c. 34, s. 22.

„ 293, line 13. By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 10—"a payment of money, or delivery of property, to a person subsequently adjudged bankrupt, or to a person claiming by assignment from him shall, notwithstanding anything in the enactments relating to bankruptcy, be a good discharge to the person paying the money or delivering the property, if the payment or delivery is made before the actual date on which the receiving order is made and (except in cases where the receiving order is made under sub-section (5) of section one hundred and three of the principal Act) without notice of the presentation of a bankruptcy petition, and is either pursuant to the ordinary course of business or otherwise *bonâ fide*."

„ 295, lines 12—23. By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 13—"the following sub-sections shall be substituted for sub-section (2) of section forty-seven of the Bankruptcy Act, 1883, which relates to the avoidance of settlements:—

'(2) Any covenant or contract made by any person (hereinafter called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's wife or husband, or children, or for the future settlement on or for the settlor's wife or husband or children of property, wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of the settlor's wife or husband, shall, if the settlor is adjudged bankrupt and the covenant or contract has not been executed at the date of the commencement of his bankruptcy, be void against the trustee in bankruptcy, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

'(2A) Any payment of money (not being payment of premiums on a policy of life assurance) or any transfer of property made by the settlor in pursuance of such a covenant or contract as aforesaid shall be void against the trustee in the settlor's bankruptcy, unless the persons to whom the payment or transfer was made, prove, either—

'(*a*) that the payment or transfer was made more than two years before the date of the commencement of the bankruptcy; or

'(*b*) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or

'(*c*) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract and was made within three months after the money or property came into the possession or under the control of the settlor:

but, in the event of any such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the commencement of the bankruptcy.'"

Page 296, note (*t*). Stat. 52 & 33 Vict. c. 62, ss. 11 *sq.*, have been amended by 3 & 4 Geo. V. c. 34, ss. 2, 3, 4, 5, and First Schedule.

" 296, note (*u*). Stat. 46 & 47 Vict. c. 52, s. 31, has been repealed and replaced by 3 & 4 Geo. V. c. 34, s. 5.

" 296, line 4. After "creditor" insert "or any surety or guarantor for the debt due to such creditor"; stat. 3 & 4 Geo. V. c. 34, s. 27, and Second Schedule.

Pages 296—298, and note (*a*). By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), s. 6, the period for which a bankrupt's discharge may be suspended may be a period of less than two years if the only fact proved is that his assets are not of a value equal to 10*s.* in the pound on the amount of his unsecured liabilities. And stat. 53 & 54 Vict. c. 71, s. 8, is further amended by the same Act (s. 27, and Second Schedule).

" 299—300. By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 31 (sub-s. 1), "All transactions by a bankrupt with any person dealing with him *bonâ fide* and for value in respect of property, whether real or personal, acquired by the bankrupt after the adjudication shall, if completed before any intervention by the trustee, be valid against the trustee, and any estate or interest in such property which by virtue of the enactments relating to bankruptcy is vested in the trustee shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.

"This sub-section shall apply to transactions with respect to real property completed before the commencement of this Act in any case where there has not been any intervention by the trustee before that date.

"For the purposes of this sub-section, the receipt of any money, security, or negotiable instrument from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument

made to, or by the order or direction of, a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value."

(sub-s. 2) "Where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless the banker is satisfied that the account is on behalf of some other person, it shall be his duty forthwith to inform the trustee in bankruptcy or the Board of Trade of the existence of the account, and thereafter he shall not make any payments out of the account except under an order of the court or in accordance with instructions from the trustee in bankruptcy, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee."

(sub-s. 3) "In the event of a second or subsequent receiving order being made against a bankrupt, any property acquired by him since he was last adjudged bankrupt which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the official receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition and subject to the provisions of sub-section (1) of this section) vest in the trustee in the subsequent bankruptcy, but any unsatisfied balance of the debts provable under the last preceding bankruptcy may be proved in the subsequent bankruptcy by the trustee in the last preceding bankruptcy."

(sub-s. 4) "Where the trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt, he shall hold any property then in his possession which has been acquired by the bankrupt since he was adjudged bankrupt until the subsequent petition has been disposed of, and, if on the subsequent petition an order of adjudication is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy."

Page 302, note (*o*). Stat. 46 & 47 Vict. c. 52, s. 42, is amended by 3 & 4 Geo. V. c. 34, s. 18.

Pages 302, 303. By sect. 21 of the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sects. 27, 73 and 121 of the Act of 1883 are made applicable in administration in bankruptcy of the estates of persons dying insolvent.

Page 331, note (*r*). By the Companies Act, 1913 (3 & 4 Geo. V. c. 25), s. 1 (1), a private company is to cease to be entitled to the privileges and exemptions conferred on private companies if it makes default in complying with the provisions required by sect. 121 of the Companies (Consolidation) Act, 1908, to be included in its articles in order to constitute it a private company; but the Court is empowered in certain cases to

relieve the company from these consequences. By sub-s. 2, the number of members of a private company is limited to fifty, exclusive not only of persons who are in the employment of the company, but also of persons who having been formerly in the employment of the company were while in such employment and have continued after the determination of such employment to be members of the company.

Page 392, lines 12—14. See stat. 3 & 4 Geo. V. c. 34, s. 25, as to the bankruptcy of an assignee of copyright liable to pay royalties or a share of profits to the author.

,, 474, note (*g*). See now stat. 3 & 4 Geo. V. c. 34, s. 24, as to the bankruptcy of the members of a limited partnership.

,, 550, lines 3—9, and note (*c*). See *Addenda* to page 267, lines 10—17.

Pages 559 (last four lines) and 560, note (*g*). See *Addenda* to page 267, lines 10—17.

Page 562, notes (*y*), (*z*). See *Addenda* to page 267, lines 10—17.

" 588, note (*p*). See stat. 3 & 4 Geo. V. c. 34, s. 23.

" 588, lines 8—13. By the Bankruptcy Act, 1913 (3 & 4 Geo. V. c. 34), sect. 15—"Where any goods in the possession of an execution debtor at the time of seizure by a sheriff, high bailiff, or other officer charged with the enforcement of a writ, warrant, or other process of execution, are sold by such sheriff, high bailiff, or other officer, without any claim having been made to the same, the purchaser of the goods so sold shall acquire a good title to the goods so sold, and no person shall be entitled to recover against the sheriff, high bailiff, or other officer, or anyone lawfully acting under the authority of either of them, except as provided by the Bankruptcy Acts, 1883 and 1890, for any sale of such goods or for paying over the proceeds thereof, prior to the receipt of a claim to the said goods unless it is proved that the person from whom recovery is sought had notice, or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor: Provided that nothing in this section contained shall affect the right of any claimant who may prove that at the time of sale he had a title to any goods so seized and sold to any remedy to which he may be entitled against any person other than such sheriff, high bailiff, or other officer as aforesaid."

,, 611, note (*a*). Add "but a trust to pay debts out of a mixed fund of realty and personalty takes the debts out of the statute as regards the entire debts, and not merely the proportion payable out of the realty; *In re Raggi*, 1913, 2 Ch. 206."

PRINCIPLES

OF THE

LAW OF PERSONAL PROPERTY.

INTRODUCTORY CHAPTER.

OF THE OBJECTS AND NATURE OF PERSONAL PROPERTY.

§ 1. *Of the difference between Real and Personal Property.*

Real and personal property.

PROPERTY in English law is divided into two classes, real property and personal property, and these are governed by very different rules. This great classification (*a*) has its origin in the fact that after the Norman Conquest land, then the main source of public wealth, became subject to the law of feudal tenure, which was not applied to moveable things known as *chattels* or *goods* (*b*). This caused a great distinction to be drawn between property in land and property in chattels. For the first principle of the law of feudal tenure is that the supreme ownership of all land belongs to the Crown, and no subject can be the absolute owner of land. Subjects can at most hold freely of the King or some mesne lord the hereditary estates called fees, or estates in fee simple (*c*). The law of feudal tenure, moreover,

Distinction between property in land and property in chattels.

(*a*) For a full account of the origin and history of the classification of property as real or personal, the reader is referred to Principles of the Law of Real Property, Introductory Chapter, 21st ed., by the present editor. W.P.P.

This book is hereinafter referred to as "Williams, R. P."

(*b*) Williams, R. P. 9–15, 21st ed.; see P. & M. Hist. Eng. Law, ii. 148 *sq.*

(*c*) Williams, R. P. 6, 7, 19, 32, 21st ed.

As to liberty of alienation.

was restrictive of alienation; and although tenants in fee simple acquired the power of disposing of their estates by act *inter vivos* at a comparatively early time (*d*), it was not until a much later period that they were enabled to devise their estates by will (*e*). Chattels on the other hand remained the object of a direct and absolute ownership resembling the dominion over corporeal things conceived in Roman law (*f*). Nor were they ever subjected to any restriction upon alienation; they were always transferable as well by will as in the owner's lifetime: though it is true that in early times the owner of chattels could not bequeath away more than a part of them, if he left a widow or child (*g*). Chattels too were not only the objects of the right of free disposition, which is incident to absolute ownership, but they were also liable to satisfy their owner's debts after his death as well as in his lifetime; a liability which was not fully imposed on fees until a very modern date (*h*).

As to succession after death.

Another difference between fees and chattels was in the mode of succession after death. Fee simple estates passed at common law to the *heir* of the tenant who died possessed of them (*i*). And the heir was ascertained from amongst the tenant's nearest blood relations by rules, of which the most prominent preferred males to females in the same degree of relationship, and of males equally related selected the eldest as heir to the exclusion of all others (*j*). Originally, it would seem, the heir was

(*d*) After stat. 18 Edw. I. c. 1; Williams, R. P. 66–74, 21st ed.

(*e*) After stats. 32 Hen. VIII. c. 1, and 12 Car. II. c. 24; *ib.* 74, 75, 244, 245.

(*f*) See Gai. Comm. I. ii. §§ 40 *sq.*; I. iv. §§ 3, 41, 45, 47, 48; Inst. I. i. tit. i. §§ 11 *sq.*, 40; I. iv. tit. vi. § 1; Co. Litt. 145 b, 351 b.

(*g*) *Post*, Part III. ch. III.

(*h*) Williams, R. P. 2, 20, 268–285, 21st ed.

(*i*) They now pass to the executor or administrator on trust for the heir or devisee; stat. 60 & 61 Vict. c. 65, Part I.

(*j*) William . R. P. 19, 85–89, 229, 21st ed.

also entitled to his deceased ancestor's chattels for the purpose of paying the ancestor's debts. But afterwards all title of an owner of chattels passed, on his death, either to the persons, whom he had appointed to perform his will and who were called his *executors*, or if he died intestate, then to the *administrator* of his effects, appointed in pursuance of a statute of Edward III. (*k*) from among the next friends of the deceased by the ecclesiastical authority, to whom the administration of intestates' effects had been previously committed (*l*). And the administrator of an intestate is bound (*m*) to distribute the surplus of his chattels, after payment of his debts, between his widow and children or next of kin, according to rules, which permit males and females in the same degree of relationship to share equally, giving no preference to males or to the eldest male (*n*).

As to the different nature of the remedies for the recovery of land and goods.

A further distinction between property in land and property in goods arose from the different nature of the remedies given for the deprivation of either. This distinction rests at bottom upon the physical difference between land, which is immoveable and indestructible, and goods, which are moveable and perishable. Hence a dispossessed landholder can always be restored by process of law to the identical holding, from which he has been ejected :. while there is no such certainty of specific restitution in the case of goods. For goods may always be taken out of the jurisdiction, lost or

(*k*) Stat. 31 Edw. III. c. 11.

(*l*) Williams, R. P. 20, 21, 21st ed. After the year 1857 the administrator of an intestate's effects was appointed by the Court of Probate. Since 1875 he has been appointed by the Probate Division of the High Court of Justice. See stats. 20 & 21 Vict. c. 77, s. 4; 36 & 37 Vict. c. 66, ss. 16, 34.

(*m*) By stats. 22 & 23 Car. II. c. 10; 29 Car. II. c. 3, s. 25; 1 Jac. II. c. 17, s. 7; enforcing a mode of distribution which the ecclesiastical courts had previously attempted to secure; see 1 Sir T. Raym. 497 499; 2 Black. Comm. 515.

(*n*) *Post*, Part III. ch. IV.

destroyed; when the law can give the dispossessed owner no remedy but pecuniary compensation (*o*). Actions were therefore classified in English law, as real or personal, according to the nature of the relief afforded thereby (*p*). Real actions were those brought for the recovery of lands or tenements (*q*), wherein specific restitution was obtainable by process of execution issuing directly against the thing demanded (*in rem*). Personal actions were brought to enforce an obligation imposed on a man personally to make reparation for a breach of contract or a wrong; in other words they were brought to obtain pecuniary compensation for a violation of right—what the English law calls *damages*. Actions in which claims for both kinds of relief were combined were called mixed actions (*r*). Not every kind of landholding, however, was recoverable in a real action. From the reign of Henry II., owing to the permanent establishment of the King's Court, and the provision of special remedies therein for dispossessed landholders, all the existing forms of landholding were submitted to the classifying action of a general judge-made law. The result was that freeholdings of land, or free tenements, were the only form of property in land admitted to be protected in the King's Court by real or mixed action. This restriction left unprotected in the King's Court, and therefore without the pale of property, the humbler form of landholding known as tenure in villenage (*s*). Tenure in villenage, however, gave rise to the customary property in land, which in later times obtained complete legal protection as copyhold (*t*). But there were in early times certain valuable interests in land, which fell short of the dignity of

(*o*) Williams, R. P. 11, 12, 21st ed.
(*p*) Williams, R. P. 23, 24, and n. (*a*), 21st ed.
(*q*) *Ib.* 23—25.
(*r*) *Ib.*, 23, 24.
(*s*) *Ib.* 16, 17, 45, 46, 454.
(*t*) *Ib.* 27, 450—462.

freehold, without incurring the degradation of villenage. The most important of these were tenancies for a term of years. Placed outside the class of free tenements, they nevertheless obtained special legal protection. But they were reckoned as chattels, and thus became the objects of the same liberty of alienation and liability for debt as attached to the ownership of other chattels. Chattel interests in land also came to be completely assimilated to other chattels with regard to the mode of succession after death, passing to the executor or administrator, not the heir (*u*).

Realty and personalty.

Now, as free tenements were the only things recoverable *in the realty*, or specifically by real action, they became known by the name of realty or of real things; while things recoverable in personal actions were termed personalty, or personal things (*x*). And when the word *realty* had thus come to denote the freehold, chattel interests in land were given the name of chattels real, because, it was said, they concerned the realty; while moveable goods were distinguished as chattels personal, "because for the most part they belong to the person of a man, or else" (which seems the better reason) "for that they are to be recovered by personal actions" (*y*). In later times, however, when men began to speak of all their property or valuable rights as their *estate*, and to classify their estate as real or personal (*z*), the limits of the two classes of property were determined rather by the difference in the mode of succession after death than by the nature of the actions for their recovery. The term *real estate* was appropriated to the realty, which

Chattels real or personal.

(*u*) Williams, R. P. 20, 21, 25, 28, 21st ed.

(*x*) *Ib.* 25.

(*y*) Co. Litt. 118 b; see Williams, R. P. 25, 21st ed.

(*z*) This was hardly common before the Restoration of Charles II.; Williams, R. P. 8 and n. (*d*), 20 and n. (*r*), 21st ed.

passed to the heir, or to real hereditaments; while chattels real, which passed to the executor, were on that account placed in the class of personal estate (*a*). Thus in modern times what is called personal property or estate comprises all chattels, which go to the executor, be they chattels real, that is, chattel interests in land, or chattels personal, namely, moveable goods and other things, for the withholding of which damages only are recoverable (*b*). As the law respecting chattels real is a branch of the law of property in land, it has been noticed in the author's treatise on the "Law of Real Property;" and chattels real will only be incidentally mentioned in the present work, which treats of chattels personal.

§ 2. *Of the Remedies for the Recovery of Goods.*

Examination of the remedies for the recovery of goods.

We have seen that, according to the better opinion, moveable goods are said to be called chattels personal or things personal because they are things recoverable in personal actions. How it came about, that goods were only recoverable in personal actions, will appear on examination of the various remedies for the wrongful deprivation of goods. This will also show us that, while the owner of goods, in respect of their freedom from the incidents of feudal tenure, enjoyed a fuller ownership than a freeholder in fee of land, in respect of the right to recover possession, which seems to be an essential part of the conception of ownership (*c*), the owner of goods was by no means so effectually protected as the freeholder of land. For the common law always gave the dispossessed freeholder the right to recover possession of his land from all others, whether he had been ejected or had parted voluntarily with

(*a*) Williams, R. P. 8. 25–29, 21st ed.

(*b*) Williams, R. P. 28, 29, 21st ed. Personal estate also comprises personal hereditaments; *ib.* 28, n. (*h*).

(*c*) *Ib.* 2, 6, 7, 17.

possession for a space of time, which had come to an end, and whether the person who held him out of the land had taken or received possession thereof from him directly, or by ejectment of or conveyance from the original wrongdoer or any of his successors (*d*). But it was only by tortuous steps that the dispossessed owner of goods acquired the right to recover possession of them as against all others, irrespective of the questions, whether he had parted with the goods against his will, or not, and whether the wrongful withholder of the goods had taken them directly from the owner, or from a previous wrongful taker. In the case of land too, the common law has accorded process enabling the freeholder, and ultimately the leaseholder and the copyholder, to obtain specific restitution (*e*). But the process given to enforce the restitution of goods was imperfect; besides, the perishable nature of goods renders any certainty of restitution impossible.

Action of theft.

The most ancient remedy for an owner of goods, who had lost possession of them from theft or otherwise unwillingly [illegible] that which Bracton describes as an action of [illegible] (*actio furti*) (*f*). A part of this remedy was the fresh pursuit of the thief or of the missing goods; and the action lay against any person, in whose possession the goods were found, whether he were the original thief or taker, or had acquired possession of them, honestly or dishonestly (*g*), from or through the original taker (*h*). By these proceedings the owner might obtain both the restitution of the goods and the punishment of the thief; for if the owner succeeded in maintaining the charge of theft and the goods

(*d*) Bract. fo. 102 a, 104 a, 160, 161, 317 b *sq.*, 327 b. *sq.*

(*e*) Williams, R. P. 17, 18, 27, 65, 460—462, 2nd ed.

(*f*) Bract. fo. 150 b, 151, 154 b; Glanv. x. 15—17; Fleta, fo. 54, 55; Britt. liv. i. ch. 16, 25; and see P. & M. Hist. Eng. Law, ii. 155—163.

(*g*) See Y. B. 13 Edw. IV. 3, pl. 7; 4 Hen. VII. 5, pl. 1.

(*h*) Bract. fo. 103 b.

were worth twelvepence or more, the thief was condemned to death for the felony. The person found in possession of the goods might, however, clear himself of the charge of theft by showing that he had come honestly by the goods, as by purchase in open market; if he succeeded, he might go quit of the criminal charge; but the goods were nevertheless restored to their owner. It was moreover competent to the owner to sue civilly in this action for the restitution of the goods alone, merely alleging that the goods were gone out of his possession, without making a charge of theft (*i*). In such case, however, it appears from Bracton that he had to put a price on the goods, and that the defendant was not absolutely bound to restore the goods, but might absolve himself by paying their value (*k*). These proceedings might be brought not only by an owner of goods, who had lost possession of them, but also by any one, who had the owner's goods in his keeping, and was unwillingly deprived of the possession of them (*l*). But the forms of the action of theft were archaic and cumbrous (*m*). On its civil side it was superseded by the action of trespass, which grew up in the course of the thirteenth century (*n*). And it retained a place in the ranks of legal remedies only as an appeal of larceny, that is, as a criminal proceeding (*o*) at suit of the party injured against one guilty of larceny or theft (*p*); an offence which mainly consists in taking and

Appeal of larceny.

(*i*) Bract. fo. 140 b, 150 b; Fleta, fo. 55, 60; Britt. liv. i. ch. 16, § 2; Y. B. 21 & 22 Ass. pl. 1, 467; P. & M. Hist. Eng. Law, ii. 160.

(*k*) Bract. fo. 102 b.

(*l*) Bract. fo. 103 b, 146, 151 a; Britt. liv. i. ch. 16, § 1; and see O. W. Holmes, Common Law, 166.

(*m*) See Bracton's Note Book, pl. 67, 824, 1115, 1539; Selden Society, Select Pleas of the Crown, pl. 192.

(*n*) See Britt. liv. i. ch. 26, § 2; Ames, Harvard Law Review, iii. 29; Select Essays in Anglo-American Legal History, iii. 549.

(*o*) See Litt. ss. 500, 501; Co. Litt. 287 b.

(*p*) It was held in 1352 that an appeal did not lie against a mere receiver of stolen goods, so as to oblige him to restore the goods; 27 Ass. pl. 69.

carrying away another's goods with intent to steal them, the felonious intent being a material ingredient (*q*). Still the restitution of the stolen goods might be obtained in an appeal of larceny, if promptly prosecuted (*r*): but a very important difference in the nature of such restitution was introduced, owing to the grasping construction of the law, by which chattels were forfeited to the Crown upon their owner's conviction of felony or flight from justice (*s*). The early law was most astute to take advantage of any technical excuse for pronouncing that, upon the conviction of a thief in an appeal by the party robbed, the stolen goods should be forfeited to the Crown as well as the felon's own proper chattels (*t*). And in the case of a conviction of larceny in criminal proceedings by indictment, that is, at suit of the Crown upon an accusation presented on oath by a jury (*u*), the stolen goods were also forfeited to the Crown, and by the common law the owner could not obtain their restitution unless he sued an appeal (*x*). Thus it came to be considered that the restitution of the stolen goods in an appeal of larceny was made, not as of old, by virtue of the owner's title to have the goods as against all the world, but rather by a gracious waiver, in reward for prompt pursuit of a criminal, of the royal right to have the goods by forfeiture. And the owner's right to recover his stolen goods in an appeal was limited to goods which the King's officer or some other had

Indictment for larceny.

(*q*) Bract. fo. 150 b; 3 Inst. 107; 4 Black. Comm. 229 *sq.*, 314.

(*r*) See Staunf. Pl. Cor. liv. iii. ch. 10; 1 Hale, P. C. ch. 47.

(*s*) Bract. 128 b, 129 a; Britt. liv. i. ch. 17; 5 Rep. 109; Co. Litt. 391 a; 4 Black. Comm. 386, 387; P. & M. Hist. Eng. Law, ii. 163, 164.

(*t*) See Y. I. 30 & 31 Edw. I. 508, 512–514. 526; Fitz. Abr. Corone, 95, 162, 318. 319, 367, 379, 392; Staunf. Pl. Cor. liv. iii. ch. 10.

(*u*) Principally by the grand jury. See Bract. fo. 115 b, 116, 143, 150 b; Fleta, fo. 23; Britt. liv. i. ch. 3, § 6; Staunf. Pl. Cor. liv. ii. ch. 23 *sq.*; Co. Litt. 126 b; 2 Hale, P. C. ch. 21; 4 Black. Comm. 299.

(*x*) Fitz. Abr. Corone, 460; Staunf. Pl. Cor. 167 a; 3 Inst. 242.

seized to the King's use (*y*). A statute of Henry VIII. gave restitution to the owner of stolen goods, after the attainder of the felon by his procurement upon indictment (*z*). In modern times, appeals of larceny went out of use (*a*); though they were not formally abolished until 1819 (*b*).

Early conception of ownership of goods.

Now, it is worthy of remark that the ancient action for theft or involuntary loss of the possession of goods seems to support a fairly complete conception of ownership. For to have the right to maintain or recover possession of a thing as against all others appears to be the essential part of ownership (*c*); and we have seen that this ancient remedy for the recovery of goods was available against any person, to whose hands they might come by whatever means. But the protection of the ownership of goods in our ancient law appears to have been incomplete in one important particular. If the owner of goods *voluntarily* parted with the possession of them by delivering them to another for some temporary purpose, as for safe custody or upon a loan, hiring or pledge, we have seen that the person who had the keeping of the goods had the remedy for the recovery of their possession (*d*). For this

Case of owner voluntarily parting with possession of his goods.

(*y*) Stamf. Pl. Cor. liv. iii. ch. 10; 5 Rep. 109; 1 Black. Comm. 297. In 2 Inst. 711, it is said that '*by the king's seizure* the property in the same being *tanquam in custodia legis*, cannot be altered by sale in market overt;' see *post*, p. 15.

(*z*) Stat. 21 Hen. VIII. c. 11, replaced by 7 & 8 Geo. IV. c. 29, s. 57, and now by 24 & 25 Vict. c. 96, s. 100, amended by 56 & 57 Vict. c. 71, s. 21, and 7 Edw. VII. c. 23, s. 6.

(*a*) 2 Hale, P. C. 152; 1 Black. Comm. 312.

(*b*) By stat. 59 Geo. III. c. 46.

(*c*) Williams, R. P. 2, 3, 21st ed. It is true that the ancient action for the recovery of goods was a remedy based on and protective of *possession*, and that it was available for possessors responsible for the safe return of the goods to others; but the more important case is that of the possessor, who was not responsible to another for the safety of the goods; and irresponsible possession, protected by a remedy availing against all others, makes ownership. See Holmes, Common Law, 165—169, 215 *sq.*, 244—246; Ames, Harvard Law Review, iii. 311; Select Essays in Anglo-American Legal History, iii. 563.

(*d*) *Ante*, p. 8.

reason he appears in early times to have been absolutely responsible to the owner for the safe return of the goods even though they had been stolen from him without any fault of his (*e*). And the owner might sue him for unjustly detaining the goods, if they were withheld or were not forthcoming at the proper time for their return: though in this action he must have named a price, by paying which the defendant would be absolved, if he preferred not to render the actual goods (*f*). But the owner, in such cases, seems originally to have had no remedy against any other but the person, to whom he had entrusted the possession of his goods, if the latter delivered over, lost or was deprived of them (*g*). Nevertheless it seems to have been conceived that the former still retained the ownership of the goods; they were *his* goods, of which the other had the keeping (*h*). In such cases, it may be explained, the transaction is called a bailment of the chattels, from the French word *bailler*, to deliver, the parties being distinguished as the bailor and the bailee (*i*). And before very long it was allowed that the bailor might bring an action as well as the bailee, if the goods were taken out of the bailee's possession by a third party (*k*). Bailment.

When the ancient remedy for the recovery of goods stolen or lost ceased to be available against any person, into whose hands the goods might come, and was reduced to a criminal action against a thief, the ownership of goods was deprived of its Gradual development of purely civil remedies for the recovery of goods.

(*e*) Glanv. x. 13; Bract. fo. 99; Selden Soc., Select Civil Pleas, pl. 8; Holmes, Common Law, 167, 176 *sq.*, *Southcote's Case*, 4 Rep. 83 b; Co. Litt. 89 a.

(*f*) Glanv. x. 13; Bract. fo. 102 b.

(*g*) Holmes, Common Law, 166—168; P. & M. Hist. Eng. Law, ii. 153, 168 *sq.*

(*h*) Glanv. x. 13; Bract. fo. 151 a.

(*i*) 2 Black. Comm. 395, 451.

(*k*) Y. B. 4 Edw. III. 20, pl. 8; Holmes, Common Law, 171 *sq.* And see Y. B. 2 Edw. IV. 5, pl. 9, *per* Needham, J., that the property in goods bailed is in the bailor.

most essential safeguard. Indeed the very conception of ownership lost one of the main conditions of its existence. Ownership survived, however, in the common sense of lawyers and laymen as a thing which ought to be protected. Slowly and laboriously its defences were reconstructed in the shape of a group of purely civil actions. And in place of the old proceedings for restitution, there were substituted, to protect the owner's right to maintain or recover possession of his goods against all others, the following remedies (*l*) :—

Trespass *de bonis asportatis.*

1. When the owner, wrongfully deprived of his goods, could no longer use the old proceedings for restitution except against a felonious taker, he had at first · other civil remedy than an action of trespass *de bonis asportatis* to obtain damages for directly taking his goods out of his possession (*m*). Upon such a wrongful taking therefore it was formerly held that the property in the goods taken passed to the trespasser, the late owner being left with a mere right of action against the trespasser personally, and that not for the recovery of his goods but for damages only (*n*). And if the trespasser were divested of the property, as by his delivery of the goods to another or by another's trespass against him, the original owner could not

(*l*) The account here given of the growth of the civil remedies for the recovery of goods is based upon a most brilliant and interesting series of articles by Professor J. B. Ames in the Harvard Law Review, iii. 23, 313 & 337 (reprinted in Select Essays in Anglo-American Legal History, iii. 541 *sq.*), and upon the authorities there cited.

(*m*) Britt. liv. i. ch. 28, § 2, and ch. 29, § 1; F. N. B. 86 A, L, 87 E, 92 M. Trespass *de bonis asportatis* was a particular form of the action of trespass *vi et armis*, which lay for any direct and forcible violation of the *possession* of lands or goods as well as for a direct and forcible injury to the person; see 3 Black. Comm. 120, 138, 151, 153, 208; Bac. Abr. Trespass; P. & M. Hist. Eng. Law, ii. 165.

(*n*) 27 Ass. pl. 64; Y. B. 2 Hen. IV. 12, pl. 51; Finch, L. Bk. III. ch. 6. In Y. B. 8 Edw. III. 10, pl. 30, the property in stolen goods is even ascribed to the thief; but see *ante*, p. 7, n. (*g*); Bro. Abr. Eject. Cust. 9, Tresp. 256.

bring an action of trespass against that other, who had not directly violated the original owner's possession (*o*).

Replevin

2. After a time the dispossessed owner of goods was enabled to gain an increased right by means of the action of replevin. This action originally lay to recover damages for unlawfully taking chattels by way of distress (*p*), as for rent service (*q*). The peculiarity of replevin is, that the first step in the action is to obtain the re-delivery to the plaintiff of the identical goods taken on his giving security to prosecute his claim for damages. This re-delivery on giving pledges (*replegiare*), from which the name of the action is derived, was effected by virtue of the jurisdiction in that behalf vested in the sheriff of the county in which the goods were taken (*r*). Now, at common law, when goods were taken by way of distress, no property or even possession was gained in them; they were merely seized and detained in a pound as a pledge for payment and were said to be in the custody of the law (*s*). Originally therefore if on proceedings in replevin, appropriate to distress alone, the defendant claimed the goods taken as his own, that put an end to the

(*o*) Y. B. 21 Edw. IV. 74, pl. 6; see also 16 Edw. II. 490; 33 Hen. VI. 5, pl. 35, *per* Laicon; 2 Edw. IV. 5, pl. 9; 4 Hen. VII. 5, pl. 1; 16 Hen. VII. 3 a, pl. 7; 21 Hen. VII. 39, pl. 49; Bro. Ab. Eject. Cust. 8, Tresp. 256; Staunf. Pl. Cor. 61 a; *Harvie* v. *Blacklole*, Brownl. 236; Ames, 3 Harv. L. R. 29, 30, Select Essays in Anglo-American Legal History, iii. 549, 550.

(*p*) Bract. fo. 155 b; Britt. liv. i. ch. 28.

(*q*) See Williams, R. P. 67, 336, 21st ed.

(*r*) Glanv. l. xii. c. 9, 12; Bract. fo. 155 b, 157 a; Britt. liv. i. ch. 28. Under statutes of Queen Victoria, the powers of the sheriff with respect to replevins have ceased; and the registrar of the county court of the district, in which any chattels are taken, is empowered to grant replevins and issue all necessary process in relation thereto; see stat. 51 & 52 Vict. c. 43, ss. 133—137 (replacing 19 & 20 Vict. c. 108, ss. 63—67, and 23 & 24 Vict. c. 126, s. 22); County Court Rules, 1903, Ord. 34, and Appx. Forms, Nos. 286—290.

(*s*) Y. B. 20 Hen. VII. 1, pl. 1; *R.* v. *Cotton*, Parker, 132, 119—123.

sheriff's jurisdiction to replevy them (*t*). It was afterwards (*u*) provided, however, that on such a claim being made the sheriff might hold an inquest, and if on the inquest the property were found to be the plaintiff's at the time of the taking, the sheriff might still proceed to replevy the goods (*x*). When proceedings in replevin could no longer be stopped by a mere claim of property by the defendant, replevin became a remedy that might in theory (*y*) be used for any unlawful taking of chattels away from their owner; and if goods were taken out of their owner's possession by a trespasser, he no longer necessarily lost the right of property in them; for it was laid down that he might at his election bring either trespass, whereby he disaffirmed the property in the goods, or replevin, whereby he affirmed the property to be his (*z*). Like trespass, however, replevin was never available against any other person than him, who directly violated the owner's possession (*a*).

Peaceable re-taking.

3. The dispossessed owner of goods, being thus allowed to retain the *right* of property in them, was accordingly permitted to retake the goods, wherever he might find them, if he could do so peaceably (*b*);

(*t*) Britt. liv. i. ch. 18, § 3; ch. 28, § 4; Y. B. 32 & 33 Edw. I. 54.

(*u*) Probably in the reign of Edw. III.; Ames, 3 Harvard Law Review, 32, Select Essays in Anglo-American Legal History, iii. 552.

(*x*) Fitz. Abr. Proprietate Probanda, pl. 4; Co. Litt. 145; Gilbert on Distress and Replevin, 115, 4th ed.

(*y*) In practice, however, replevin does not appear to have been used for an unlawful taking, not by distress, until quite modern times; see *Mellor* v. *Leather*, 1 E. & B. 619.

(*z*) See Y. B. 7 Hen. IV. 28 b, pl. 5; 10 Hen. VI. 65, pl. 5; 2 Edw. IV. 16, pl. 8; 6 Hen. VII. 7, pl. 4; 14 Hen. VII. 12, pl. 22; *Bishop* v. *Montague*, Cro. Eliz. 821; Cro. Jac. 50.

(*a*) *Mennie* v. *Blake*, 6 E. & B. 842.

(*b*) Litt. s. 497; Y. B. 10 Hen. VI. 65, pl. 5, *per* Markham; 32 Hen. VI. f. p. 3; 6 Hen. VII. 7, pl. 4; *Chapman* v. *Thumblethorp*, Cro. Eliz. 329; 3 Black. Comm. 4, 5. Originally it was not lawful for a dispossessed owner to re-take his goods, except according to the old formal procedure on fresh pursuit; P. & M. Hist. Eng. Law, ii. 156, 167; Britt. liv. i. ch. 19, §§ 1, 2, and ch. 25, § 3, and notes, pp. 55, 57, 116, ed. Nichols.

and such retaking is still lawful (*c*). But the right of ownership so re-established over goods was subject to an important limitation, which did not exist in the case of the ownership protected by the old action of theft (*d*). For if, after goods were gone out of their owner's possession, they were sold without his consent in open market (or market overt, as it is called), a person so buying the goods in good faith obtained a valid title to them, and the late owner could no longer retake them, or successfully sue the buyer for the goods or their value (*e*). So the law still continues (*f*). But under the statutes giving restitution of stolen goods after conviction of the thief on indictment (*g*), the ownership of the goods is effectually re-vested in the party robbed after the thief's conviction, notwithstanding any intermediate sale in market overt (*h*). And, after such re-vesting (*i*) any person in possession of the goods is not entitled to withhold them from the robbed owner upon the plea of previous purchase in market overt (*k*). Sale in market overt

4. The right of a dispossessed owner of chattels was further increased by the expansion of the action Detinue.

(*c*) Even by force, if no unnecessary violence be used; *Blades* v. *Higgs*, 10 C. B. N. S. 713; *Ex parte Drake*, *Re Ware*, 5 Ch. D. 866, 871.

(*d*) *Ante*, p. 8.

(*e*) Paston, J., Y. B. 9 Hen. VI. 45, pl. 28; 32 Hen. VI. 1, pl. 3; 33 Hen. VI. 5, pl. 15; 2 Inst. 713.

(*f*) See *Hargrave* v. *Spink*, 1892, 1 Q. B. 25; stat. 56 & 57 Vict. c. 71, s. 22; *Clayton* v. *Le Roy*, 1911, 2 K. B. 1031, 1038 *sq.* The purchase of horses in market overt is subject to special regulations; stats. 2 & 3 P. & M. c. 7; 31 Eliz. c. 12.

(*g*) *Ante*, p. [illegible].

(*h*) Stat. 56 & 57 Vict. c. 71, s. 24, amended by 7 Edw. VII. c. 23, s. 6, postponing the re-vesting (unless the Court before whom the conviction takes place direct to the contrary in any case in which in their opinion the title to the property is not in dispute) until the expiration of ten days after the date of the conviction, or, where notice of appeal or leave to appeal is given within ten days after the date of the conviction, until the determination of the appeal.

(*i*) See *Horwood* v. *Smith*, 2 T. R. 750.

(*k*) 1 Hale, P. C. 543, 544; 4 Black. Comm. 363; *Scattergood* v. *Sylvester*, 15 Q. B. 506; *Delmard* v. *Beatley*, 18 Q. B. 322; see stat. 56 & 57 Vict. c. 71, s. 24

of *detinue*, in which he was ultimately enabled to recover the goods themselves, or their value, if they could not be had, from any one, who unlawfully detained them from him. Detinue was originally an action for breach of a contract to deliver a specific chattel, as upon the termination of a loan, or upon a sale (*l*); and it lay only against the original contractor, and those who came into possession of the goods with his privity (*m*) and were thus affected with the duty of delivery (*n*). It was however extended to the case of the detainer of goods, by one who had gained possession of them by finding (*o*), the finder of lost goods having no right to withhold them from their owner (*p*). And in later times detinue was allowed to be brought by the fiction of a delivery or finding against any one, who unlawfully detained goods from their owner, without regard to the means by which the defendant obtained possession of them (*q*); and it was laid down that the gist of the action is the unlawful detainer (*r*). Thus in detinue the owner wrongfully deprived of the possession of his goods, acquired a

(*l*) It should be noted that detinue was merely a variation of the action of *debt*, which lay to recover a certain sum of money due: and that debt was the most proprietary of personal actions, the earliest writ of debt being in the same form as a writ of right in the King's Court for land and suggesting that the plaintiff was "deforced" of his money and the judgment being that the plaintiff do recover his debt together with his damages and costs. See Glanv. l. 10, c. 13, 14, 18; Bract. fo. 61 b, 102 a; Britt. liv. i. ch. 29, §§ 3, 34, 35; Reg. 139; L. Q. R. iv. 402, 403; P. & M. Hist. Eng. Law. ii. 171.

(*m*) *E.g.*, his executors. At first detinue did not lie, in the original contractor's lifetime, against any one, to whom he had delivered over the goods; but afterwards it was held to lie in such a case; see Y. B. 24 Edw. III. 41 a, pl. 22; 43 Edw. III. 29, pl. 11; 11 Hen. IV. 46 b, pl. 20; 10 Hen. VII. 7, pl. 14.

(*n*) Y. B. 16 Edw. II. 490.

(*o*) Y. B. 2 Edw. III. 2, pl. 5; 11 Hen. IV. 46 b, pl. 20.

(*p*) Britt. liv. i. ch. 18, § 2; Y. B. 33 Hen. VI. 26, pl. 12; *Isaack* v. *Clark*, 2 Bulstr. 312 *sq.*; Pollock and Wright on Possession, 172—187.

(*q*) See Y. B. 9 Hen. V. 14, pl. 22; 6 Hen. VII. 3, pl. 4; *Bishop* v. *Montague*, Cro. Eliz. 824, Cro. Jac. 50; Co. Litt. 286 b; *Mills* v. *Graham*, 1 Bos. & Pul. N. R. 140.

(*r*) *Holdstock* v. *Hewitt*, 1 Cr. & J. 565; *Clossman* v. *Wheate*, 7 C. B. 43.

remedy for their recovery available against all the world, not only against the direct violator of his *possession*, but also against any one who, by unlawful detainer, violated his *right to recover* possession.

Trover.

5. In comparatively modern times (*s*) the dispossessed owner of goods acquired a further remedy for the violation of his right to the possession of them in the action of trover, or trover and conversion, in which he might recover the value of the goods as damages, though not the goods themselves (*t*). Trover was originally an action for damages by the owner of lost goods, against a finder of the goods, who had wrongfully converted them to his own use (*u*). But by means of the fiction of a loss and finding, which the defendant was not permitted to *traverse* or dispute, this action was allowed to be brought by a person entitled to the immediate possession of goods (*x*) against any one, who had come into possession of the goods by whatever means (*y*), and afterwards refused to give them up. For such refusal was held to argue a conversion of them to his own use (*z*). And the wrongful conversion was said to be the gist of the action (*a*). Thus in trover, as well as in detinue (*b*),

(*s*) Hardly before the 17th century. See *Bishop* v. *Montague*, Cro. Eliz. 824, Cro. Jac. 50; *Isaack* v. *Clark*, 2 Bulst. 306; also Y. B. 12 Edw. IV. 13, pl. 10; 2 Ric. III. 14, pl. 39.

(*t*) 3 Black. Comm. 152, 153.

(*u*) See note (*p*), above. Trover was an action of the technical class known as trespass on the case. Trespass on the case was the general remedy for personal wrongs and injuries without force; the action of trespass, or trespass *vi et armis*, lying only for damage directly caused by a man's wrongful and forcible act; 3 Black. Comm. 122, 123, 152; *Scott* v. *Shepherd*, 2 W. Black. 892, 1 Smith, L. C.; Holmes on the Common Law, 275–283; *ante*, p. 12, n. (*m*).

(*x*) *Gordon* v. *Harper*, 7 T. R. 9; 1 R. R. 369; 2 Wms. Saund. 47 b *sq.*

(*y*) *Bishop* v. *Montague*, Cro. Eliz. 824, Cro. Jac. 50.

(*z*) *Agar* v. *Lisle*, Hob. 187. Cf. *Clayton* v. *Le Roy*, 1911, 2 K. B. 1031.

(*a*) *Cooper* v. *Chitty*, 1 Burr. 20, 31.

(*b*) See 7 T. R. 12. In practice trover superseded detinue, because in detinue wager of law, or expurgation by oath, was

the dispossessed owner of chattels acquired a remedy available against all, who violated his right of possession, whether they were the immediate invaders of his possession or not.

No certainty of the specific restitution of goods.

The dispossessed owner of goods was thus tardily invested with the right to recover possession of them as against all the world. But still he had no such certainty of specific restitution as the dispossessed freeholder enjoyed. Thus in a real or mixed action the claimant might always obtain judgment in his favour, either at the trial of the action, or upon his adversary making default in appearance before trial; and in either case he could have the king's writ directing the sheriff to put him in possession of the very land he claimed (*c*). But in personal actions (with the one exception of replevin) all process preliminary to trial (called mesne process) was directed entirely against the *person* sued with the object of compelling him to appear and answer the plaintiff's claim; and formerly, if the defendant failed to appear, the plaintiff could not recover anything from him (*d*).

Mesne process.

available as a defence. Wager of law was abolished in 1833. See Co. Litt. 295; 3 Black. Comm. 153, 341—347; Bac. Abr. Detinue; Stat. 3 & 4 Will. IV. c. 42, s. 13.

(*c*) Glanv. i. 7, 12, 13, 16, 18, 21, 31; ii. 3, 4, 19, 20; iii. 3—6, 9; xiii. 7—9, 32—39.

(*d*) The defendant in a personal action might be attached by gage and pledges to appear, and then distrained by all his lands and chattels continually until he appeared; he might moreover be arrested in trespass *vi et armis* at common law, and in actions of account, debt, detinue, and on the case by statute. But before the year 1832 the plaintiff in a personal action could never obtain final judgment against the defendant in default of his appearance. If the defendant absconded, the plaintiff's only remedy was to proceed against him by distress infinite to compel his appearance, or to pursue him to outlawry in actions wherein his person might be arrested. See Bract. fo. 439 b—441 a; Britt. liv. i. ch. 27, ss. 1—5, 12; Fleta, Lib. ch. 26; Co. Litt. 288 b; 3 Black. Comm. 280, 281; 1 Tidd's Practice, 109—112, 128—130, 9th ed. Stat. 2 Will. IV. c. 39, s. 16, first enabled the plaintiff in a personal action to obtain final judgment in default of the defendant's appearance; arrest on mesne process was abolished in the year 1838 by stat. 1 & 2 Vict. c. 110. Every action is now commenced by a writ of summons calling on the person sued to enter

Also, if judgment were given for the plaintiff on the trial of a personal action, he could have no writ directly enforcing the restitution of anything whereof the defendant had unjustly deprived him; but his ultimate remedy was to obtain satisfaction of the amount of money adjudged due to him for debt or damages by seizure of the defendant's goods or lands or by the imprisonment of his person (*e*).

Now of the remedies given to the dispossessed owner of chattels, trespass and trover were for damages only, and therefore purely personal (*f*). Detinue, being originally an action *ex contractu* (*g*), was personal in its mesne process; so that, if the defendant would not appear, the plaintiff could not recover the goods. And judgment for the plaintiff in detinue was conditional, *viz.*, that the plaintiff should recover the chattels sued for, or their value, if they could not be had (*h*). The defendant, after judgment against him, might indeed be distrained by all his lands and chattels in order to make him restore the goods: but if, after this, he still continued obstinate, the plaintiff could only recover the value of the goods against him (*i*). Since 1854, however, Detinue.

an appearance in the action, and if he fails to do so, the plaintiff may obtain judgment in his own favour. An appearance is entered by delivering, either personally or by solicitor, a memorandum in writing to the proper officer of the court, requesting him to enter the appearance. See Rules of the Supreme Court, 1883, Orders II., XII., XIII., and App. A., Parts I. and II.

(*e*) See *post*, Part I. ch. 2; Part II. ch. 3. A judgment creditor's remedy by imprisonment of the debtor was taken away at the end of the year 1869 by stat. 32 & 33 Vict. c. 62.

(*f*) *Ante*, p. 4.

(*g*) *Ante*, p. 16.

(*h*) Com. Dig. Pleader, 2 W. 52, 2 N. 12; *Phillips* v. *Jones*, 15 Q. B. 859; see *ante*, pp. 8, 11.

(*i*) Thesaurus Brevium, 48, 89, 90; 3 Black. Comm. 413; Tidd's Practical Forms, 357. A court of equity would order a chattel to be specifically delivered up to its owner, if it were of such peculiar value to him that the recovery of damages would be a manifestly inadequate compensation for its loss, or if the person who wrongfully withheld it stood in a fiduciary relation (as trustee, agent, or otherwise) to its owner. The remedy for contempt of such an order was by process of contempt against the person who disobeyed it, viz.:—by the attachment and imprisonment of his person and the sequestration of his Specific delivery up of a chattel in equity.

it has been provided by statute that the Court or a judge may, on the application of the plaintiff in any action for the detention of goods, order that execution shall issue for the delivery of the goods, without giving the defendant the option of retaining the goods on paying their value (*k*). As to replevin, the action is for damages for the unlawful taking, and as we have seen, it lies only against the original wrong-doer (*l*); it is therefore strictly personal (*m*). In replevin however, specific restitution of the goods taken forms part of the mesne process (*n*). But the process so given was imperfect; for if the goods taken had been *eloigned*, that is, removed out of the county and therefore beyond the sheriff's jurisdiction, the law gave no further process against the goods themselves (*o*). And it is of course obvious that, in replevin as well as in detinue, the destruction

Replevin.

property. See *Duke of Somerset* v. *Cookson*, 3 P. W. 389, 1 White & Tudor L. C. Eq.; *Fells* v. *Read*, 3 Ves. 70; *Wood* v. *Rowcliffe*, 2 Ph. 383; *Dowling* v. *Betjemann*, 2 J. & H. 544; *Fothergill* v. *Rowland*, L. R. 17 Eq. 132; Gilbert, Forum Romanum, 84—86; 1 Spence, Eq. Jur. 391.

(*k*) In such a case, if the goods cannot be found, the defendant may be distrained by all his lands and chattels till he deliver them, or the plaintiff may, at his option have execution for their value; or, under the practice introduced by the Judicature Acts, the order for delivery may be enforced by the attachment of the defendant's person or the sequestration of his property. See stats. 17 & 18 Vict. c. 125, s. 78, repealed by 46 & 47 Vict. c. 49, s. 2 (see s. 5); 38 & 39 Vict. c. 77, s. 17; Rules of the Supreme Court, 1883, Order XLII. r. 6, Order XLVIII. App. H. Nos. 10, 11; County Court Rules, 1903, Order XXV. r. 69; *Winfield* v. *Boothroyd*, 34 W. R. 501; *Hymas* v. *Ogden*, 1905, 1 K. B. 246, 250, 251. Under stat. 56 & 57 Vict. c. 71, s. 52, replacing 19 & 20 Vict. c. 97, s. 2, a contract to deliver any specific or ascertained goods may, on the plaintiff's application in an action for breach of the contract, be directed to be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.

(*l*) *Ante*, p. 14.

(*m*) See Mirror, c. 2, s. 26; *Eaton* v. *Southby*, Willes, 131, 134; 1 Tidd's Practice, 5, 9th ed.

(*n*) *Ante*, p. 13.

(*o*) In such a case the plaintiff's only remedy was to have goods of the defendant to the same value taken in *withernam*, that is, by way of reprisal, or, if the defendant had no goods that could be taken in withernam, to set in motion process for his arrest and outlawry. See Bract. fo. 157; Britt. liv. i. ch. 28, § 3; Bro. Abr. Replevin, pl. 4; F. N. B. 68 G, 73 E, 74 C, D; Gilbert on Distress and Replevin, 101, 108, 110, 115, 4th ed.

of the goods might always render their restitution impossible. Thus, in actions for the recovery of goods, there was no process which could ensure their restitution at all hazards; there was no certainty of recovering aught but damages. For this reason, it seems, such actions were classed as personal (*p*); and goods were named personal things after them (*q*).

The present practice in actions for the recovery of goods.

The Common Law Procedure Act, 1852 (*r*) abolished the fictitious statement of the loss and finding of the goods in trover, and of the delivery or finding of the goods in detinue (*s*); and introduced simple statements of the cause of action in the place of the former pleadings relying on the old forms of action. Under the present practice, which has prevailed since the Judicature Acts took effect in 1875, every action is commenced with a writ of summons indorsed with a statement of the nature of the claim made; the forms of indorsement in use are concise and simple; formal errors may be easily amended; and the test of obtaining relief is, whether the suitor has a good cause of action (*t*). Claims for the recovery of goods, or their value, are therefore no longer precisely formulated in detinue, trespass or trover (*u*).

Recovery of chattels bailed.

Hitherto we have been considering the remedies

(*p*) Bract. fo. 102 b; see an article by the present writer in the Law Quarterly Review, vol. iv. p. 394.

(*q*) Although in modern times chattels real are included in personal *estate*, it does not appear that they were ever included in the term *personal things*, which was of earlier origin. A lease for years, before it was settled to be personal, and not real *estate*, was regarded rather as a real thing than a personal thing. See Williams, R. P. 25, n. (*l*), 28, n. (*f*), 21st ed.

(*r*) Stat. 15 & 16 Vict. c. 76, ss. 49, 222, and Schedule B.

(*s*) *Ante*, pp. 16, 17.

(*t*) See stat. 36 & 37 Vict. c. 66, s. 24 (7); Rules of the Supreme Court, 1883, Orders II. rr. 1–3, XXVIII. r. 1, and App. A. Pt. III.; *Companhia de Mocambique* v. *British South Africa Co.*, 1892, 2 Q. B. 358, reversed 1893, A. C. 602.

(*u*) See *Joseph* v. *Lyons*, 15 Q. B. D. 280, 283; *Hallas* v. *Robinson*, *ib.* 288. As to replevin, see *ante*, p. 13, n. (*r*).

of an owner deprived of chattels, of which he had possession himself. Let us now briefly advert to the case of a bailment (*x*) of the chattels, and suppose that the goods have been taken away from the bailee by a stranger and are withheld either by the taker, or some other. In such a case the bailee is and has always been entitled, in respect of his possession of the goods, to use all the remedies given by law to protect the owner's possession or right to possession (*y*). As early as 1375, the bailor was allowed to bring trespass against a stranger, who took the goods out of the bailee's possession, as if his own possession had been violated (*z*). But the bailor could not bring trespass against one, to whom his bailee had delivered the goods, or against a second taker, for neither of these directly and forcibly violated the possession, in respect of which the bailor was entitled to sue (*a*). In later times the bailor could make use of the actions of detinue and trover (*b*), and so recover from any person, who wrongfully withheld the goods, even though he were a second trespasser or had obtained the goods with the bailee's privity (*c*). In modern times, however, the bailor's right to sue for the recovery of his goods is limited to those cases of bailment in which he is entitled to resume possession of his goods at will; as upon a deposit for safe custody or gratuitous loan. And if the owner has contracted to give the bailee exclusive possession of his goods, as upon a

(*x*) *Ante*, p. 11.

(*y*) A bailee might bring trespass; Y. B. 48 Edw. III. 20, pl. 8; 11 Hen. IV. 24 b; replevin; Y. B. 11 Hen. IV. 17, pl. 39; detinue; Y. B. 12 Hen. IV. 18, pl. 19, *per* Hankford J.; Bac. Abr. Detinue (A); or trover; Bac. Abr. Trover (C); *Sutton* v. *Buck*, 2 Taunt. 302, 309; 11 R. R. 585; *Manders* v. *Williams*, 4 Ex. 339, 344; *The Winkfield*, 1902, P. 42, 54 *sq.*

(*z*) Y. B. 48 Edw. III. 20, pl. 8; see Holmes, Common Law, 171; *ante*, p. 11.

(*a*) Needham, J., Y. B. 2 Edw. IV. 5, pl. 9; 16 Hen. VII. 3 a, pl. 7; 21 Hen. VII. 39, pl. 49; Ames, 3 Harvard Law Review, 30; and see *Smith* v. *Milles*, 1 T. R. 475.

(*b*) *Manders* v. *Williams*, 4 Ex. 339, 344.

(*c*) See *ante*, pp. 16—18.

hiring or pledge, his right to recover the goods from strangers wrongfully possessed of them is suspended during the continuance of the bailment (*d*). But when a bailment of any kind is determined, the owner may sue to recover his goods or their value from any person, to whose hands they may have come, as well as from the bailee. For in modern law, the fact that the owner voluntarily parted with the possession of the goods in the first instance, by delivering them to the bailee, is no bar to his recovery of the goods from strangers, so soon as he has become entitled to have his goods returned into his possession (*e*). Under the present Factors Act (*f*), however, there are four cases of bailment in which the bailor may lose his title to recover the chattels bailed in consequence of a disposition of them made without his consent by the bailee (*g*).

(*d*) *Gordon* v. *Harper*, 7 T. R. 9; 4 R. R. 369. In Y. B. 22 Edw. IV. 10, pl. 29, it was held that the hirer of goods is entitled to the exclusive possession of them for the term of the hiring.

(*e*) *Wilkinson* v. *King*, 2 Camp. 335; *Loeschman* v. *Machin*, 2 Stark. 311; 20 R. R. 687; *Dyer* v. *Pearson*, 3 B & C. 38; *Williams* v. *Barton*, 3 Bing. 139, 145; 24 R. R. 448; *Marner* v. *Bankes*, 16 W. R. 62; *Biggs* v. *Evans*, 1894, 1 Q. B. 88; cf. *ante*, p. 11.

(*f*) Stat. 52 & 53 Vict. c. 45, consolidating and amending previous Acts of 1824, 1826, 1842, and 1877.

(*g*) 1. Where the owner entrusts a "mercantile agent" (*i.e.*, one having in the customary course of his business authority to sell, consign for sale, buy or borrow on goods) with the possession of his goods, or of the documents of title thereto; in which case any sale, pledge, or other disposition for valuable consideration of the goods made by the agent in the ordinary course of his business to a person acting in good faith without notice of any want of authority from the owner is as valid as if expressly authorized by the owner. See *Oppenheimer* v. *Frazer*, 1907, 2 K. B. 50; *Oppenheimer* v. *Attenborough*, 1908, 1 K. B. 221; *Weiner* v. *Harris*, 1910, 1 K. B. 285.

2. Where the owner has given possession of his goods to another for the purpose of consignment or sale, or has shipped his goods in the name of another; when the consignee of the goods, if without notice that such other person is not the owner, may acquire a valid lien on the goods (*i.e.*, a right to retain possession of them as security) in respect of advances made to or for such other person.

3. Where the buyer of goods allows the seller to retain possession of them, or of the documents of title thereto; when the delivery or transfer by the latter, or by a mercantile agent acting for him, of such goods or documents under any sale, pledge, or other disposition for value, to any person receiving the same in good faith without

Ownership of goods and its limitations in modern law.

In modern law then, the owner of goods completely enjoys the right to maintain or recover possession of them as against all others; and this right is not lost, though it may be suspended, by a bailment of the chattels. On the other hand, ownership of goods is in modern law subject to the following limitations:—The owner may be deprived of his property in the goods without his consent by a sale of them in market overt (*h*). He may also, without his consent, lose his title to money or negotiable securities gone out of his possession through theft, trespass, loss or bailment. For he cannot recover such money or securities (*i*) from any person, who has subsequently acquired the same in good faith and for value in the ordinary course of business. This limitation of ownership is based, in the case of money, on the inconvenience which would ensue, if a valid title could not be obtained by the transfer of current coin in the ordinary course of circulation. In the case of negotiable securities, the rule in question is founded on mercantile custom incorporated into the common law. For the term negotiable securities is applied to such written instruments, evidencing an obligation to pay money, as by mercantile custom recognized in law are transferable by delivery and current as money. Such are bills of exchange and

notice of the previous sale, will be as valid as if expressly authorized by the owner.

1. Where a person having agreed to buy goods (without having acquired the property in them) obtains with the consent of the seller possession of the goods or of the documents of title thereto; when the delivery or transfer by the former, or by a mercantile agent acting for him, of such goods or documents, under any sale, pledge or other disposition for value, to any person receiving the same in good faith and without notice of any lien or other right of the original seller, will be as valid as if expressly authorized by the latter. The provisions of the Factors Act, 1889, as to cases (3, 4) above are repeated in the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, s. 25.

(*h*) *Ante*, p. 15.

(*i*) Not even if the same have been stolen and he prosecute the thief to conviction; stat. 24 & 25 Vict. c. 96, s. 100, replacing 7 & 8 Geo. IV. c. 29, s. 57; cf. *ante*, p. 15

cheques, promissory notes, including bank notes, and the so-called bonds payable to bearer of foreign or colonial governments (*k*). Again, if any chattels be out of their owner's possession and come into a foreign country, he may lose his title thereto, without his consent, by any transaction, with regard to them, which by the law of that country confers a valid title to the goods against all the world (*l*). This last limitation of ownership is a consequence of the physical mobility of chattels. A man may moreover lose his ownership of goods gone out of his possession, if their nature be so changed that they can no longer be recognized. Thus, if one takes my barley and makes malt therewith, I cannot take back the malt (*m*). And it appears that the ownership of goods may be ended by their abandonment (*n*). Lastly, a man may unintentionally lose his property in goods by the consequences annexed by law to his own conduct; as in the above-mentioned cases under the Factors Act (*o*), and one or two other instances (*p*). Under the Statute of

(*k*) *Miller* v. *Race*, 1 Burr. 452, 1 Smith, L. C. and notes thereto; *Moss* v. *Hancock*, 1899, 2 Q. B. 111; see section III. below.

(*l*) *Cammell* v. *Sewell*, 5 H. & N. 728; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Alcock* v. *Smith*, 1892, 1 Ch. 238; *Minna Craig Steamship Co.* v. *Chartered Mercantile Bank of India, &c.*, 1897, 1 Q. B. 55, 461; *Embiricos* v. *Anglo-Austrian Bank*, 1905, 1 K. B. 677.

(*m*) Y. B. 5 Hen. VII. 15, 16, pl. 6; Moore, 19, 20, pl. 67; 2 Black. Comm. 404, 405. In this case the malt-maker acquires title to the malt *per specificationem*, by the creation of a new species of thing, over which he exercises a kind of occupancy, or original taking of possession (Bract. fo. 10 a); but of course he remains liable in damages for taking the barley. So if another wrongfully affix my timber or bricks to land which is not mine, I shall lose the ownership of them; *Gough* v. *Wood*, 1894, 1 Q. B. 713, 719; *Reynolds* v. *Ashby*, 1904, A. C. 466, 475.

(*n*) *Arrow Shipping* v. *Tyne Improvement* [illegible], 1894, A. C. 508, 532.

(*o*) *Ante*, p. 23, and [illegible] (*q*).

(*p*) Thus at common law, if a man has acted so as to induce the belief that another was the owner or had power to dispose of his goods he will be estopped by his conduct from recovering the goods from parties who have taken the goods for value in the belief so induced; *Pickard* v. *Sears*, 6 A. & E. 469; *Bragg* v. *Wells*, 10 A. & E. 90; *Goodwin* v. *Roberts*, 1 App. Cas. 476. And if the owner allow his goods to remain in the possession, order or disposition of another,

Limitations relating to personal actions, the owner of goods gone out of his possession will lose his right to sue for their recovery, if he do not assert it within six years after the cause of action accrued (*q*). But as he appears to retain his right to retake his goods after the time so limited has expired (*r*), it seems that, in theory, he is not deprived of his ownership in such a case (*s*). There are also various other ways in which the ownership of goods may be ended through the exercise of sovereign authority (*t*), but which can hardly be called limitations of ownership.

Equitable interests in chattels personal.

It remains to add that, besides the ownership of goods which may be enjoyed at common law, a man may have valuable interests in chattels personal, to which he is entitled in *equity* only. Equitable interests in chattels have the same origin as equitable estates in land (*u*). The jurisdiction of the Court of Chancery was invoked to enforce trusts of chattels about the same time as it was extended to protect

in the other's trade or business, so that the other is the reputed owner thereof, the true owner will lose his property in the goods on the other's bankruptcy; when the goods will be divisible under the bankruptcy law among the other's creditors; stat. 46 & 47 Vict. c. 52, s. 44; *Re Button*, 1907, 2 K. B. 180; *post*, Pt. II. Ch. IV. And if the owner of goods so dispose of them as to confer upon some other a voidable title thereto, on a sale by the latter, before his title has been avoided, the buyer will acquire a good title to the goods, provided he buy in good faith and without notice of the seller's defect in title; stat. 56 & 57 Vict. c. 71, s. 23.

(*q*) Stat. 21 Jac. I. c. 16, s. 3; *Wilkinson* v. *Verity*, L. R. 6 C. P. 206.

(*r*) See Litt. s. 498; Pollock & Wright on Possession, 114.

(*s*) That the right of retaking is a test of ownership, see Y. B. 5 Hen. VII. 15, 16, pl. 6.

(*t*) Under this head may be grouped such causes of the loss of ownership as the forfeiture of goods for smuggling (stat. 39 & 40 Vict. c. 36, s. 177), or a breach of the excise laws (7 & 8 Geo. IV. c. 53, s. 32), or the Merchandise Marks Act (50 & 51 Vict. c. 28, s. 12), the sale of unclaimed stolen goods by the receiver of the metropolitan police under 2 & 3 Vict. c. 71, s. 30, or the sale of a ship under proceedings against her *in rem* in a Court of Admiralty jurisdiction (*Castrique* v. *Imrie*, L. R. 4 H. L. 414, 428, 429, 442); see also *Goodlock* v. *Cousins*, 1897, 1 Q. B. 348, 558.

(*u*) Williams, R. P. 161, 21st ed.

trusts or uses of land (*x*). Trusts of chattels, however, were not affected by the Statute of Uses (*y*); and they are not required to be proved by writing as are trusts of lands, tenements and hereditaments, under the Statute of Frauds (*z*) In other respects, the rules for the creation of trusts are the same for chattels as for land (*a*). Equitable interests in chattels are generally of the same nature as equitable estates in land. Thus if chattels personal be delivered or assigned to one, on trust for another simply, the former, who is the trustee, has the legal ownership. But the latter, who is called the *cestui que trust*, has the right in equity to compel the trustee to allow him to have the beneficial enjoyment (*b*). And in consequence of this right he is regarded in equity as enjoying, as against all persons bound by the trust, an interest equivalent to ownership in the chattels in question (*c*). This equitable interest of the *cestui que trust* is analogous to the legal ownership of the chattels, and would pass to his executor or administrator, on his death, as personal estate. But if the trustee should manage to dispose of the chattels to a *bonâ fide* purchaser for value, who had no notice of the trust, the latter would not be bound by the trust. And the *cestui que trust* would have no *equity* to recover the chattels from the purchaser so acquiring the legal ownership of them; and would have no remedy but to sue the trustee, under the equitable jurisdiction of the Court, for damages for the breach of trust (*d*). In these respects, the nature of an equitable interest

(*x*) *Dodd* v. *Browning*, 1 Cal. xiii.; *Hylton* v. *Pollard*, *ib.* i.; *Walfute* v. *Cassyn*, 2 Cal. xxxiii.; 1 Spence Eq. Jur. 457, 467; Williams, R. P. 170, 21st ed.

(*y*) Williams, R. P. 174, 177, 21st ed

(*z*) Stat. 29 Car. II. c. 3, s. 7; Lewin on Trusts, 45, 47, 6th ed.; 55, 53, 12th ed.

(*a*) See *Richards* v. *Delbridge*, L. R. 18 Eq. 11; Williams, R. P. 183, 189, 21st ed.

(*b*) Lewin on Trusts, 564, 6th ed.; 878, 12th ed.

(*c*) *Darcy* v. *Williamson*, 1898, 2 Q. B. 194.

(*d*) Williams, R. P. 181—184, 21st ed.

in chattels, has not been altered by the Judicature Acts (*e*), which in 1875 transferred the original jurisdiction of the old superior Courts of Common Law and Equity to the High Court of Justice, and made provision for the enforcement of equitable, as well as legal, rights in every branch of that Court, and in the Court of Appeal established at the same time (*f*).

§ 3. *Of things in possession and in action.*

Besides the division of chattels into chattels real and personal (*g*), another important distinction exists among personal things. Such things are said to be in possession or in action; or they are called, in law French, *choses in possession* or *choses in action* (*h*).

Choses in possession.

Choses in possession are moveable goods, of which their owner has actual possession and enjoyment, and which he can deliver over to another upon a gift or sale; tangible things, as cattle, clothes, furniture, or the like. They are things, which may be taken and carried away by a thief, so as to be the object of larceny at common law (*i*); or which may be seized and sold by the sheriff in execution of a judgment in a personal action (*k*). Such things in

(*e*) Stats. 36 & 37 Vict. c. 66, s. 10; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

(*f*) See Williams, R. P. 167, 21st ed.; *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hollas* v. *Robinson*, *ib.* 288.

(*g*) *Ante*, p. 5.

(*h*) The use of the term *chose in action* is not very early; although the difference between corporeal things in their owner's possession and mere rights of action is well marked in our earliest text-writers; Bract. fo. 10 b, 61, 407 b; Fleta, fo. 125, 126, 183; Britt. liv. i. ch. 29, § 2, and liv. ii. ch. 2, §§ 1, 10; see Williams, R. P. 4–6, 30, 31, 21st ed. In 22 Ass. pl. 37, a distinction is taken between what is in possession of a villein (as a rent of which he is seised) and what remains in action to the villein, as if obligation of debt be made to him. The term *chose in action* is used by Paston, J., in Y. B. 9 Hen. VI. 6, pl. 64; and as a well-known term by Sir R. Brooke (C. J. of C. B., 1544; ob. 1558; Foss, Judges, v. 380), in his Abridgment (tit. *Chose in action*). See, too, Co. Litt. 317 a, 351 b; 10 Rep. 48 a.

(*i*) *Ante*, pp. 8, 9.

(*k*) *Ante*, p. 19.

early times formed the bulk of a man's chattels. The term *choses in action* appears to have been applied to things, to recover or realize which, if wrongfully withheld, an action must have been brought; things, in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action (*l*). The most important personal things recoverable by action only were money due from another, the benefit of a contract and compensation for a wrong (*m*); and these have always been the most prominent c[illegible]es in action, though not the only things to which the term has been applied (*n*). Choses in action, being valuable

Choses in action.

(*l*) Termes de la Ley, *chose in action*; 2 Black. Comm. 389, 396, 397; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, 285; 290; 11 App. Cas. 426; *Re Thynne*, 1911, 1 Ch. 282.

(*m*) See Co. Litt. 288 b, 289 a; *ante*, pp. 4, 5, 16, n. (*l*), 19.

(*n*) See L. Q. R. x. 143, xi. 223. In Y. B. 9 Hen. VI. 6, pl. 54, Paston J. seems to have suggested that if the owner of a box of deeds bailed it to another, and the other delivered it over to a sub-bailee, the box would be a chose in action to the first bailee. Brooke's abridgment of this case (*Chose in action*, 13) led Lord Justice Fry to state (30 Ch. D. 288) that in 9 Hen. VI. the property in deeds in the hands of a third person was considered as a *chose in action*. On reference to the Year Book, it appears that Paston's *dictum* does not warrant this statement, and that he clearly recognized that if the *owner* of chattels bailed them, he would retain the property in them. It is true that at one time a man deprived of his goods by a trespasser was considered to retain a mere right of action against the trespasser personally: but at that time the former was held to lose all right to the goods, so they cannot have been *his* things in action; *ante*, p. 12. It is submitted that in modern law, at all events, the owner of a corporeal chattel, which is in another person's possession, either through bailment or wrongful taking, has not a mere chose in action: the thing is not merely in action to him. It has always been admitted that a bailor retains the property in the chattels bailed; *ante*, p. 11, and nn. (*h*), (*k*). As we have seen (*ante*, p. 14), it also came to be allowed that, where goods were taken by a trespasser, the owner retained the right of property in them, which right he might assert by re-taking the goods, wherever found. Also, according to Littleton, if I have a cause of action in detinue against another, and I release to him all personal actions, I may nevertheless retake my goods from him, because no right of the goods is released to him; Litt. s. 498. Could this be so if the thing were merely in action to the releasor? Again in *Sir T. Palmer's case*, 5 Rep. 24 b, Sir T. P., seised in fee of a great wood, sold to C. and his assigns 600 cords of wood, to be taken by the assignment of Sir T. P.; and it was held that C. had an interest which he might assign over, and not a thing in action, or a possibility only; for it was resolved that if Sir T. P. did not assign them to C. on request, C. might take them without assignment.

things, are now included in the general term *property* as well as tangible goods. But when mere rights of action are reckoned as property, they are simply regarded objectively as sources of profit, and no heed is paid to the essential difference between them and rights of ownership in possession (*o*). In early times, however, the true nature of rights of action was more prominent, and they were particularly distinguished from tangible property in being incapable of transfer; for by the common law none might assign over a chose in action, save the king (*p*). It has been said that this rule was made to avoid "the multiplying of contentions and suits" (*q*). But it appears, in truth, to have been a consequence of the early view of contract, *viz.*—that the obligation imposed on a man by his contract, was to

By the common law, too, a husband became absolutely entitled to his wife's personal things in possession on marraige, but for her choses in action they must, as a rule, have jointly sued; Co. Litt. 351 b. Now if the goods of a single woman were wrongfully distrained or taken from her, or bailed by her, and she afterwards married, her husband alone could sue in replevin or detinue, or release her right to the goods; Fitz. Abr. Replevin, 43; Moore, 25, pl. 85; Bac. Abr. Detinue (A). In *Franklin* v. *Neate*, 13 M. & W. 481, moreover, it was contended that the owner of a pawned chattel had but a chose in action: but the contrary was decided. It is further submitted that the term *chose in action* points to the personal duty to be exacted by action (see Termes de la Ley, *sub verb.*), and is therefore improperly applied to such a right as the ownership (without possession) of a chattel, which right, although a *bare* right, is realizable by taking the thing, wherever found. Even debt and damages recovered by judgment, though not realized by execution, are not things lying merely in action; Litt. s. 504; and see Bract. fo. 61, 407 b; Fleta, fo. 125, 126; 1 Rop. Husb. & Wife, 212. And it seems that the sheriff may seize and sell chattels bailed, of which the owner is entitled to resume possession at will, in execution of a judgment against the owner: though it is otherwise of chattels pawned or hired or otherwise in the exclusive possession of the bailee; *ante*, p. 22, 23; Bro. Abr. Pledges, 28; *Duncan* v. *Garrett*, 1 C. & P. 169; 26 R. R. 629; *Balls* v. *Thick*, 9 Jur. 304; *Rogers* v. *Kennay*, 9 Q. B. 592. There is, however, some analogy between chattels bailed and things in action with regard to their assignment; see *Burn* v. *Carvalho*, 4 My. & Cr. 690.

(*o*) See Williams, R. P. 4–6, 21st ed.; L. Q. R. xi. 223, 227, 232; *Tempest* v. *Kelner*, 2 C. B. 308, 308.

(*p*) Fleta, fo. 183; Bro. Abr. Chose in Action, 1, 5, 9, 11; 2 Rolle Abr. 45, 46, tit. Grants, F. (6–8), G.; *R.* v. *Twine*, Cro. Jac. 179; Perk. S. 86; Co. Litt. 266 a.

(*q*) 10 Rep. 48 a.

perform what he had undertaken with or for the benefit of the person with whom he had contracted, and no other (*r*)—and of the principle that the right to sue, and the liability for damages for a wrong are personal to the injured party and wrong-doer respectively (*s*). It was impossible, however, that this simple state of things should long continue. Within the class of choses in action was comprised a right of growing importance, namely, that of suing for money due, which right is all that constitutes a *debt*. That a debt should be incapable of transfer was obviously highly inconvenient in mercantile transactions; and as these became more frequent and important men's ingenuity was exercised in surmounting the difficulty in question.

A debt.

Now the difficulty of transferring a right of action is inherent in the nature of the thing. It is not like a corporeal chattel, of which a gift may be made effectual by delivery of possession (*t*). Nor is a right of personal action a right to a specific corporeal thing in another's possession: but it is a right to the performance of a *duty* by another person; it is the means of enforcing an *obligation* imposed on another to make reparation for a breach of contract

Assignment of a chose in action is really a substitution of duty

(*r*) 2 Spence, Eq. Jur. 850; see Pollock on Contracts, ch. 5, pp. 197, 217, and App. note F, 7th ed. But at first the heir, afterwards the executor, and by statute the administrator of a party to a contract might sue or be sued thereon as representing the *persona* of the deceased; see Williams, R. P. 20, and notes (*h*), (*i*), 21st ed.; Wms. Exors., 785, 1721, 7th ed.; 601, 1346, 10th ed.

(*s*) 1 Wms. Saund. 216 a, note (1). The king might assign a chose in action certain, as a debt due to him, but not an uncertain thing, as damages for a trespass done to him; Y. B. 5 Edw. IV. 8, pl. 22. The principle stated above has been so far modified by statute that executors or administrators may in certain cases sue or be sued in respect of an injury to *property* committed against or by their testator or intestate, and the right to sue in respect of an injury done to *property* passes to a trustee in bankruptcy; but the principle remains unaltered with regard to injuries to the person or reputation; see *post*, Pt. II. Ch. I.

(*t*) Bract. fo. 10 b; Britt. liv. ii. ch. 2, §§ 1, 10.

or a wrong (*u*). But when two persons are joined together in law by the link of an obligation arising from contract or wrong, what is created between them is a personal relation, which is, strictly speaking, incapable of assignment. For the duty of the one *to the other* can never be transferred: though it may be extinguished and replaced by a similar duty of the former to a third party. To make an assignment of a chose in action is therefore really to substitute a new duty to the assignee for the duty originally incurred (*x*); and the problem was, how to effect this in the most convenient way.

Novation.

The desired result may obviously be attained with the consent of the person bound to the duty. The transfer intended may then be made upon the principle of *novation*, a term taken from Roman law and applied therein to the extinction of an existing obligation by the creation of a new one in its place. Thus novation takes place when a duty of A. to pay a sum of money to B. is by the consent of all parties replaced by a duty of A. to pay the same sum to C.; the new obligation of A. to C. taking away the obligation of A. to B. (*y*). The necessity of obtaining the consent of the person liable to the duty was however an obstacle in the way of the ready transfer of a claim by novation after the duty had arisen. But this obstacle was avoided when the required consent was given in advance at the time of the creation of the duty. Accordingly we find that in early times a form of contract was contrived in certain cases, whereby the party undertaking the

Novation by consent given in advance.

(*u*) *Ante*, pp. 4, 19; Bract. fo. 98 b, 99 a.

(*x*) Ames, Harvard Law Review, iii. 337, 339 *sq.*, Select Essays in Anglo-American Legal History, iii. 580, 582, 583.

(*y*) Novation equally takes place when a duty of A. to B. is by consent of all parties replaced by a duty of C. to B.; Gai. II. § 38, III. §§ 176, 177; Inst. III. 29, § 3, and notes, Moyle's ed. pp. 452, 453, 465; Bract. fo. 101 a; *Fairlie* v. *Denton*, 8 B. & C. 395, 400; *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464.

stipulated duty expressly agreed to perform it in favour either of the person named in the contract or of any person to whom he might assign his claim (*z*). This principle of the transfer of a claim under a contract by the consent given in advance of the party bound received its most important development under the law merchant in the case of bills of exchange. Bills of exchange appear to have been originally devised to meet the necessity arising in mercantile transactions of making or obtaining payments in a foreign country: but in modern times they have been freely applied and recognized in inland trade or business (*a*). The established form of a bill of exchange was a written order from one person to another, who owed him money or had funds at his disposal, to pay a certain sum of money on a given day to a third party named or to the bearer of the order. If the person so directed to pay signified his acceptance of the obligation, he became bound to pay the sum named, when due, to any *bonâ fide* holder of the bill, who should present it for payment (*b*). In this way, by the consent

Bills of exchange.

(*z*) The most notable example is that of a warranty by a feoffor in favour of the feoffee, his heirs, *or assigns*; a contract which, before the statute of *Quia Emptores* (18 Edw. I. c. 1), played an important part in the development of the right of alienation of fee-simple estates in land; Williams, R. P. 71, 72, 21st ed. The same principle was applied in grants of annuities to a man *and his assigns*, and in covenants to enfeoff a man, his heirs *or assigns*. See as to warranties, Bracton's Note Book, case 804; Bract. fo. 37 b, 381 b, 390, 391; Britt. liv. ii. ch. 8, § 8; Fitz. Abr. Garrante, 93; as to annuities, Britt. liv. ii. ch. 10, § 3; Co. Litt. 144, n. (1); as to covenants, Bracton's Note Book, case 804; Y. B. 21 Edw. I. 137; F. N. B. 145; and see Ames, Harvard Law Review, iii. 338, Select Essays in Anglo-American Legal History, iii. 581, 582.

(*a*) See 2 Lutw. 1585; Macaulay's History of England, iv. 490—492; Cunningham, Growth of English Industry and Commerce, vol. i. (Early and Middle Ages), 194, 229, 230, 326, 379; vol. ii. (Modern Times), 222—224, 394—396.

(*b*) It will be observed that, where the person on whom a bill was drawn owed money to the drawer, the bill operated as an assignment of that debt *pro tanto* to the payee of the bill. This assignment, however, took effect by a true novation, the drawee not being liable on the bill without his acceptance of it; Marquard, Tractatus de Jure Mercatorum, l. 2, c. 12, §§ 10, 28, 33; l. 3, c. 9, §§ 57 *sq.*

expressed in advance of the acceptor of the bill, the right to demand payment of the money secured thereby might pass to any one, who in good faith obtained possession of the bill; and so the right to sue on the contract made by the bill became transferable by the mere delivery of the bill. This method of assignment of the right to sue on a bill of exchange was recognized by mercantile tribunals all over Europe (*c*). And in modern times, the custom of merchants with regard to bills of exchange was recognized and embodied in the English common law; so that the right to sue on bills of exchange payable to a certain person, or to his *order*, became transferable by indorsement of the payee's name on the bill, and delivery of the bill, although the bill were not expressly made payable to bearer (*d*).

Promissory notes.

By a statute of Anne (*e*), promissory notes, which are written promises to pay a certain sum at a given time to a person named, or to his order, or to the bearer, were made assignable in the same manner as bills of exchange.

Assignment of chose in action by means of power of attorney.

The principle of the assignment of a duty by the consent expressed in advance of the party bound was not, however, applied to things in action generally. With regard to these, an indirect method of assignment was devised in the shape of a *letter of attorney* from the person entitled to a right of action, empowering another to sue upon or realize the claim in the name of the person so entitled, but to retain the proceeds for his own use. The transfer of a

(*c*) See Jenks, Early History of Negotiable Instruments, L. Q. R., ix. p. 70; Maitland, Select Pleas in Manorial Courts (Selden Society), 132, 153; Smith's Mercantile Law, Introd. pp. lxx. n., lxxxi. 11th ed.

(*d*) See Cro. Jac. 6, 306; Cro. Car. 301; Carth. 3, 82, 83, 129, 403; *Grant* v. *Vaughan*, 3 Burr. 1516; *Smith* v. *Kendall*, 6 T. R. 123; Bac. Abr. Merchant (M); 2 Black. Comm. 466, 468.

(*e*) Stats. 3 & 4 Anne, c. 8 (c. 9 in Ruffhead); made perpetual by 7 Anne, c. 25, s. 3; and repealed by 45 & 46 Vict. c. 61, codifying the law as to bills of exchange and promissory notes.

chose in action by means of a power of attorney for the transferee to sue in the transferor's name for his own use appears to have been practised at a very early period (*f*). These means of assignment proved so effectual that during a considerable interval it was thought that they unduly stimulated litigation, and that to take advantage of them fell within the offence of maintenance, or maintaining another person in his suit (*g*). On this ground such powers of attorney were treated as void from the beginning of the fifteenth until nearly the end of the seventeenth century, unless given in favour of a creditor of the transferring party (*h*). In modern times, however, the objection of maintenance was overruled, and it was established that a chose in action was lawfully transferable at common law by means of a power of attorney enabling the transferee to sue in the name of the transferor (*i*).

Equitable choses in action.

Besides legal choses in action, or things recover-

(*f*) Ames, Harvard Law Review, iii. 340, and n., Select Essays in Anglo-American Legal History, iii. 583, 584 and n., citing an example of A.D. 1309 from Riley's Memorials of London, p. 68; P. & M. Hist. Eng. Law, ii. 223—225. See West, Symbol. § 521, for a full form of letter of attorney.

(*g*) Prohibited by stats. 1 Edw. III. st. 2, c. 14; 1 Ric. II. c. 14; 7 Ric. II. c. 15; and 32 Hen. VIII. c. 9.

(*h*) Ames, Harvard Law Review, iii. 341, Select Essays in Anglo-American Legal History, iii. 584 and n., citing Y. B. 9 Hen. VI. 64, pl. 17; 34 Hen. VI. 30, pl. 15; 37 Hen. VI. 13, pl. 3; 15 Hen. VII. 2, pl. 3; *Penson* v. *Hickbed*, 4 Leon. 99; Cro. Eliz. 170; *South* v. *March*, 3 Leon. 234; *Harvey* v. *Bateman*, Noy, 52; *Barrow* v. *Gray*, Cro. Eliz. 551; *Loder* v. *Cheslyn*, 1 Sid. 212; Freem. C. C. 145, n. Professor Ames says, "The doctrine of maintenance was pushed so far that it came to be regarded as the real reason for the inalienability of choses in action, and the notion became current that no contracts were assignable, not even covenants or policies of assurance and the like, although expressly made payable to the obligee and his assigns. Even bills and notes were thought solely to derive their assignability from the custom of merchants. Warranties, being obviously not open to the objection of maintenance, continued assignable, and so did annuities, although not without question. Perk. s. 101."

(*i*) 1 Lilly's Abr. 125; *Deering* v. *Carrington*, *ib.* 124; Shep. Touch. 240; 2 Black. Comm. 442; *Winch* v. *Keeley*, 1 T. R. 619; *Gerard* v. *Lewis*, L. R. 2 C. P. 305, 309; *Fitzroy* v. *Cave*, 1905, 2 K. B. 364.

able by action at law, there existed, after the development of the equitable jurisdiction of the Court of Chancery (*k*), equitable choses in action or things recoverable only by suit in equity. Of these a pecuniary legacy is a familiar instance; for which, if the executor withheld payment, the legatee could maintain no action at law (*l*), but was obliged to bring a suit in equity (*m*).

By the rules of modern equity, which began to be formulated after the restoration of Charles II. (*n*), equitable choses in action were directly assignable from one person to another, and the assignee was enabled to sue in his own name (*o*). In equity, moreover, all choses in action were regarded as assignable, so that if a direct assignment were made of a legal chose in action, the assignee became entitled thereto in equity (*p*); though he could only realize the same at law by suing in the assignor's name (*q*).

(*k*) See Williams, R. P. Pt. I. Ch. VII. sect. 1. 21st ed.

(*l*) *Decks* v. *Strutt*, 5 T. R. 690; *Braithwaite* v. *Skinner*, 5 M. & W. 313.

(*m*) Before 1858, a legacy was also recoverable in the ecclesiastical courts; but this remedy, which appears to have been the only one in early times, was seldom used after the establishment of the equitable jurisdiction in this behalf, the remedy in equity being more effectual. See *Matthews* v. *Newby*, 1 Vern. 133; *Duncan* v. *Howard*, *ib.* 134; [illegible] v. [illegible], 1 Hagg. [illegible] 35 Bac. Abr. Legacy [illegible] Story, Eq. Jur. §§ 536— [illegible] 20 & 21 Vict. [illegible] In 1875 the equitable jurisdiction of the Court of Chancery in respect of legacies was transferred to the High Court of Justice, and its exercise assigned to the Chancery Division; stats. 36 & 37 Vict. c. 66, ss. 16, 34; 37 & 38 Vict. c. 83. Since 1865 legacies payable out of estates not exceeding 500*l.* in value have been recoverable in the county courts; stat. 51 & 52 Vict. c. 43, s. 67, replacing 28 & 29 Vict. c. 99, s. 1.

(*n*) Williams, R. P. 166, 21st ed.

(*o*) *Squib* v. *Wyn*, 1 P. W. 378, 381; Gilb. Forum Romanum, 173; see Bac. Tr. 312.

(*p*) *Perryer* v. *Halifax*, Rep. t. Finch, 299; *Peters* v. *Soame*, 2 Vern. 428; *Crouch* v. *Martin*, *ib.* 595; *Row* v. *Dawson*, 1 Ves. Sen. 331.

(*q*) *Heath* v. *Hall*, 4 Taunt. 326, 328. Such an assignment authorized the assignee to sue at law in the assignor's name, and the latter would be restrained in equity from obstructing the exercise of this right; *Hammond* v. *Messenger*, 9 Sim. 327, 332;

Notice of assignment of a chose in action

But although the mere assignment of a chose in action, either at law by letter of attorney or in equity by direct transfer, was a sufficient relinquishment of the assignor's right in favour of the assignee (*r*), a further step was necessary in order to secure effectively the necessary substitution of a new duty to the assignee. This was to give notice of the assignment to the person liable to the duty. For if, before receipt of any such notice, the person liable performed his duty to the person, to whom he was originally bound, he would be discharged from his obligation, notwithstanding that the benefit thereof had been assigned to another. But after he had received notice of assignment of the claim upon him, he was bound to perform his duty, or what remained of it, to the assignee (*s*). Thus if the claim were for payment of money and the person liable, notwithstanding that he had had notice of an assignment, persisted in paying the assignor, he was not discharged from his duty, but remained liable to pay over again to the assignee (*t*). The assignment of a chose in action was moreover subject to all equities existing between the person

Mangles v. *Dixon*, 3 H. L. C. 702, 726. And the assignment, if made for valuable consideration, would be effectual in equity, though made by parol only; *Rodick* v. *Gandell*, 1 De G. M. & G. 763, 777, 778; *Riccard* v. *Pritchard*, 1 K. & J. 277; *Gurnell* v. *Gardner*, 9 Jur. N. S. 1220; *Field* v. *Megaw*, L. R. 4 C. P. 660. And even at law, upon the assignment of a chose in action, the authority to sue in the assignor's name was not required to be given by deed, but might have been given by parol; *Howell* v. *McIvers*, 4 T. R. 690; *Pickford* v. *Ewington*, 4 Dowling, P. C. 453. It was held that the power to sue in the assignor's name was irrevocable, if given for value; *Winch* v. *Keeley*, 1 T. R. 619; see 1 Wms. V. & P. 738, 739, 2nd ed.

(*r*) *Burn* v. *Carvalho*, 4 My. & Cr. 690, 702; *Re Way's Trusts*, 2 De G. J. & S. 365; *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, *ib.* 264; *Gorringe* v. *Irwell India Rubber Works*, 34 Ch. D. 128; *Re Wallis*, 1903, 1 K. B. 719.

(*s*) *Ashcomb's case*, 1 Ch. Ca. 232; *Baldwin* v. *Billingsley*, 2 Vern. 232; *Legh* v. *Legh*, 1 B. & P. 447; *Norrish* v. *Marshall*, 5 Madd. 475; *Stocks* v. *Dobson*, 4 De G. M. & G. 11; *Yates* v. *Terry*, 1902, 1 K. B. 527.

(*t*) *Legh* v. *Legh*, *ubi sup.*; *Jones* v *Farrell*, 1 De G. & J. 208.

liable and the assignor up to the time when the former received notice of the assignment (*u*); that is, the former might avail himself, as against the assignee seeking to enforce the claim, of every defence, by way of set-off or upon any other equitable ground, which he would have had against the assignor, and which had accrued to him up to the time when he received notice of the assignment, but not after (*x*). Notice of the assignment of a chose in action was further necessary in order to complete the title of the assignee; for if the same chose in action were assigned twice over, the claim preferred was that of the assignee, who first gave notice to the person liable of the assignment in his favour; even though the assignment, under which he claimed, were subsequent, in point of time, to the other (*y*).

Assignment of chose in action under statutory authority.

From time to time various particular choses in action were made assignable by statute, the assignee being empowered to sue in his own name at law (*z*). But no legislation was directed towards the assignment of choses in action generally, until the Judica-

(*u*) *Mangles* v. *Dixon*, 3 H. L. C. 702, 731; *Graham* v. *Johnson*, L. R. 8 Eq. 36, 43; *Phipps* v. *Lovegrove*, L. R. 16 Eq. 80, 88.

(*x*) *Cavendish* v. *Geares*, 24 Beav. 163; *Stephens* v. *Venables*, 30 Beav. 625; *Watson* v. *Mid Wales Ry. Co.*, L. R. 2 C. P. 593; *Christie* v. *Taunton & Co.*, 1893, 2 Ch. 175; *Turner* v. *Smith* 1901, 1 Ch. 213; *Re Palmer's, &c., Co.*, 1904, 2 Ch. 741; *Newfoundland Govt.* v. *Newfoundland Ry. Co.*, 13 App. Cas. 199, 210—213. Cf. *Stoddart* v. *Union Trust, Ld.*, 1912, 1 K. B. 181.

(*y*) *Dearle* v. *Hall*, 3 Russ. 1; *Ward* v. *Duncombe*, 1893, A. C. 369; *Marchant* v. *Morton*, 1901, 2 K. B. 829; *Re Lake*, 1903, 1 K. B. 151.

(*z*) For instance, bail bonds by stat. 4 & 5 Anne, c. 2 (4 Anne, c. 16, in Ruffhead), s. 20; replevin bonds by 11 Geo. II. c. 19, s. 23; the contracts made by bills of lading by 18 & 19 Vict. c. 111; policies of life assurance by 30 & 31 Vict. c. 144; policies of marine insurance by 31 & 32 Vict. c. 86, now replaced by 6 Edw. VII. c. 41, ss. 50, 92. As to a bankrupt's choses in action, see 2 Black. Comm. 485; Bac. Abr. Bankrupt (F. 1.); stats. 12 & 13 Vict. c. 106, s. 141; 32 & 33 Vict. c. 71, ss. 4, 15, 17, 22, 83, par. (7), 111; 46 & 47 Vict. c. 52, ss. 20, 21, 44, 50 (5), 54, 83, 168, *ante*, p. 31, n. (*s*).

ture Act of 1873. By that Act (*a*), any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual at law (subject to all equities which would have been entitled to priority over the right of the assignee if that Act had not passed (*b*)) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. Upon an assignment of a chose in action made in compliance with this enactment, the assignee is invested with a legal, as distinguished from an equitable, right to the thing assigned, and is entitled to sue therefor in his own name (*c*): but it should be noted that the statute requires an *absolute* (*d*) assignment *in*

(*a*) Stat. 36 & 37 Vict. c. 66, s. 25, sub-s. 6. The commencement of this Act was postponed to the 1st Nov. 1875, by stat. 37 & 38 Vict. c. 83.

(*b*) Above, p. 37.

(*c*) *Read* v. *Brown*, 22 Q. B. D. 128.

(*d*) It has been decided that an unconditional assignment of a man's entire legal interest in his chose in action may be an absolute assignment (not purporting to be by way of charge only) within the meaning of the Act, notwithstanding that it be made to secure the payment of money due from the assignor to the assignee and be subject to a proviso for redemption on such payment: *Hughes* v. *Pump House Hotel Co.*, 1902, 2 K. B. 190; or although it be made on trust for the assignor himself; *Comfort* v. *Betts*, 1891, 1 Q. B. 737; *Fitzroy* v. *Cave*, 1905, 2 K. B. 364. But an assignment which is merely conditional, or purports to give a charge only on the chose in action, or is of an undetermined part thereof, is not within the Act; *Durham* v. *Robertson*, 1898, 1 Q. B. 765; *Mercantile Bank of London* v. *Evans*, 1899, 2 Q. B. 613; *Jones* v. *Humphreys*, 1902, 1 K. B. 10. It is a question whether a legal assignment can be made under the Act of part of a debt; but the better opinion appears to be that it cannot; *Forster* v. *Baker*, 1910, 2 K. B. 636; *contra*, *Skipper* v. *Tucker*, *ib.* 630.

writing (e) *under the hand of the assignor*, and notice thereof *in writing;* without which the assignment will only take effect in equity according to the previous law (*f*). The other legal choses in action mentioned in the Act, besides debts, appear to include all those, of which the indirect assignment under the previous law, by means of a power to sue in the assignor's name (*g*), was free from all objection of maintenance (*h*). The Act moreover makes no change in the nature of the assignment of a chose in action (*i*), the old rule, that it shall be subject to all equities between the person liable and the assignor, being expressly preserved (*k*).

Modern personal estate.

Mortgages.

Bills, notes, and cheques

Government annuities or stock.

In modern times several species of property have sprung up which were unknown to the early common law. Mortgages became common when the lending of money at interest had been recognized as legal, and the modern equitable jurisdiction over the redemption of mortgages was firmly established (*l*). The development of modern commerce and banking has sent bills of exchange, bank-notes (*m*), and latterly cheques into general circulation. The funding of the National Debt, after the revolution of 1688, first afforded means for the permanent investment of capital in Government annuities or stock; in which the investor looks rather to the enjoyment of the perpetual annuity secured to him

(e) Which must be stamped as an assignment; *Buck* v. *Robson*, 3 Q. B. D. 686; see stat. 54 & 55 Vict. c. 39, ss. 54 *sq.*, 86 *sq.*, and First Schedule.

(*f*) *Ante*, p. 36, and n. (*q*); *William Brandt's Sons & Co* v. *Dunlop Rubber Co., Ld.*, 1905, A. C. 454, 461, 462.

(*g*) *Ante*, pp. 34, 35.

(*h*) See *Torkington* v. *Magee*, 1902, 2 K. B. 427, reversed on the facts, 1903, 1 K. B. 644; *Dawson* v. *Great Northern & City Ry. Co.*, 1905, 1 K. B. 260, 270; *Defries* v. *Milne*, 1913, 1 Ch. 98; *Glegg* v. *Bromley*, 1912, 3 K. B. 474; see *post*, Pt. II. Ch. I. II.

(*i*) *Ante*, p. 32.

(*k*) See *Young* v. *Kitchin*, 3 Ex. D. 127; *Brice* v. *Bannister*, 3 Q. B. D. 569, 578; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; above, p. 38, n. (*x*).

(*l*) See Williams, R. P. 545 and n. (*c*), 546—549, 21st ed.

(*m*) *Ante*, pp. 25, 33.

under Government guarantee, by way of interest, than to the repayment of his capital (*n*). Companies of merchants putting their money into joint stock for the purposes of a trading or mercantile adventure were occasionally incorporated by royal charter in the seventeenth century, or even earlier (*o*). But the prominence of shares in joint-stock companies as a form of property belongs to the last century, in which so many railway and other companies were constituted by special Act of Parliament, and which witnessed, since 1862, the incorporation of countless companies, for pursuing all kinds of schemes of profit, under the Companies Acts (*p*). Again, the borrowings of companies have given rise to debentures and debenture stock, which sometimes merely secure a debt against the company, but more frequently give a charge on the company's property as well. Whilst loans offered for subscription by foreign and colonial governments, and municipal authorities of every description have produced a host of other securities—taking the form sometimes of written instruments (*q*), promising the payment of a certain sum and interest, frequently to the bearer (*r*), and sometimes of stock inscribed in books kept at some bank. The importance of copyright in books and of patents for invention is also obviously modern. All these kinds of property have been classed as personal estate, on the ground of their passing to the executor or administrator,

Shares in joint-stock companies.

Debentures.

Stock Exchange securities.

(*n*) See Cunningham, Growth of English Industry and Commerce, vol. ii. (Modern Times), 290.

(*o*) Cunningham, Growth of English Industry and Commerce, vol. ii. (Modern Times), 24–27, 118–127, 267 *sq.*, 280–284, 289; and see vol. i. (Early and Middle Ages), 371–372, 438, 448, 468; Gardiner's History of England, ii. 310.

(*p*) Stat. 25 & 26 Vict. c. 89, and several amending Acts; all now replaced by the Companies (Consolidation) Act, 1908, stat. 8 Edw. VII. c. 69.

(*q*) Commonly called *bonds*, though differing from what is called a *bond* at common law; *post*, Part II. ch. III.

(*r*) *Ante*, p. 25; *Bechuanaland Exploration Co.* v. *London Trading Bank*, 1898, 2 Q. B. 658.

not the heir (*s*); indeed, many of them have been expressly declared to be and to descend as personal estate by the statutes creating them (*t*). But they do not always fit easily into the classification of personal things as being in possession or in action. Thus a debt is a thing in action, although it be secured by mortgage, bill of exchange, or promissory note. But the *charge* created by a mortgage of land in fee (*u*), although personal estate in equity, is not to be comprehended in any classification of chattels. On the other hand, bills and notes seem to share the characteristics of things both in possession and in action. In regard to the debts they secure, they are things in action (*x*): but as the tangible evidence of the right to sue, their possession is of supreme importance. And this remark applies to all negotiable securities (*y*). A sum of Government stock, which is properly the right to receive a perpetual annuity redeemable on payment of a certain sum, as 100*l*. for every 2*l*. 10*s*. of annuity, has been judicially declared to be of the nature of a mere right of action in the personalty (*z*). And a share in a joint-stock company has been ascertained to be a mere chose in action (*a*). The right

(*s*) *Ante*, pp. 2 and n. (*i*), 5, 6.

(*t*) See stats. 8 & 9 Will. III. c. 20, s. 33, as to stock in the Bank of England; 9 & 10 Will. III. c. 44, s. 71, as to shares in the East India Co.; 1 Geo. I. st. 2, c. 19, s. 9, now replaced by 33 & 34 Vict. c. 71, s. 9, as to Government annuities; 5 & 6 Vict. c. 45, s. 25, now replaced by 1 & 2 Geo. V. c. 46, s. 5 (2), as to copyright; 8 & 9 Vict. c. 16 s. 7; 25 & 26 Vict. c. 89, s. 22, now replaced by 8 Edw. VII. c. 69, s. 22, as to shares in companies.

(*u*) See Williams, R. P. 534, 548, 21st ed.

(*x*) *Hertford* v. *Lowther*, 7 Beav. 1. At common law, too, bills, notes, and other securities for money, being regarded as concerning mere choses in action, and as not importing any property in possession, were held not to be goods, whereof larceny could be committed; 4 Black. Comm. 234. But they were made the objects of larceny by stat. 2 Geo. II. c. 25, now replaced by 24 & 25 Vict. c. 96, s. 27.

(*y*) See *ante*, p. 24; *Re Prater*, 37 Ch. D. 481; *Re Robson*, 1891, 2 Ch. 559.

(*z*) *Dundas* v. *Dutens*, 1 Ves. jun. 196, 198; *Wildman* v. *Wildman*, 9 Ves. 174, 177; *R.* v. *Capper*, 5 Price, 217, 263, 264.

(*a*) *Humble* v. *Mitchell*, 11 A.

given by a patent for inventions has likewise been classified as a chose in action (*b*). But the exclusive privileges known as copyrights and patents are rights of a different kind from other things in action. They are in fact monopolies (*c*), in the former case of the right of multiplying copies of a book or other work of art, in the latter of working a new invention. Thus, they are mere rights unaccompanied with the possession of anything corporeal (*d*); they are also in a manner realizable only by action against transgressors. But they differ from obligations arising from contract or wrong (*e*) in that they are rights availing against all the world, and not against particular persons only (*f*). They have moreover always been directly assignable, copyrights by statute (*g*) and patent rights at common law and under the express words of the royal grants, which create them (*h*). Stocks and shares too, though held to be things in action, have in most cases been made directly assignable by the Acts of Parliament, to which they owe their existence. And the manner of transferring them has also been usually prescribed by statute. Thus the assignment of a sum of Government or Bank of England stock is made by the entry of the transfer thereof in the proper books kept at the Bank of England (*i*); while

Copyrights and patents.

& E. 205; *Colonial Bank* v. *Whinney*, 30 Ch. D. 261, 286; 11 App. Cas. 426, 439, 446, 447.

(*b*) *British Mutoscope, &c., Co. Ld.* v. *Homer*, 1901, 1 Ch. 671, 675; *Re Heath's Patent*, 1912, W. N. 137.

(*c*) Black. Comm. ii. 407; iv. 159; *Hanfstaengl* v. *Empire Palace*, 1894, 3 Ch. 109, 128; *Edwards* v. *Picard*, 1909, 2 K. B. 903, 905, 910.

(*d*) See Williams, R. P. 5, 6, 23rd ed.; L. Q. R. xl. 223, 232 *sq.*

(*e*) Ante, pp. 4, 31.

(*f*) 1 Austin's Jurisprudence, 48, 400, 4th ed.; *British Mutoscope, &c., Co.* v. *Homer*, 1901, 1 Ch. 671; *Badische Anilin, &c.* v. *Isler*, 1906, 1 Ch. 605, 2 Ch. 443.

(*g*) 8 Anne, c. 19, s. 1, replaced by 5 & 6 Vict. c. 45, s. 3, and now by 1 & 2 Geo. V. c. 46, s. 5 (2).

(*h*) Godson on Patents, 211, 215, 237; *Dunnicliff* v. *Mallett*, 7 C. B. N. S. 209; *Walton* v. *Lavater*, 8 C. B. N. S. 162; stats. 15 & 16 Vict. c. 83, s. 35 and Schedule; 46 & 47 Vict. c. 57, ss. 23, 33, 36, and First Schedule, Form D; 7 Edw. VII. c. 29, ss. 14, 28; Patents Rules, 1908, No. 49, and Third Schedule.

(*i*) See stats. 8 & 9 Will. III.

shares in joint-stock companies are generally transferred by deed or writing (as required by the regulations of the company) registered at the office of the company (*k*).

How personal chattels differ from real property.

Such is the general outline of the nature of personal chattels, and of the objects included in the term. As we have seen (*l*), personal chattels are distinguished from real property in being unaffected by the feudal rules of tenure, in passing on intestacy according to a different mode of succession, and in being recoverable by entirely different actions. Personal chattels are also alienable, in modern times, by methods altogether different from those required in the case of land. On the first of these characteristics, however, mainly depends the nature of the property which exists in things personal. The first lesson to be learned of the nature of real property is this—that our law does not admit of the absolute ownership of land in the hands of the subject; the utmost he can enjoy is an *estate* in fee simple *held* of the Crown or some mesne lord. But with regard to personal property, the primary rule is precisely the reverse. Chattels are essentially the objects of absolute ownership, and cannot be held for any estate (*m*). That chattels are the objects of ownership, not of tenure, was settled in times when they consisted almost exclusively of tangible moveable things, and principally of cattle. And this rule was applied to all things comprised in the class of chattels (*n*), and remained unchanged

c. 20, s. 34; 1 Geo. I. st. 2, c. 10, s. 11, now replaced by 33 & 34 Vict. c. 71, ss. 5, 22.

(*k*) See stats. 8 & 9 Vict. c. 16, ss. 14, 15; 25 & 26 Vict. c. 89, s. 22, and First Schedule, Table A (8, 9), now replaced by 8 Edw. VII. c. 69, s. 22, and First Schedule, Table A (18, 19).

(*l*) *Ante*, pp. 1—3.

(*m*) Williams, R. P. 6—15, 21st ed.

(*n*) Dial. de Scaccario, II. xiv.; Stubbs, Select Charters, 230, 2nd ed.; Glanv. vii. 5, x. 6; Bract. fo. 60 b, 129 a, 131 a, 407 b.

in later times, when property of a more permanent nature, such as leases of land for a thousand years and perpetual Government annuities, were included among chattels. In the first place then we will consider the laws respecting those moveable chattels, or choses in posesssion, which constitute the most ancient and simple kind of personal property; these chattels having imparted so much of their nature to the rest.

PART I.

OF CHOSES IN POSSESSION.

CHAPTER I.

OF OWNERSHIP WITH AND WITHOUT POSSESSION.

§ 1. *Of Ownership in Possession and its Acquisition.*

Choses in possession.

CHOSES in possession are tangible moveable things; as cattle, clothes, coins, house furniture, carriages, railway rolling stock and ships. Such things are the objects of absolute ownership, that is, of a right of exclusive enjoyment, mainly including the right to maintain or recover possession of the things against or from all other persons, and further comprehending the right of free use, alteration or destruction, and the right of free alienation with the corresponding liability to alienation for debt (*a*).

Ownership of goods compared with the fee simple of land.

The absolute quality of the ownership of goods appears when it is compared with the nature of an estate in fee simple, the largest interest that a subject may enjoy in land. For the law regards every estate in fee as created by grant either from the Crown directly or else from some other lord practising subinfeudation in the days when this was lawful. Every estate in fee is therefore derived out of the grantor's estate, and it is properly an interest limited to continue so long as the grantee's heirs shall last: though every tenant in fee has the right to substitute another in his place and so prolong the

(*a*) *Ante*, pp. 2, 6—17, 28; Williams, R. P. 2, 3, 21st ed.

estate till the failure of heirs of the substituted tenant (*b*). But the law does not conceive of the ownership of goods as being derived out of any other superior or supreme ownership, or as being limited in duration (*c*). Again, an estate in fee simple may be divided into any number of smaller estates taking effect successively; there may be limited, after an estate for life or in tail in possession, innumerable like estates in remainder, with an ultimate remainder or reversion in fee simple (*d*). But the common law does not regard the ownership of personal chattels as capable of division into smaller successive interests; and it knows no such thing as the remainder or reversion of a chattel (*e*).

Ownership with and without possession.

The law then knows only the simple ownership of goods. Such ownership may, however, be divided into certain constituent parts. Thus the full ownership of goods would appear to include the possession of them (*f*); for how else can their use and enjoyment be had? But as we have seen (*g*), the owner may lose or voluntarily part with possession of his goods; when he will be left with a mere right of ownership without possession. Ownership without possession may or may not be accompanied with the right to possession. Ownership without possession however involves possession without ownership; and the possession of goods, though without ownership, is protected in law against all but the owner, and even against him, if he has parted with his right of exclusive possession. For one who is merely in possession of goods, even by wrong, is said to have a

(*b*) Williams, R. P. 6, 7, 12—15, 37—40, 48, 55, 65—73, 147—149, 21st ed.

(*c*) Williams, R. P. 3, 21st ed.

(*d*) *Ib.* 332, 333, 342—345.

(*e*) *Post*, Part III. Ch. I. Successive interests in chattels may, however, be created in equity, as we shall see.

(*f*) 2 Black. Comm. 199, 395, 396; Ames, Harvard Law Review. iii. 314. Select Essays in Anglo-American Legal History, iii. 563.

(*g*) *Ante*, pp. 10, 16, 17, 22.

title to them as against all except the true owner (*h*). This shows us at once how large a part of ownership is made up of possession, accompanied with the right to maintain or recover possession; which further appears from the fact that the legal mode of acquiring the ownership of ownerless things (*res nullius*) is by occupancy, that is, by taking possession of them (*i*).

The acquisition of ownership.

Now the acquisition of ownership by any one generally presupposes a previous ownership (*k*); thus one usually becomes the owner of goods either by succeeding to the title of a previous owner, or else by succeeding to the title of a previous possessor under circumstances which deprive the owner of his title. The former case includes every gift, sale, release or bequest from an owner and every succession to his title upon intestacy or upon exercise of any creditor's right against his goods. The latter covers the acquisition of ownership through purchase in market overt, by taking money or negotiable securities in the course of currency, by getting a title valid against a true owner in a foreign country, under the Factors Act, by estoppel, and under the bankruptcy law of reputed ownership (*l*). The acquisition of ownership by accession or confusion of substances also presupposes a previous title. Thus the young of a domestic animal belong to the owner of the mother (*m*). If any substances, for instance tallow, belonging to various owners be mixed by consent or accidentally, the mass appears

(*h*) Bro. Abr. Trespass, 433; *Armory* v. *Delamirie*, 1 Str. 505; as to a bailee, see Y. B. 11 Hen. IV. 17, pl. 39; 21 Hen. VII. 14 b, pl. 23; Kelyng, 39; *ante*, pp. 10 and n. (*e*), 22; *The Winkfield*, 1902, P. 42, 54 *sq.*

(*i*) Bract. fo. 8 b; 2 Black. Comm. 258, 400.

(*k*) Holmes, Common Law, 245.

(*l*) *Ante*, pp. 23 and n. (*g*), 24, 25 and n. (*m*)

(*m*) See Bract. fo. 9, 10; Bro. Abr. Trespass, 323; 2 Black. Comm. 404, 405; *Buckley* v. *Gross*, 3 B. & S. 566, 575.

to belong to the owners of its parts in common. And if the confusion be made wilfully by one without the other's leave, the mass belongs to the latter, whose ownership is thus unlawfully invaded (*n*). There are, however, two ways of acquiring the ownership of goods, which are quite irrespective of any previous title. One is under an exercise of sovereign authority; as upon the sale of a ship in proceedings against her *in rem* in a Court of Admiralty jurisdiction (*o*), or of goods ordered to be sold pending litigation under the Rules of the Supreme Court, 1883 (*p*), or directed to be sold without the owner's leave by statute (*q*). The other is by occupancy, or the original taking possession of ownerless things (*r*).

Res nullius, wild animals.

Ownerless things, however, are rare in civilized countries. Indeed they appear to be limited to wild animals, which are not the object of property until they are killed or caught (*s*). And in this country the ownership even of wild animals is not generally to be acquired by simple occupancy. For the right of sporting on any land is a valuable right, which may be enjoyed either by virtue of a franchise (*t*) originally granted by the Crown, or as incident to the ownership of land (*u*). So that the question, to whom do wild animals killed on any land belong, cannot be decided without considering, who had

(*n*) 2 Black. Comm. 405; *Spence* v. *Union Marine Insurance Co.*, L. R. 3 C. P. 427; *Smurthwaite* v. *Hannay*, 1894, A. C. 494, 505, 507.

(*o*) *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 428, 429, 442.

(*p*) Order L. rule 2, whereby the sale may be ordered of any goods, which are of a perishable nature, or which for any other just and sufficient reason it may be desirable to have sold at once; see *Evans* v. *Davies*, 1893, 2 Ch. 216.

(*q*) See *ante*, p. 26, n. (*t*).

(*r*) Vaughan. 188, 190.

(*s*) Bract. fo. 8, 9 a; 7 Rep. 17 b; Black. Comm. ii. 391, iv. 235.

(*t*) As a forest, chase, park or free warren; see Williams on Commons, 228 *sq.*

(*u*) 11 Rep. 87 b; see 2 Black. Comm. 417; Williams on Commons, 240.

the right to kill and take them, and other circumstances, which will be explained hereafter (*v*). But an instance of the acquisition of ownership by mere occupancy occurs in catching fish in the sea (*x*).

Original taking possession.

We have described occupancy as the original taking possession of ownerless things. There may, however, be an original taking possession of things which are not ownerless, as upon the finding of lost goods, or the wrongful taking of goods. These cases are closely allied to that of occupancy, of which they seem to reproduce the characteristics, modified, however, by the fact, that some one exists, who has a better title to the goods than the finder or taker. Thus the original occupant of a thing is entitled to maintain or recover possession of it against all the world; no one has a better right to it than he; and he is responsible to no one for its safety; he is therefore its owner. The finder or wrongful taker of another's goods, has the right to maintain or recover possession of them as against all the world, except the owner (*y*). Should he be dispossessed

(*v*) *Post*, Ch. IV.; *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139, 168.

(*x*) See *Fennings* v. *Lord Grenville*, 1 Taunt. 241; *Hogarth* v. *Jackson*, Moo. & Malk. 58. But royal fish, which are whale and sturgeon, thrown ashore or caught near the coasts are the property of the Crown by prerogative; 1 Black. Comm. 216, 280. As to occupancy *per specificationem*, see *ante*, p. 25, n. (*m*).

(*y*) As to the finder's position with regard to the owner, and the cases in which he may be guilty of larceny in appropriating the thing found to his own use, see Bac. Abr. Trover (B.); Pollock and Wright on Possession, 171—187. Here it should be mentioned that certain things, of which possession has been lost or abandoned belong to the Crown, by prerogative, if the owner do not appear to claim them. These are *treasure trove*, which is any money or coin, gold, silver, plate or bullion found hidden in the earth or other private place; *waifs*, which are stolen goods waived or thrown away by the thief in his flight, for fear of apprehension; *estrays*, which are valuable animals found wandering in any manor or lordship, their owner being unknown; *wreck* of the sea come to land; *jetsam*, goods cast into the sea, which sink and remain under water; *flotsam*, like goods, which float; and *ligan*, goods sunk in the sea, but tied to a cork or buoy. The right to have any of these things may be and frequently is vested in a subject, as

by any stranger, he will be entitled to use any of the owner's remedies (*z*) for the recovery of the goods or their value (*a*). And the stranger will not be enabled to set up the owner's right (*jus tertii*) as a defence to the action, unless he show that he acted with the owner's authority (*b*). The requisites of every original taking possession of goods, whether as occupant, finder, or trespasser, are the same. In each case, the sole (*c*) physical control of the thing must be effectively gained, with the intent to exclude the world at large: otherwise *possession* will not have been acquired (*d*). And neither an intending occupant, nor a finder or trespasser has any title to sue for the recovery of goods, of which he has not actually taken possession (*e*). Whether, in any particular case of alleged taking possession of goods, there has been the required physical control coupled

a franchise, by grant or prescription. See Co. Litt. 114 b; *Sir Henry Constable's case*, 5 Rep. 106; 1 Black. Comm. 291—299; Williams on Commons, 271, 280—292; *A.-G.* v. *Moore*, 1893, 1 Ch. 676; *A.-G.* v. *Trustees of British Museum*, 1903, 2 Ch. 598.

(*z*) *Ante*, pp. 12—21.

(*a*) See as to a finder, *Armory* v. *Delamirie*, 1 Str. 505; O. W. Holmes, Common Law, 237; as to a taker, Y. B. 13 Hen. VII. 10, pl. II.; Bro. Abr. Tresp. 433; Y. B. 12 Hen. VIII. 10 b.; *Basset* v. *Maynard*, Cro. Eliz. 819; *Woadson* v. *Nawton*, 2 Str. 777; *Rackham* v. *Jesup*, 3 Wils. 332.

(*b*) *Newnham* v. *Stevenson*, 10 C. B. 713; *Jeffries* v. *Great Western Ry. Co.*, 5 E. & B. 802; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; *The Winkfield*, 1902, P. 42, 54 *sq.* If, however, a finder or taker of goods be lawfully deprived of the possession of them (as by lawful seizure of the goods as stolen; see 2 Hale, P. C. 113; stats. 24 & 25 Vict. c. 96, s. 103; 34 & 35 Vict. c. 112, s. 16; Archbold's Justice of the Peace, ii. 1812, 7th ed.), he cannot recover them from a stranger to whose hands they may afterwards come; *Buckley* v. *Gross*, 3 B. & S. 566. As to the cases in which *jus tertii* is available as a defence to an action to recover goods, see *Leake* v. *Loveday*, 4 Man. & Gr. 972; Pollock and Wright on Possession, 91, 92, 147, 148.

(*c*) See Pollock and Wright on Possession, 21.

(*d*) Holmes, Common Law, 216 *sq*; and see *Kynoch, Ltd.* v. *Rowlands*, 1912, 1 Ch. 527.

(*e*) Thus in *Young* v. *Hichens*, 6 Q. B. 606, the plaintiff, while fishing for pilchards, had nearly encompassed the fish with his net; but the defendant, by rowing his boat to the opening, disturbed the fish and prevented their capture. The plaintiff brought trespass for disturbing and taking fish in his possession: but it was held that he could not recover, as he never had *possession* of the fish.

with the necessary intent, in a question of fact to be determined with regard to all the circumstances (*f*). When possession of goods has been once acquired, it is not necessary, in order to retain it, that the effective control, which must be used to gain possession originally, should continue to be actively exercised. Possession will not be lost so long as the power of resuming effective control remains. Thus, if I leave my house uninhabited, I still remain in possession of it, and of the goods in it; and shall continue to be possessed of them, unless some other person break into my house and occupy it, or take my goods away (*g*).

§ 2. *Of Ownership without Possession.*

Ownership without possession.

1. Having thus briefly considered the acquisition of ownership and possession, and touched upon the position of an owner in possession, let us pass on to the cases in which the ownership of goods exists apart from their possession. The first instance of this which we will examine is where the owner of goods parts with their possession involuntarily; as where he loses them or they are taken from him. The gradual establishment of the rights and remedies of an owner so deprived of possession has been already described (*h*). We have seen that he is held to retain the *property* in his goods, giving him the right to recover possession of them as against all the world; a right which he may assert himself by peaceable retaking (*i*). The reader will also remember that, whilst the owner might maintain trespass or replevin against any one who forcibly

(*f*) See *Bridges* v. *Hawkesworth*, 15 Jur. 1079; Holmes, Common Law, 222–224; Pollock and Wright on Possession, 37–42; *South Staffordshire Water Co.* v. *Sharman*, 1896, 2 Q. B. 44; *Johnson* v. *Pickering*, 1907, 2 K. B. 437, reversed, 1908, 1 K. B. 1.

(*g*) Holmes, Common Law, 216, 235 *sq.*; *Kynoch Ld.* v. *Rowlands*, 1912, 1 Ch. 527.

(*h*) *Ante*, pp. 6–21.

(*i*) *Ante*, p. 14.

took his goods out of his possession, he might bring detinue or trover, not only (if he chose (*k*)) against an actual disturber of his *possession*, but also against any person who came into possession of the goods by any means and violated his *right to* possession of the goods by wrongfully withholding them from him (*l*). In modern times before the year 1833, trover, though for damages only, was found to be the most convenient remedy for an owner wrongfully deprived of his goods (*m*); and questions of the right to recover possession of goods were therefore most frequently determined in this action: although it was generally considered that detinue would lie equally with trover in such cases (*n*). Under the present practice it seems clear that any one entitled to recover possession of goods may, at his option, sue either for the return of the goods or their value, or else for damages for their wrongful conversion (*o*). At the same time it appears that the test of succeeding in such an action will be, whether the plaintiff have such a cause of action as would have enabled him to maintain trover under the old practice. It will therefore be convenient, in considering the remedy for goods wrongfully withheld, still to speak of the right to maintain trover; although, as we have seen, the old strict forms of action are no longer used (*p*). Now, to maintain trover, the plaintiff must have shown a right in himself to the immediate possession of the goods, and a wrongful conversion (*q*) of them to the defendant's use. Conversion.

(*k*) *Bishop* v. *Montague*, Cro. Eliz. 824, Cro. Jac. 50.

(*l*) *Ante*, pp. 15–18. This must of course be taken subject to the limitations mentioned, *ante*, pp. 24–26.

(*m*) *Ante*, p. 17, n. (*b*).

(*n*) 1 Lilly's Practical Register, 24, 2nd ed.; Vin. Abr. Detinue (B. 9); Bac. Abr. Detinue, Trover (A); 7 T. R. 12; *Halliday* v. *Holgate*, L. R. 3 Ex. 299, 302.

(*o*) *Ante*, p. 21, and n. (*l*).

(*p*) *Ante*, p. 21.

(*q*) As to what acts amount to a conversion of chattels, so as to give rise to a liability in damages to the owner, see Bac. Abr. Trover (B); *Hollins* v. *Fowler*, L. R. 7 H. L. 757; *Barker* v. *Furlong*, 1891, 2 Ch. 172; *Con-*

The conversion, it will be remembered, was the gist of the action; and a mere refusal to deliver up the goods on demand was evidence of conversion (*r*). The owner of goods taken from him or lost has an immediate right to their possession; for the property which remains in him is said to draw with it the right to possession (*s*). And an action for the wrongful conversion of goods can only be maintained when the plaintiff has been in possession of the goods (*t*), or has such a property in them as draws to it the right to their possession (*u*). If the goods have been wrongfully converted by the defendant, the plaintiff will succeed in his action, if he should prove either way his own right to the immediate possession of the goods (*x*); if he should not prove such right he will fail (*y*). As the right to recover possession of goods is most usually enjoyed in respect of their ownership, the right to maintain trover is often stated to depend on the plaintiff's property in the goods (*z*); a right to possession of goods enjoyed in respect of a mere possession (without ownership) of them is also frequently spoken of as being a special kind of property therein (*a*). But while the use of such expressions serves to remind us how large a part of property is the right to recover possession (*b*), it must not mislead the

solidated Co. v. *Curtis*, 1892, 1 Q. B. 495; *Union Credit Bank* v. *Mersey Docks and Harbour Board*, 1899, 2 Q. B. 205.

(*r*) *Ante*, p. 17; 2 Wms. Saund. 472; cf. *Clayton* v. *Le Roy*, 1911, 2 K. B. 1031.

(*s*) *Hudson* v *Hudson*, Latch, 214; 2 Wms. Saund. 47 b.

(*t*) See *Addison* v. *Round*, 4 A. & E. 709; *Brooke* v. *Mitchell*, 6 Bing. N. C. 349.

(*u*) 2 Wms. Saund. 47 b—g.

(*x*) *Wilbraham* v. *Snow*, 2 Saund. 47; *Armory* v. *Delamirie*, 1 Str. 505; *Roberts* v. *Wyatt*, 2 Taunt. 268; 11 R. R. 566; *Legg* v. *Evans*, 6 M. & W. 36; *Evans* v. *Nichol*, 3 Man. & Gr. 614; *Blades* v. *Higgs*, 11 H. L. C. 621.

(*y*) *Gordon* v. *Harper*, 7 T. R. 9; 4 R. R. 369; *Ferguson* v. *Cristall*, 5 Bing. 305; 30 R. R. 604; *Leake* v. *Loveday*, 4 Man. & Gr. 972; *Bradley* v. *Copley*, 1 C. B. 685; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Lord* v. *Price*, L. R. 9 Ex. 54.

(*z*) 3 Black. Comm. 152, 153.

(*a*) See the cases cited *ante*, p. 48, n. (*h*); 2 Wms. Saund. 47 a, b, d *sq.*; *Rogers* v. *Kennay*, 9 Q. B. 592.

(*b*) *Ante*, pp. 47, 48.

student into thinking that an action for the detention or conversion of chattels can be maintained on proof of mere ownership, without regard to the right to possession. Such is not the case. The action tries only the right to the immediate possession of the goods, and cannot be maintained by an owner, who has parted with the exclusive right to their possession (*c*). And there is no action known to the English law in which the right of property in chattels will be determined, apart from the right to their possession.

Can the owner of stolen goods sue the thief before prosecution ?

It has been laid down that if goods be stolen or otherwise feloniously obtained, the owner cannot bring any civil action for the goods or their value against the felon, before he be prosecuted criminally ; for so should felonies be healed (*d*). But if the owner do bring a civil action before prosecution, it does not appear by what means the felon can raise this rule of law as a defence, or how the action can be hindered from proceeding (*e*). The owner may retake goods feloniously obtained from him : but it is a misdemeanor for him to receive them again upon agreement not to prosecute or to favour the offender (*f*).

Right of finder or

It has been already explained that if the finder

(*c*) *Gordon* v. *Harper*, 7 T. R. 9 ; 4 R. R. 309 ; *Donald* v. *Suckling*, L. R. 1 Q. B. 585 ; *Halliday* v. *Holgate*, L. R. 3 Ex. 299.

(*d*) *Dawkes* v. *Coveneigh*, Style 346 ; 1 Hale, P. C. 546 ; 4 Black. Comm. 350 ; *Crosby* v. *Leng*, 12 East, 409 ; 11 R. R. 437 ; *Stone* v. *Marsh*, 6 B. & C. 551, 564, 565 ; *Marsh* v. *Keating*, 1 Bing. N. C. 198, 217 ; 37 R. R. 75 ; *Ex parte Elliot*, 3 Mont. & A. 110 ; *Wellock* v. *Constantine*, 2 H. & C. 146.

(*e*) See *Wells* v. *Abraham*, L. R. 7 Q. B. 554, where the Court discharged a rule for a new trial of an action of trover for a brooch obtained on the ground that the evidence tended to prove a felony ; *Ex parte Ball, Re Shepherd*, 10 Ch. D. 667 ; and *Roope* v. *D'Avigdor*, 10 Q. B. D. 412, where the Court overruled a demurrer to a statement of claim alleging that the defendant stole and embezzled the plaintiff's property

(*f*) 1 Hale, P. C. 619 ; 4 Black. Comm. 133, 358 ; Stephen, Digest of Criminal Law, Art. 158.

taker to possession.

or taker of chattels lose possession of them, otherwise than by being lawfully deprived of them, he retains the right to their possession as against all except the owner; he can therefore maintain trover against all who wrongfully withhold the chattels from him (*g*).

Property possession and right to possession of goods lost or taken.

We see then that when goods are lost or unlawfully taken away, the property remains in their owner, in virtue of which he has the right to their possession as against all the world. But until he recovers his goods, their possession will be first in the finder or taker, and then in any person, to whom the latter may transfer the goods, or who may acquire them upon a second finding or taking. And every person, who may so come into possession of the goods, will have the right to their possession if he be unlawfully deprived of them, against all except those who have better title by virtue either of ownership or of prior possession.

Bailment.

2. Ownership without possession may also exist where a chattel, instead of being lost or taken, becomes the subject of bailment. Bailment, which has already received a brief notice (*h*), is defined by Sir William Jones in his admirable and classical Treatise on the Law of Bailment (*i*), to be a delivery of goods, on a condition expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions, as soon as the purpose for which they were bailed shall be answered (*k*). The purposes for which goods may be bailed are various. The principal are the following. They

(*g*) *Ante*, p. 50.
(*h*) *Ante*, pp. 10, 11, 22.
(*i*) P. 1; see also p. 117.
(*k*) In *R.* v. *McDonald*, 15 Q. B. D. 323, an infant who had sold goods delivered to him under a contract of hiring, which was void by reason of his infancy, was held to have been rightly convicted of larceny as a bailee, the Court being of opinion that the essence of bailment is the delivery upon condition.

may be merely deposited with a friend to keep, or lent to him for use, or left in the custody of a warehouseman or wharfinger, or they may be entrusted to a carrier to convey to a distance, or to an agent or factor to sell; or they may be pawned for money lent, with or without a power to sell them (*l*), or let out to hire (*m*). In all cases of bailment, however, the simple rule still holds, that the *property* in goods can belong to one party only; and when any goods are *bailed*, the property still remains in the bailor (*n*). The possession of the goods, however, is evidently for the time being with the bailee. But if, while goods are in bailment, a third person should become possessed of them, and should wrongfully convert them to his own use, the right to recover possession will in some degree depend upon the nature of the bailment.

Property remains in the bailor

If the bailment should be what is called a *simple bailment*, as in the first five instances above mentioned, that is, a bailment which does not confer on the bailee a right to exclude the bailor from possession, in such a case either the bailee or the bailor may maintain an action of trover against the wrong-doer (*o*). The bailee may maintain this action, because the action depends only on the right

Simple bailment.

Bailee or bailor may maintain trover.

(*l*) In the absence of express agreement as to the sale of pawned goods, the pawnee has the power of sale where a day has been fixed for payment of the amount due and default has been made in payment at the time appointed; where no day has been fixed for payment, the pawnee has no power to sell without proper demand and notice, but it seems that after such demand and notice he may sell; *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Pigot* v. *Cubley*, *ib.* 701; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; *France* v. *Clark*, 22 Ch. D. 830, 26 Ch. D. 257; *Deverges* v. *Sandeman*, 1902, 1 Ch. 579, 589, 593, 597. Pledges of goods with pawnbrokers on loans of not above 10*l.* are now regulated by the Pawnbrokers Act, 1872, stat. 35 & 36 Vict. c. 93.

(*m*) See *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 912; 1 Smith, L. C.

(*n*) *Ante*, p. 11; *Franklin* v. *Neate*, 13 M. & W. 481.

(*o*) *Nicholls* v. *Bastard*, 2 C. M. & R. 659; *Manders* v. *Williams*, 4 Exch. Rep. 339; *ante*, pp. 21—23

to the possession which the bailee has by virtue of the bailment made to him (*p*); and the bailor may also maintain the action, because his property in the goods draws with it the right of possession, and the bailment is not of such a kind as to vest this right in the bailee solely. The bailee is rather in the situation of servant to the bailor, and the possession of the one is equivalent in construction of law to the possession of the other. But as it would be unjust that the wrong-doer should pay damages twice over for his offence, the recovery of damages either by bailee or bailor deprives the other of his right of action (*q*). If, however, the bailment should not be of the simple kind, but should confer on the bailee the right to exclude the bailor from the possession, here, though the property in the goods still remains in the bailor, the bailee can alone maintain an action of trover against any person who may have taken the goods and converted them to his own use. Thus the pawnee or hirer of goods can alone maintain an action of trover so long as the pawning or hiring continues (*r*). Here again we have the property in the goods still vested in one person, the bailor, drawing with it, in the case of simple bailment, the right to the possession, and in the case of other bailments, temporarily disconnected from that right. If, however, any bailee, whatever be the nature of his bailment, should convert the goods bailed to him to his own use, he will by that act have determined the bailment: the property in the bailor will draw to it the right to immediate possession, and the bailor may accordingly recover

Pawnee or hirer can alone maintain trover.

(*p*) *Sutton* v. *Buck*, 2 Taunt. 302; 11 R. R. 585; *ante*, p. 22 and n. (*y*).

(*q*) Bac. Abr. tit. Trover (C).

(*r*) *Gordon* v. *Harper*, 7 T. R. 9; 4 R. R. 369; *Burton* v. *Hughes*, 2 Bing. 173; 27 R. R. 578; *Ferguson* v. *Cristall*, 5 Bing. 305; 30 R. R. 604; *Pain* v. *Whitaker*, Ry. & Moo. 99; *Donald* v. *Suckling*, L. R. 1 Q. B. 585; *Halliday* v. *Holgate*, L. R. 3 Ex. 299.

damages for the act by an action of trover (*s*). And when a bailment is determined, by whatever means, the bailor may, as we have seen, maintain trover, not only against the bailee, if he withholds the goods (*t*), but also against any other person, to whose hands they may have come, and who has wrongfully converted them to his own use (*u*). For example, if a hirer of goods wrongfully pawn or sell them (which is a conversion to his own use, and so determines the bailment), the letter may recover the goods, or their value, from the pawnee or purchaser refusing to give them up at his request (*v*). The exceptions to the bailor's right to recover possession of his goods have been already mentioned (*x*).

Bailee's responsibility for the safety of the goods.

We have seen that, according to the early common law, a bailee appears to have been absolutely responsible to the bailor for the safe return of the goods, even though they had been taken from or lost by the bailee without his fault; the reason being that, in early times, the bailee alone had the right of action to recover them (*y*). And the bailee was only excused for failure to return the goods, if he had been deprived of them by the act of God or of the King's enemies (*z*). But for damage to or destruction of the goods while in his possession, the bailee was not liable without negligence (*a*). In modern times, however, the bailor having been allowed to sue for goods wrongfully taken from the

(*s*) *Cooper* v. *Willomatt*, 1 C. B. 672; *Johnson* v. *Stear*, 15 C. B. N. S. 330; *Pigot* v. *Cubley*, *ib.* 701.

(*t*) Thus the owner of pledged goods may maintain trover against a pawnbroker who withholds them after tender of the amount due; *Walter* v. *Smith*, 5 B. & A. 439; *Franklin* v. *Neate*, 13 M. & W. 481.

(*u*) *Ante*, p. 23; *Jelks* v. *Hayward*, 1905, 2 K. B. 460.

(*v*) *Helby* v. *Matthews*, 1895, A. C. 471; *Payne* v. *Wilson*, 1895, 1 Q. B. 653, 2 Q. B. 537.

(*x*) *Ante*, pp. 24—26.

(*y*) *Ante*, p. 10.

(*z*) Y. B. 33 Hen. VI. 1, pl. 3; Holmes, Common Law, 175, 177, 180, 199—202.

(*a*) Y. B. 7 Hen. IV. 14, pl. 18; 2 Hen. VII. 11, pl. 9; Keilway, 77 b, 160, pl. 2; Holmes, Common Law, 183, 200, 201.

bailee, as well as the bailee himself (*b*), the law of the bailee's responsibility for the return of the bailed goods has been altered (*c*). According to modern law, a bailee is not, as a rule, responsible for failure to return chattels bailed, which have been taken from or lost by him, unless he should have failed to take due care of them (*d*). What care of the goods bailed is due on the part of the bailee, would appear to depend on the nature of the bailment (*e*). If the bailment be for the benefit of the bailor alone, as in the case of a deposit of goods to keep for the bailor without reward, it is held that the bailee is not liable for the loss of the goods, without gross negligence; which seems to mean that he is liable for want of reasonable care (*f*). If the bailment be for the benefit of the bailee alone, as in the case of a gratuitous loan for use, it is said that he is bound to take the greatest care of the goods (*g*). If the bailment be for the parties' mutual benefit, as in the case of pledging or hiring goods, the bailee is bound to take what is called ordinary care of the goods (*h*). There are, however, two exceptions to the modern rules as to a bailee's responsibility for the return of the goods. These arise in the case of innkeepers and common carriers,

Innkeepers and common carriers.

(*b*) *Ante*, pp. 11, 22, 23.

(*c*) For the history of this change, see Holmes, Common Law, 180 *sq.*

(*d*) The foundation of the modern law on this subject is the celebrated judgment of Lord Holt in *Coggs* v. *Bernard*, 2 Lord Raym. 909, in which the old common law rule of the bailee's responsibility for goods stolen or lost out of his possession was thrown over; and new principles derived from Roman law, were introduced. As to the bailee's duty to give notice to the bailor of an adverse claim by a third party, see *Ranson* v. *Platt*, 1911, 2 K. B. 291.

(*e*) See notes to *Coggs* v. *Bernard*, 1 Smith, L. C.

(*f*) *Beauchamp* v. *Powley*, 1 Moo. & Rob. 38; *Doorman* v. *Jenkins*, 2 A. & E. 256; *Giblin* v. *McMullen*, L. R. 2 P. C. 317; 1 Smith, L. C. 179, 189—196, 11th ed.

(*g*) *Coggs* v. *Bernard*, 2 Lord Raym. 915; 1 Smith, L. C. 181, 197, 11th ed.

(*h*) Notes to *Coggs* v. *Bernard*, 1 Smith, L. C. 197, 198, 11th ed.; *Sanderson* v. *Collins*, 1904, 1 K. B. 628; *Cheshire* v. *Bailey*, 1905, 1 K. B. 237.

who are by the modern common law absolutely responsible for the loss of any goods entrusted to them, even without their fault, unless the loss were caused by the act of God or the King's enemies (*i*). This responsibility is, however, now greatly mitigated in the case of innkeepers by a statute of 1863 (*k*). And the common law liability of common carriers has been modified in many important particulars by the Carriers Act, 1830 (*l*), the Railway and Canal Traffic Act, 1854 (*m*), and several statutes relating to carriers by water (*n*). In modern law the responsibility of a bailee for damage to the goods while in his possession is generally governed by the same principles as determine his liability for loss of the goods, if they be taken or go from his possession (*o*). Here we may note that if goods in the possession of a bailee be destroyed or injured by the act of a stranger, the bailee (whether responsible to the bailor for the loss or not) may sue the stranger for the damage done, and can recover the full value of the goods, if destroyed, or of the depreciation caused by the injury done to them (*p*). And if the bailment were determinable at the bailor's will, the bailor also might sue the wrong-doer, as in the case of trover (*q*); but the recovery of damages by bailee or bailor would bar the other

Remedies for injury done by a stranger to goods bailed.

(*i*) *Calye's case* and notes to *Coggs* v. *Bernard*, 1 Smith, L. C. 119, 200 *sq.*, 11th ed.; *Shaw* v. *Great Western Ry.*, 1894, 1 Q. B. 373, 380 *sq.*; *Hill* v. *Scott*, 1895, 2 Q. B. 371, 713. Mr. Justice Holmes (Common Law, 180 *sq.*) shows that this strict responsibility of innkeepers and common carriers is a fragmentary survival of the old law of bailments.

(*k*) Stat. 26 & 27 Vict. c. 41.

(*l*) Stat. 11 Geo. IV. & 1 Will. IV. c. 68; see 1 Smith, L. C. 213 *sq.*, 11th ed.

(*m*) Stat. 17 & 18 Vict. c. 31, s. 7; see 1 Smith, L. C. 218 *sq.*, 11th ed.

(*n*) See 1 Smith, L. C. 226 *sq.*, 11th ed.

(*o*) See notes to *Coggs* v. *Bernard*, 1 Smith, L. C. 188 *sq.*, 11th ed.

(*p*) *The Winkfield*, 1902, P. 42. The bailee must account to the bailor for the value so recovered; *ib.* 55, 61.

(*q*) *Lotan* v. *Cross*, 2 Camp. 464; Williams, J., *Mears* v *London & South Western Ry. Co.*, 11 C. B. N. S. 850, 854; *ante*, p. 57.

from suing on the same cause of action (*r*). If, however, the bailment were such as would exclude the bailor from the right to possession during the continuance of the bailment (*s*), the bailee may sue as above mentioned; and the bailor also may sue the stranger for any permanent injury caused to his reversionary property in the goods (*t*). In this case the recovery by the bailee of full damages for the injury done will deprive the bailor of his action (*u*): but it is thought that the recovery of damages by the bailor for the injury to his reversionary property in the chattels would be no answer to an action by the bailee to recover compensation for the loss sustained by himself alone during the remainder of the term of the bailment (*x*).

Lien.

3. The last case requiring notice in which goods may be in the possession of a person who has no property in them is the case of the existence of a *lien* on the goods. A lien is the right of a person in the possession of goods to retain them until a debt due to him has been satisfied (*y*). A lien is either *particular* or *general*. A particular lien is a right to retain the particular goods in respect of which the debt arises. A general lien is a right to retain goods in respect of a general balance of an account. The former kind of lien is favoured in law; but the latter having a tendency to prefer one creditor above another, is taken strictly (*z*). A particular lien is given by the common law over goods which a person is compelled to receive (*a*); thus carriers (*b*)

Particular or general.

Particular lien.

(*r*) Story on Bailments, § 352, 7th ed.

(*s*) *Ante*, p. 58.

(*t*) *Hall* v. *Pickard*, 3 Camp. 187; *Mears* v. *London & South Western Ry. Co.*, 11 C. B. N. S. 850.

(*u*) *The Winkfield*, 1902, P. 42, 61.

(*x*) See Story on Bailments, § 352, 7th ed.

(*y*) *Hammonds* v *Barclay*, 2 East, 227, 235.

(*z*) 3 Bos. & Pul. 494.

(*a*) *Singer Manufacturing Co.* v. *London and South Western Ry. Co.*, 1894, 1 Q. B. 833.

(*b*) *Skinner* v. *Upshaw*, 2 Lord Raym. 752.

and innkeepers (*c*) have a lien on the goods in their care, although an innkeeper cannot detain his guest's person, or take his coat off his back, to secure payment of his bill (*d*). A particular lien is also given by law to every person who by his labour or skill has improved or altered an article entrusted to his care: thus a miller has a lien on the flour he has ground for the cost of grinding (*e*); and a shipwright has a lien on a ship entrusted to him to repair for the costs of repairing it (*f*). So a lien may be claimed for training a horse, because he is improved by the labour and skill thus bestowed upon him (*g*); but no lien can arise merely for his keep (*h*), unless he has been kept by an innkeeper, who is compelled to take him in (*i*). At common law, a lien on goods is not sufficient to warrant the sale of them (*k*), nor does it authorize the possessor to charge for their standing (*l*). But by the Innkeepers Act, 1878, innkeepers now have power, on certain conditions, to sell goods deposited or left with them or on their premises, to satisfy debts for which they could have retained the goods under their lien (*m*). A particular lien also arises in the case of salvage, or rescuing a ship or its lading from the perils of the sea or the King's enemies, for the trouble and risk incurred (*n*); but this kind of

Salvage.

(*c*) *Thompson* v. *Lacey*, 3 B. & Ald. 283; 22 R. R. 385; *Threfall* v. *Borwick*, L. R. 7 Q. B. 711; *Mulliner* v. *Florence*, 3 Q. B. D. 484; *Gordon* v. *Silber*, 25 Q. B. D. 491; *Rogers* v. *Gray*, 1895, 2 Q. B. 78, 501.

(*d*) *Sunbolf* v. *Alford*, 3 M. & W. 248.

(*e*) *Ex parte Ockenden* 1 Atk. 235.

(*f*) *Franklin* v. *Hosier*, 4 B. & Ald. 341; 23 R. R. 305; *The Tergeste*, 1903, P. 26.

(*g*) *Beman* v. *Waters*, 1 Moo. & Mal. 236; 33 R. R. 692.

(*h*) *Wallace* v. *Woodgate*, 1 Ry. & Moo. 193. See *Sanderson* v. *Bell*, 2 Cro. & Mee. 304, 311; 4 Tyr. 244, 252.

(*i*) *Johnson* v. *Hill*, 3 Stark. 172; 23 R. R. 764; *Allen* v. *Smith*, 12 C. B. N. S. 638, affirmed 9 Jur. N. S. 1284; 11 W. R. 440.

(*k*) *Thames Iron Works Company* v. *Patent Derrick Company*, 1 J. & H. 93; *Mulliner* v. *Florence*, 3 Q. B. D. 484.

(*l*) *British Empire Shipping Company* v. *Somes*, 3 E. B. & E. 353.

(*m*) Stat. 41 & 42 Vict. c. 38.

(*n*) *Hartford* v. *Jones*, 1 Lord Raym. 393; *Baring* v. *Day*, 8 East, 57.

lien is modified by the Merchant Shipping Act, 1894, which provides for the appointment of public receivers of all wreck, into whose hands any person, not being the owner, who finds or takes possession of any wreck, is bound to deliver it as soon as possible (*o*).

Freight.

The lien of a shipowner for freight is now regulated by the Merchant Shipping Act, 1894 (*p*).

General lien.

A general lien, when it does not arise by express contract, or from a contract implied by the course of dealing between the parties (*q*), accrues in consequence of the custom of some trade or profession; and it may be local also that is confined to some particular place (*r*). It obtains in many trades and businesses, such as wharfingers (*s*), dyers (*t*), calico printers (*u*), packers (*v*), factors (*w*), policy brokers (*z*), stockbrokers (*a*) and bankers (*b*), and perhaps also common carriers (*c*).

Solicitor's lien.

Solicitors have also a lien on all the deeds and documents of their clients in their possession for their professional charges generally (*d*);

(*o*) Stat. 57 & 58 Vict. c. 60, ss. 510—571 (see ss. 518, 566), amended by 6 Edw. VII. c. 48, s. 72, replacing similar provisions of the Merchant Shipping Act, 1854 (ss. 432 *sq.*, 450), and amending Acts.

(*p*) Stat. 57 & 58 Vict. c. 60, ss. 492—501, replacing 25 & 26 Vict. c. 63, ss. 66—78. See *White* v. *Furness*, 1895, A. C. 40; *Montgomery* v. *Foy*, 1895, 2 Q. B. 321.

(*q*) *Simond* v. *Hibbert*, 1 Rus. & Myl. 719.

(*r*) *Holderness* v. *Collinson*, 7 B. & C. 212; 31 R. R. 174; *Re Catford*, 43 W. R. 159.

(*s*) *Naylor* v. *Mangles*, 1 Esp. 109; *Moet* v. *Pickering*, 8 Ch. D. 372.

(*t*) *Savill* v. *Barchard*, 4 Esp. 53. See, however, *Close* v. *Waterhouse*, 6 East, 523, n.; 8 R. R. 524, n.

(*u*) *Weldon* v. *Gould*, 3 Esp. 268.

(*x*) *Re Witt*, 2 Ch. D. 489

(*y*) *Houghton* v. *Matthews*, 3 Bos. & Pul. 488; 7 R. R. 815; *Cowell* v. *Simpson*, 16 Ves. 280; 10 R. R. 183.

(*z*) *Man* v. *Shiffner*, 2 East, 523; *Fisher* v. *Smith*, 4 App. Cas. 1; stat. 6 Edw. VII. c. 41, s. 53 (2).

(*a*) *Re London & Globe Finance Corporation*, 1902, 2 Ch. 416; *Hope* v. *Glendinning*, 1911, A. C. 419, 422, 436.

(*b*) *Davis* v. *Bowsher*, 5 T. R. 488; 2 R. R. 650; *Brandao* v. *Barnett*, 3 C. B. 519, 530.

(*c*) See *Rushforth* v. *Hadfield*, 6 East, 519; 7 East, 224; 8 R. R. 520; *Aspinall* v. *Pickford*, 3 Bos. & Pul. 44, note. As to railways, see stat. 2 & 3 Vict. c. 20, s. 97; *Wallis* v. *London and South Western Railway Company*, L. R. 5 Ex. 62.

(*d*) *Stevenson* v. *Blakelock*, 1

but this doctrine is to be taken in connection with the peculiar nature of title deeds, which being the sinews of the land, follow the seisin of it, and may therefore be held by the client only for a limited interest. Thus, if a tenant for life should leave the title deeds of the land in the hands of his solicitor, the lien of the solicitor for his professional charges would be co-extensive only with his client's interest, and on the client's decease the solicitor would be bound to deliver up the deeds to the remainderman, although his charges might remain unpaid (*e*). So, if the client should be a mortgagee, the solicitor having the deeds would be bound to deliver them to the mortgagor, on the reconveyance of the property, on payment to the mortgagee of all principal and interest; for on such reconveyance the mortgagee ceased to have any interest in the lands (*f*). And in like manner if the client should have been a mortgagor at the time when the lien arose, the solicitor would have no right to retain the deeds as against the prior claim of the mortgagee (*g*). But a solicitor retains his lien upon title

Solicitor's charges on property recovered or preserved.

Mau. & Sel. 535; 14 R. R. 525; *Ex parte Sterling*, 16 Ves. 258; 10 R. R. 177; *Ex parte Pemberton*, 18 Ves. 282. Besides a solicitor's lien upon his clients' documents, he has (1) a lien, at common law, upon any judgment or money fund recovered for his client through his instrumentality, for the costs of its recovery. And under the Solicitors Act, 1860, he may obtain (2) a charge for his taxed costs and expenses in reference to any proceeding in any court of justice, which he has been employed to prosecute or defend, upon any property, of whatever kind, thereby recovered or preserved through his instrumentality. See, as to (1), *Stephens* v. *Weston*, 3 B. & C. 535; *Bozon* v. *Bolland*, 4 My. & Cr. 354; *Haynes* v. *Cooper*, 33 Beav. 431; *Ross* v. *Buxton*, 42 Ch. D. 190; *Re Wright's Trust*, 1901, 1 Ch. 317; *Re Meter Cabs, Ld.*, 1911, 2 Ch. 557. And, as to (2), stat. 23 & 24 Vict. c. 127, s. 28; *Wilson* v. *Hood*, 3 H. & C. 148; *Bailey* v. *Birchall*, 2 H. & M. 371; *Callow* v. *Callow*, 2 C. P. D. 362; *Bulley* v. *Bulley*, 8 Ch. D. 479; *Greer* v. *Young*, 24 Ch. D. 545; *Briscoe* v. *Briscoe*, 1892, 3 Ch. 543; *Cole* v. *Eley*, 1894, 2 Q. B. 350; *The Paris*, 1896, P. 77.

(*e*) *Davies* v. *Vernon*, 6 Q. B. 443, 447.

(*f*) *Wakefield* v. *Newbon*, 6 Q. B. 276; *Re Llewellin*, 1891, 3 Ch. 145.

(*g*) *Smith* v. *Chichester*, 2 Dr. & War. 393; *Blunden* v. *Desart*, *ib.* 405; *Peily* v. *Wathen*, 7 Hare. 351; 1 De G. M. & G. 16.

deeds, as against a subsequent purchaser or mortgagee from his client, for charges due before the date of the sale or mortgage (*h*). If, however, the solicitor act, in a mortgage or other transaction passing the deeds, for both parties, he will lose his lien, unless he expressly reserve it (*i*). Again, if the client should be a trustee, the deeds must be given up for the purposes of the trust (*k*); unless the lien be for costs, charges or expenses, which the trustee is liable to pay (*l*). A solicitor's lien upon his client's documents will not avail against the right of a third person not claiming under the client to obtain production of the documents (*m*). This lien extends only to charges strictly professional (*n*), and to documents in the possession of the solicitor in his professional character (*o*); but it has been held that such lien is assignable, together with the debt and documents, to a third person not a solicitor (*p*). A mere certificated conveyancer has no general lien on the documents in his hands (*q*).

Vendor's lien

Another instance of lien is the right of one who has sold goods, without receiving payment and without having agreed to give credit, but has not delivered them, to retain possession of them until payment of the price: but this kind of lien will be more conveniently considered in connection with the subject of sale (*r*).

(*h*) See *Blunden* v. *Desart*, 2 Dr. & War. 405, 420, 421, 425—431; *Pelly* v. *Wathen*, 1 De G. M. & G. 16, 23; *Re Safety Explosives, Ld.*, 1904, 1 Ch. 220, 237; see also *Re Rapid Road Transit Co.*, 1900, 1 Ch. 96.

(*i*) *Re Snell*, 6 Ch. D. 105; *Re Mason & Taylor*, 10 Ch. D. 729; *Re Lawrance*, 1894 1 Ch. 556.

(*k*) *Baker* v. *Henderson*, 4 Sim. 27

(*l*) *Re Dee Estates, Ld.*, 1911, 2 Ch. 85.

(*m*) *Re Hawkes*, 1898, 2 Ch. 1.

(*n*) *The King* v. *Sankey*, 5 A. & E. 423; *Worrell* v. *Johnson*, 2 J. & W. 218; *Re Taylor, Stileman and Underwood*, 1891, 1 Ch. 590.

(*o*) *Champernowne* v. *Scott*, 6 Madd. 93; 22 R. R. 248; *Balch* v. *Symes*, T. & R. 87; 23 R. R. 195.

(*p*) *Bull* v. *Faulkner*, 2 De G. & S. 772; *Briscoe* v. *Briscoe*, 1892, 3 Ch. 543.

(*q*) *Hollis* v. *Claridge*, 4 Taunt 807; *Steadman* v. *Hockley*, 15 M. & W. 553.

(*r*) See next chapter.

Lien, then, of whatever kind, is merely a right to retain the *possession* of the goods. This right of possession enables the person who has been in possession by virtue of the lien to maintain an action of trover for the goods (*s*); but the *property* in the goods still remains with the owner; and if the person having the lien should give up the possession of the goods, his lien will be lost (*t*); the owner's property in them will draw to it the right of possession, and enable him to maintain an action of trover (*u*). And if the person having the lien should take a security for his debt, under circumstances showing an intention to abandon his lien, his lien would on that account be lost (*x*); and in this case also an action of trover may be maintained by the owner of the goods, by virtue of the right of possession now accrued to him in respect of his property (*y*). But if the goods be wrongfully taken out of the possession of a person having a lien thereon, without his consent, the owner of the goods cannot maintain trover for them; because in such a case the owner has not the *right* to the immediate possession of the goods (*z*).

Property of goods subject to lien is in the owner.

How lien is lost.

When goods are taken under a distress for rent, the property in the goods still remains in the owner, until a sale is made pursuant to the statute (*a*) by which a sale is authorized (*b*).

Distress for rent.

(*s*) *Legg* v. *Evans*, 6 M. & W. 36; see Bramwell, B., *Lord* v. *Price*, L. R. 9 Ex. 54, 56.

(*t*) *Kruger* v. *Wilcox*, Amb. 252, 254.

(*u*) *Sweet* v. *Pym*, 1 East, 4; 5 R. R. 487.

(*x*) *Cowell* v. *Simpson*, 16 Ves. 275; 10 R. R. 181; *Re Taylor, Stileman and Underwood*, 1894, 1 Ch. 590; *Re Douglas, Norman, & Co.*, 1898, 1 Ch. 199, cf. *Re Morris*, 1908, 1 K. B. 473

(*y*) *Heuiston* v. *Guthrie*, 2 New Cas. 756, 759.

(*z*) *Lord* v. *Price*, L. R. 9 Ex. 54.

(*a*) Stat. 2 Wm. & Mary, Sess. 1, c. 5, s. 2.

(*b*) *Ante*, p. 13; *King* v. *England*, 4 B. & S. 782; *Moore* v. *Singer Manufacturing Co.*, 1904, 1 K. B. 820; *Pheasant Collieries Co., Ld.* v. *Partridge, Jones & Co. Ld.*, 1912, 2 K. B. 315.

In all the above cases of taking or finding goods, bailment, lien, and distress, it appears clear, therefore, that the property in the goods is still simply vested in one party only, although the right to their immediate possession may be in another party, and the actual possession possibly in a third.

CHAPTER II.

OF THE ALIENATION OF CHOSES IN POSSESSION.

§ 1. *Of the means of transferring the Ownership of Chattels.*

Choses in possession have always been freely alienable from one person to another. The feudal principles of tenure, which in ancient times opposed the alienation of landed estates, had no application to chattels; although, as we shall hereafter see, the full right of testamentary disposition was not at first enjoyed in respect of goods. And the manner in which the alienation of personal chattels is effected is in many respects essentially different from the modes of conveying real estate. In ancient times, indeed, there was more similarity than there is at present. Thus by the early common law a gift of goods might be made with or without writing or deed, but was invalid unless completed by delivery of possession (*a*). Land too was transferable at common law by feoffment, or the gift of a freehold estate therein; this might well have been made by word of mouth, but was void without livery of seisin (*b*). The Statute of Frauds made writing necessary to a feoffment (*c*); and now the chief requisite to the conveyance of land is a deed (*d*). The alienation of goods has had a different history. In two cases the transfer of chattels is still regulated by the old common law principles; these are gift

(*a*) Bract. fo. 10 b, 15 b, 38, 39 b; Britt. bv. ii. ch. 2, § 10; ch. 3, §§ 1, 15; ch. 8, § 11; ch. 9, § 1; *Cochrane* v. *Moore*, 25 Q. B. D. 57, 64–67.

(*b*) Williams, R. P. 146, 21st ed.

(*c*) *Ib.* 157, 21st ed.

(*d*) *Ib.* 145, 157, 206, 503, 519, 21st ed.

and loan for consumption, in which delivery of possession is essential to pass the property. But in modern law the property in chattels may be well assigned by *deed*, without the necessity of delivering over the possession of the goods. Property in chattels is also transferable by *sale* in a manner which has no parallel amongst the methods of conveying land (*e*). Each of these modes of conveyance deserves a separate notice.

Gift.

1. And first, personal chattels are alienable by a mere gift of them, accompanied by delivery of possession. For this purpose no deed or writing is required, nor is it essential that there should be a consideration (*f*) for the gift. Thus, if I give a horse to A. B. and at the same time deliver it into his possession, this gift is complete and irrevocable, and the property in the horse is thenceforward vested in A. B. (*g*). But if I purport to assign the horse, and yet retain possession of it, the gift, though made by writing (so that it be not a deed), is absolutely void at law (*h*); and equity will give no relief to the donee (*i*). It may, however, be observed, that if the donor should not attempt to part with the subject of gift, but should declare that he keeps possession of it *in trust* for the donee, equity will seize on and enforce this trust, though voluntarily created (*k*).

(*e*) As to the early law of sale of goods, see Glanv. x. 14; Bract. fo. 61 b, 62 a; Y. B. 40 Hen. VI. (10 Edw. IV.), 18, pl. 23; 17 Edw. IV. 1, pl. 2; 18 Edw. IV. 21, pl. 1; Keilway, 77 b; P. & M. Hist. Eng. Law, ii. 205–208.

(*f*) Williams, R. P. 79, 21st ed.

(*g*) 2 Black. Comm. 441.

(*h*) *Irons* v. *Smallpiece*, 2 B. & Ald. 551; 21 R. R. 395; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; *Cochrane* v. *Moore*, 25 Q. B. D. 57.

(*i*) *Antrobus* v. *Smith*, 12 Ves. 39, 40; 8 R. R. 278; *Edwards* v. *Jones*, 1 My. & Cr. 226; *Dillon* v. *Coppin*, 4 My. & Cr. 647, 671; *Richards* v. *Delbridge*, L. R. 18 Eq. 11; *Re Breton's Estate*, *Breton* v. *Woollcen*, 17 Ch. D. 416.

(*k*) *Ellison* v. *Ellison*, 6 Ves. 656; 6 R. R. 19; *Ex parte Dubost*, 18 Ves. 140, 150; 11 R. R. 173; *Vandenberg* v. *Palmer*, 1 K. & J. 204; *Jones* v. *Lock*, L. R. 1 Ch. 25, 28; see Williams, R. P. 183, 21st ed.; *ante*, p. 27.

Transfer of possession.

Delivery of possession being essential to the validity of a gift of chattels it is important to consider by what means the possession of goods may be transferred. Now we have seen that besides an actual possession of goods where the possessor has himself the exclusive control of them (*l*), there may be what is called a constructive possession of chattels. This arises where goods are in the possession of a bailee under a simple bailment, when the bailor is entitled to resume possession at will, and either the bailee or the bailor may maintain trover for the goods (*m*). In such cases the possession of the bailee is considered to be, in construction of law, the possession of the bailor (*n*). This being so, the possession of goods may be transferred in two ways. The first is by the possessor handing over the actual control of the goods to another. The second is by the possessor changing the character of his possession, without any change in the actual control of the goods. This may occur where the possession of an owner is changed to that of a bailee for another, and *vice versâ*, and where the possession of a bailee for one person is changed to that of bailee for another. Actual delivery of possession evidenced by a change in the control of the goods seldom presents much difficulty. If a friend gives me a book in his library, and I at once take it to my own home, or if goods be sent to a warehouse for storage in my name and at my expense, it is equally clear that a complete transfer of possession is effected. There may, however, be an actual delivery of possession without any handling of the goods. Thus, if goods be stored under lock and key, there may be an actual delivery of possession of them by the delivery of the key; for when the possessor of

Actual delivery of possession.

(*l*) *Ante*, p. 51.
(*m*) *Ante*, p. 57.
(*n*) 4 T. R. 490; 7 T. R. 12.

goods hands over the means of access to them, he effectively parts with their control (*o*).

Constructive delivery of possession.

Constructive delivery of possession by a change in the character of a possession, which is otherwise undisturbed, has been held to take place far more frequently in cases of sale than of gift. Thus it is settled that, where goods sold remain under the actual control of the seller, the buyer may nevertheless receive possession of the goods constructively, if the seller cease to hold them as owner, and keep them as bailee for the buyer (*p*). But there is not any reported case in which this doctrine has been successfully invoked to sustain a gift. It is, however, submitted that, on principle, the delivery of possession essential to the validity of a gift should be satisfied by a constructive as well as by an actual delivery of possession. The difficulty, in the case of a gift, is to establish an irrevocable change of the donor's possession from that of owner into that of bailee for the donee. When there is merely a verbal gift coupled with a voluntary promise to hold the goods for the donee, without any change of actual control, it seems impossible to hold that the donor is not at liberty to change his mind and use his possession for his own benefit as owner (*q*). But if there were a voluntary gift accompanied with a contract that the donor should

(*o*) *Ward* v. *Skep*, 1 Ves. sen. 244; *Ryall* v. *Rowles*, *ib.* 362; *Ward* v. *Turner*, 2 Ves. sen. 443; 1 Dick. 172; *Gough* v. *Everard*, 2 H. & C. 1; *Hilton* v. *Tucker*, 39 Ch. D. 669; *Re Prigoshen*, 1912, 2 K. B. 494; see Pollock & Wright on Possession, 61–68. In such cases the intent, with which the key is handed over, is of course material. Unless the intention were that, from the moment of handing over the key, the goods should remain under the exclusive control of the person receiving the key, possession of the goods would not appear to be effectively delivered.

(*p*) *Elmore* v. *Stone*, 1 Taunt. 458; 10 R. R. 578; *Castle* v. *Sworder*, 6 H. & N. 828; Benjamin on Sale, 135, 2nd ed.; 218, 5th ed.

(*q*) See the cases cited, *ante*, p. 70, n. (*h*); and *Re Ridgway*, 15 Q. B. D. 447

keep the goods as the donee's bailee for reward, could it be maintained that there was not an irrevocable change of possession on the donor's part? And if there was, the gift would appear to be perfect (*r*). It seems too that an irrevocable change of possession might be established, where a donor remaining in possession of the goods given has nevertheless assented to the exercise by the donee of acts of ownership over them (*s*).

Gift to bailee or other possessor.

When goods are in the possession of a bailee, it is held that there may be a valid gift of them from the owner to the bailee by mere word of mouth, expressing an intention of present gift (*t*), coupled with that change of possession which takes place, when the bailee, with the donor's consent, ceases to hold the goods as bailee and begins to hold them for his own exclusive use as owner (*u*). A gift may be made in the same way from the owner of goods to a finder or wrongful taker, in whose possession the goods remain (*x*).

Constructive delivery when goods are in the custody of a simple bailee.

When goods are in the custody of a simple bailee, such as a wharfinger or carrier, the constructive possession of the bailor may be transferred to a third person by the agreement of all parties that the goods shall be held for the transferee. But the rule is that there can be no legal delivery of the goods from the bailor to a third person without the assent

(*r*) If a horse were given, with an agreement that the donor should keep the animal for the donee, charging for his standing and keep, surely the gift would be complete; see *Elmore* v. *Stone*, 1 Taunt. 458.

(*s*) Take the case of a sale of the goods by the donee (see *Chaplin* v. *Rogers*, 1 East, 192; 6 R. R. 249), or of his marking timber with his initials, as in *Stovold* v. *Hughes*, 14 East, 308; 12 R. R. 523.

(*t*) Promise of future gift will not do; *Shower* v. *Pilck*, 4 Ex. 478.

(*u*) *Winter* v. *Winter*, 9 W. R. 747; *Kilpin* v. *Ratley*, 1892, 1 Q. B. 582; *Cain* v. *Moon*, 1896, 2 Q. B. 283.

(*x*) Shepp. Touch. Preston's ed. 240, 241.

of the bailee; and the constructive possession of the bailor is accordingly not transferred until the bailee has consented to hold the goods for the transferee (*y*). But when goods are at sea, the delivery of the bill of lading, after its indorsement, is equivalent to delivery of the goods themselves; for it is not possible in this case to make any nearer approach to an actual delivery (*z*). It seems, on principle that a gift of goods in the possession of a bailee for the donor will be complete when the bailee agrees to hold them for the donee, but not before; and that a gift of goods at sea will be complete on delivery of the bill of lading (*a*).

Loan for consumption.

2. On a loan for consumption (*mutuum* in Roman law), the ownership of the chattel lent passes to the borrower on delivery to him of possession thereof in pursuance of the contract. Thus, if I borrow a bottle of wine to drink or money to spend, I become the owner of the wine or coins immediately upon delivery of the same into my possession; when the

(*y*) *Zwinger* v. *Samuda*, 7 Taunt. 265; 18 R. R. 476; *Lucas* v. *Dorrien*, *ib.* 278; *Bryans* v. *Nix*, 4 M. & W. 775, 791; *Farina* v. *Home*, 16 M. & W. 118; *M'Ewan* v. *Smith*, 2 H. L. C. 309; stat. 56 & 57 Vict. c. 71, s. 29, sub-s. 3; *Re Hamilton, Young & Co.*, 1905, 2 K. B. 772, 786, 789, 790.

It appears from these authorities that, at common law, the bailor's constructive possession is not transferred merely by his handing over an order for delivery of the goods. But, as we shall presently see, this rule is now modified by the Factors Act, 1889.

(*z*) Benjamin on Sale, 673, 2nd ed.; 845, 5th ed.; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; *Sanders* v. *Maclean*, 11 Q. B. D. 327, 341; *Burdick* v. *Sewell*, 10 App. Cas. 74, 82, 83, 95, 96.

(*a*) It has been the custom to draw bills of lading in triplicate. The property in goods at sea passes to the person to whom an indorsement and delivery of any one part of a bill of lading, drawn in triplicate, is first made with intent to pass the property; *Barber* v. *Meyerstein*, L. R. 4 H. L. 317; *Sanders* v. *Maclean*, 11 Q. B. D. 327, 334, 335, 341. But the shipowner, or any person standing in his place, is justified in delivering the goods on arrival to the holder of any one part of a bill of lading, drawn in the usual form, provided that the delivery be made in good faith and without notice or knowledge of any assignment of another part of the bill of lading; *Glyn, Mills & Co.* v. *East and West India Dock Co.*, 7 App. Cas. 591.

lender parts with all property in the things lent and has nothing but the benefit of my obligation to return to him the same quantity of wine or sum of money (*b*).

Alienation by deed.

3. The next method of alienating chattels personal is by deed. A grant of chattels personal by deed is irrevocable on the part of the grantor though made without any valuable consideration and at once transfers the property in the goods to the grantee (*c*). For the formality of a deed affords indisputable evidence of an intention of gift (*d*). And although in early times every gift of chattels, made with or without deed, was void unless perfected by delivery of possession (*e*), it was afterwards established, that a gift of chattels by deed is complete without any delivery of the goods (*f*). But under the Bills of Sale Act, 1878 (*g*), an absolute assignment of personal chattels by deed, not followed by delivery of possession of the chattels within seven

(*b*) Bract. fo. 99 *a*, 102 b; L. Q. R. xi. 228.

(*c*) Y. B. 7 Ed. IV., fo. 20, pl. 21; 3 Rep. 26 b, 27 a; 2 Man. & Gr. 691, n.; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Carr* v. *Burdiss*, 1 C. M. & R. 443, 782, 788; 1 C. B. 381, n.; Parke, B., *Flory* v. *Denny*, 7 Ex. 583; 31 Ch. D. 286. Voluntary conveyances of any property by deed executed on or after the 29th April, 1910, are chargeable with the like stamp duty as conveyances on sale, with the substitution of the value of the property conveyed for the amount or value of the consideration for the sale; and the stamp must be adjudicated. Voluntary conveyances by deed executed before that date were subject to a stamp duty of 10*s.* only. The stamp duty on conveyances on sale is at the rate of one half per cent. where the consideration for the sale does not exceed 500*l.* and at double that rate where it does (except in the case of a conveyance or transfer of any stock or marketable security, where the rate remains one half per cent.); see stats. 10 Edw. VII., c. 8, ss. 73, 74, amending 54 & 55 Vict. c. 39, ss. 1, 14, 54—61, and First Schedule; 1 Wms. V. & P. 397, 398 and notes (*q*), (*r*), 696 *sq.*, 2nd ed.; Williams, R. P. 156, n. (*d*), 615, n. (*p*), 21st ed.

(*d*) See Bract. fo. 100 b; Shep. Touch. by Preston, 224; Holmes on the Common Law, 272, 273.

(*e*) *Ante*, p. 69.

(*f*) *Cochrane* v. *Moore*, 25 Q. B. D. 57, 64—67, 73.

(*g*) Stat. 41 & 42 Vict. c. 31; see ss. 4, 8, 10, 11, and s. 10 of the amending Act of 1882, stated in Appendix A.; *Casson* v. *Churchley*, 53 L. J. Q. B. 335.

days after, must be attested and registered in accordance with the conditions of the Act: otherwise it will be liable to become void, as against the assignor's creditors, with regard to such chattels comprised therein as remain in the assignor's apparent possession, and will also be liable to be defeated by a subsequent absolute assignment duly registered (*h*). Assignments of chattels for the benefit of the assignor's creditors or by way of marriage settlement are, however, exempt from the provisions of this Act (*i*); and any absolute assignment of chattels by deed is valid as between assignor and assignee, though not registered (*k*). Assignments of chattels by deed made by way of security for the payment of money are altogether void unless made and registered in accordance with the Bills of Sale Act of 1882 (*l*).

Sale.

4. The fourth and most usual mode of alienation of chattels personal is by sale. It is here that the contrast presents itself most strongly between the means to be employed for the alienation of real property and chattels personal. When a contract has been entered into for the sale of lands, the legal estate in such lands still remains vested in the vendor; and it is not transferred to the vendee until the vendor shall have executed and delivered to him a proper deed of conveyance. In *equity*, it is true that the lands belong to the purchaser from the moment of the signature of the contract; and from the same moment the purchase-money belongs, in equity, to the vendor. But at *law* the only result of the signature of a contract for the sale of

Effect of a contract for the sale of lands.

(*h*) *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. D. 471.

(*i*) Stat. 41 & 42 Vict. c. 31, s. 4.

(*k*) *Tuck* v. *Southern Counties Deposit Bank*, 42 Ch. D. 471; *Antoniadi* v. *Smith*, 1901, 2 K. B. 589; but cf. *Hopkins* v. *Gudgeon*, 1906, 1 K. B. 690.

(*l*) Stat. 45 & 46 Vict. c. 43, stated in Appendix A.

lands is, that each party acquires a right to sue the other for pecuniary damages, in case such contract be not performed (*m*). Not so, however the case of a contract for the sale of chattels personal. Such a contract transfers the legal ownership of the goods sold to the buyer, without the necessity of any further formality: although it is a question of the intention of the parties in each particular case, whether the property in the goods shall so pass immediately upon the formation of the contract, or subsequently, upon the fulfilment of some condition, which by the terms or nature of the contract is precedent to the transfer of the ownership of the goods (*n*). The law as to the sale of goods has been partially codified by the Sale of Goods Act, 1893 (*o*), and with respect to the effect of a contract of sale in passing the property in the goods sold is now contained in the following provisions:—

Contract for sale of goods transfers the property.

Sect. 1.—(1.) A contract of sale of goods (*p*) is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

Sale and agreement to sell.

(2.) A contract of sale may be absolute or conditional.

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Sect. 16.—Where there is a contract for the sale of unascertained goods (*q*) no property in the goods is

Goods must be ascertained.

(*m*) Williams, V. & P. i. 504 *sq.*; ii. 1036, 1048, 1061, 2nd ed.

(*n*) Benjamin on Sales, 227 *sq.*, 2nd ed.; 310, 5th ed., stat. 56 & 57 Vict. c. 71, ss. 16, 17, below.

(*o*) Stat. 56 & 57 Vict. c. 71.

(*p*) In this act "goods" include all chattels personal other than things in action and money; sect. 62.

(*q*) As of an article to be manufactured, or of a certain quantity of goods in general (*e.g.*, 10 tons of flax), without a specific identification of them. See *Atkinson* v. *Bell*, 8 B. & C. 277; 32 R. R. 382; *Wilkins* v. *Bromsead*, 6

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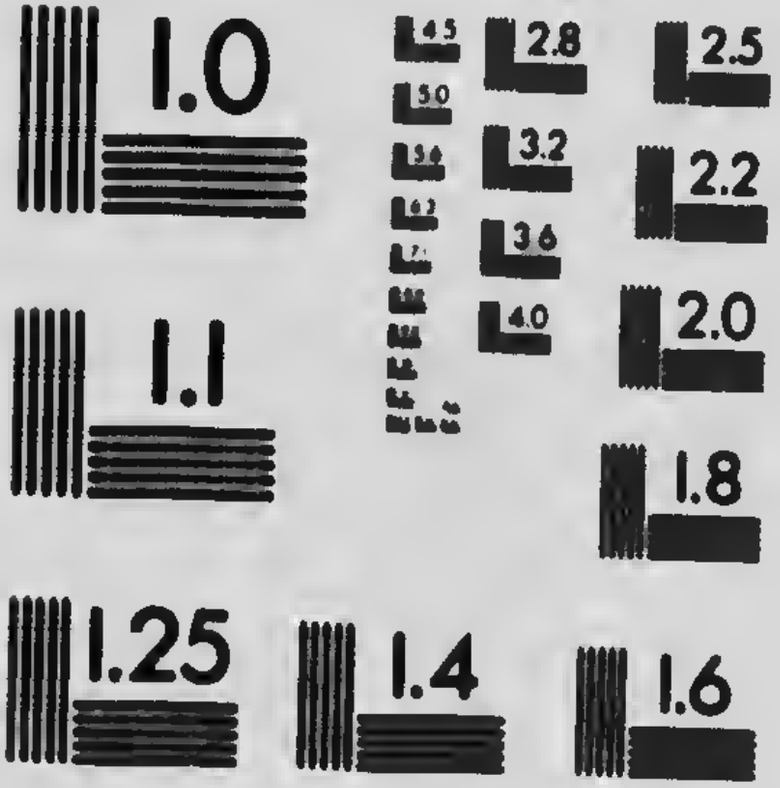

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transferred to the buyer unless and until the goods are ascertained.

Property passes when intended to pass.

Sect. 17.—(1.) Where there is a contract for the sale of specific or ascertained goods (*r*), the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (*s*)

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Rules for ascertaining intention.

Sect. 18.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state (*t*), the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed (*u*).

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on

Man. & Gr. 963; *Lee* v. *Griffin*, 1 B. & S. 272; *Busk* v. *Davies*, 2 M. & S. 397; 15 R. R. 288; *Shipley* v. *Davis*, 5 Taunt. 617.

(*r*) *I.e.*, goods identified and agreed upon at the time a contract of sale is made; sect. 62.

(*s*) See *Varley* v. *Whipp*, 1900, 1 Q. B. 513.

(*t*) *I.e.*, in such a state that the buyer would under the contract be bound to take delivery of them; sect. 62.

(*u*) This rule codifies the modern law of sale laid down in *Simmons* v. *Swift*, 5 B. & C. 857, 862; 29 R. R. 438; *Tarling* v. *Baxter*, 6 B. & C. 360; 30 R. R. 355; *Dixon* v. *Yates*, 5 B. & Ad. 313, 340; 39 R. R. 489; *Martindale* v. *Smith*, 1 Q. B. 389; *Gilmour* v. *Supple*, 11 Moo. P. C. 551, 566; Blackburn on Sale, 196, 197; 265, 266. 2nd ed.; Benjamin on Sale, 227—234, 2nd ed.; 310—314, 5th ed. It was formerly considered that no sale of goods passing the property therein could be made without payment of part of the price, unless the goods were delivered to the purchaser, or something were given in earnest of the bargain, or a day were fixed for delivery of the goods and payment; Shep. Touch. 224; Noy's Maxims, pp. 87—89; 2 Black. Comm. 447, 448. As to the early law of sale, see *ante*, p. 70, n. (*e*).

approval or "on sale or return" or other similar terms the property therein passes to the buyer:—

(*a.*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction (*v*);

(*b.*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1.) Where there is a contract for the sale of unascertained (*w*) or future goods (*x*) by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer (*y*). Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Reservation of right of disposal.

Sect. 19.—(1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to

(*v*) As pledging the goods, *Kirkham* v. *Attenborough*, 1897, 1 Q. B. 201; cf. *Weiner* v. *Gill*, 1906, 2 K. B. 574.

(*w*) See p. (*q*), p. 77, above.

(*x*) *I.e.*, goods to be manufactured or acquired by the seller after the making of the contract of sale; sect. 5.

(*y*) See *Reid* v. *Macbeth*, 1904, A. C. 223

return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him (*z*).

Formation of contract of sale.

The provisions above stated apply to sales of goods of any value. But the rules for the formation of a valid contract of sale (without which there cannot of course be any transfer of ownership) depend upon the value of the goods. Contracts for the sale of goods under the value of 10*l*. are governed by the common law rules for the formation of contract (*a*), and may be made by the mere consent of the parties however expressed, whether in writing, by word of mouth, or by their conduct (*b*). But in order to establish a binding contract for the sale of goods of the value of 10*l*. or upwards, the requirements of the 4th section of the Sale of Goods Act, 1893 (*c*), must be satisfied. This section re-enacts, with slight alterations, the provisions (*d*) of the 17th section of the Statute of Frauds (*e*), as amended by Lord Tenterden's Act (*f*), and runs as follows :—

Requisites for the sale of goods of the value of 10*l*. or upwards.

Contract of sale for 10*l*. and upwards.

Sect. 4.—(1.) A contract for the sale of any goods (*g*) of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to

(*z*) See *Cahn* v. *Pockett's &c., Co.*, 1899, 1 Q. B. 643.

(*a*) See *post*, Part II., ch. II.

(*b*) Stat. 56 & 57 Vict. c. 71, s. 3.

(*c*) Stat. 56 & 57 Vict. c. 71.

(*d*) Repealed by sect. 60 of the Act of 1893.

(*e*) Stat. 29 Car. II. c. 3. In the revised edition of the Statutes this is sect. 16.

(*f*) Stat. 9 Geo. IV. c. 14, s. 7.

(*g*) See *ante*, p. 77, n. (*p*). Sect. 17 of the Statute of Frauds spoke of "goods, wares and merchandizes."

the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not (*h*).

(4.) The provisions of this section do not apply to Scotland.

The 17th section of the Statute of Frauds has been interpreted by a vast number of cases decided on almost every one of the phrases it contains (*i*); and these cases of course remain authorities upon the construction of the 4th section of the Sale of Goods Act, so far as its provisions repeat the previous enactments. The chief difficulty has been to determine the exact meaning of the acceptance of part of the goods and actual receipt of the same, required on the part of the buyer, and to ascertain in each particular case whether such acceptance and actual receipt have taken place or not. The acceptance required, as to which an authoritative rule is now supplied by the 3rd sub-section of the present enactment, is not necessarily such as shall preclude the purchaser from afterwards objecting to the quality of the goods (*k*), and it may be prior to the receipt (*l*). And it has been held that to inspect and reject goods as not equal to sample is an act recognising a pre-existing contract for sale, and is therefore evidence of the acceptance required by the statute (*m*). Actual receipt seems, according to the great preponderance of authority, to mean receipt of the *possession* of the goods, and to be merely correlative to delivery of possession on the part of the vendor (*n*). There must, there-

What is an acceptance and actual receipt within the statute.

(*h*) See *Taylor* v. *Great Eastern Railway Co.*, 1901 1 K. B. 774.

(*i*) See Benjamin on Sales, Bk. I. Pt. II. 72 *sq.* 2nd ed.; 149 *sq.*, 5th ed.

(*k*) *Morton* v. *Tibbett*, 15 Q. B. 428; *Bushell* v. *Wheeler*, 15 Q. B. 442; *Currie* v. *Anderson*, 2 E. & E. 592, 600; *Page* v. *Morgan*, 15 Q. B. D. 228. See, however, *Hunt* v. *Hecht*, 8 Exch. 814; *Nicholson* v. *Bower*, 1 E. & E. 72; *Smith* v. *Hudson*, 6 B. & S. 431.

(*l*) *Cusack* v. *Robinson*, 1 B. & S. 299.

(*m*) *Abbott* v. *Wolsey*, 1895, 2 Q. B. 97.

(*n*) Benjamin on Sales, 140, 2nd ed.; 222, 5th ed.

fore, be an actual transfer of the article sold, or some part thereof, by the seller, and an actual taking possession of it by the buyer (*o*). The possession of a simple bailee is, however, as we have seen (*p*), constructively the possession of the bailor. If therefore the vendor should change his character and become the bailee of the purchaser, there may be a sufficient actual receipt in law on the part of the purchaser, although the goods still remain in the possession of the vendor (*q*). So if any part of the goods be delivered to an agent of the buyer, or to a carrier, whether named by him or not, this is a sufficient receipt by the buyer himself (*r*); and if the goods should be in the possession of a warehouseman or wharfinger at the time of sale, the receipt by the purchaser of a delivery order, provided it were coupled with the assent of the bailee, would be a sufficient receipt of the goods within the statute (*s*). The wharfinger holds the goods as the agent of the vendor until he has agreed with the purchaser to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the purchaser, and the possession of such wharfinger is that of the purchaser; and then only is there a constructive delivery to him (*t*).

The requisitions of the statute are in the alternative.

The requisitions of the statute, it will be observed, are in the alternative. Either the buyer must accept part of the goods sold, and actually receive the same, *or* he must give something in earnest or

(*o*) *Baldey* v. *Parker*, 2 B. & C. 37, 41; 26 R. R. 260.

(*p*) *Ante*, pp. 57, 58, 71.

(*q*) *Castle* v. *Sworder*, 6 H. & N. 828; Benjamin on Sales, 132, 2nd ed.; 216, 5th ed.

(*r*) *Dawes* v. *Peck*, 8 T. R. 330; 4 R. R. 675; *Hart* v. *Bush*, 1 E., B. & E. 494, 498; Benjamin on Sales, 135, 2nd ed.; 218, 5th ed.; stat. 56 & 57 Vict. c. 71, s. 32, sub-s. 1.

(*s*) *Bentall* v. *Burn*, 3 B. & C. 423; 27 R. R. 391; *Pearson* v. *Dawson*, 1 E., B. & E. 448. See *ante*, p. 73.

(*t*) *Farina* v. *Home*, 16 M. & W. 119, 123; Benjamin on Sales, 132, 2nd ed.; 216, 5th ed.; stat. 56 & 57 Vict. c. 71, s. 29, sub-s. 3.

in part payment, *or* some note or memorandum in writing must be signed. In the absence of the two former alternatives, therefore, sales of goods of the value of 10*l.* or more must be established by the evidence of a note or memorandum in writing duly signed (*u*). It is generally necessary, in order to satisfy the statute, that the terms of the contract should so appear from the writing as to enable the Court to understand what they were. But where there is no actual agreement as to price, the price need not appear in writing; for the law implies a promise by the buyer to pay a reasonable price (*x*). If, however, a price be orally agreed on, it must be shown in writing in order to satisfy the statute (*y*). The only *signature* required by the statute is that of the party to be charged or his agent, the contract thus being enforceable at the option of the party who has not signed (*z*). But it is settled that the memorandum must show, by name or description, who is the party in whose favour the other is to be charged, or the contract cannot be enforced (*a*). An auctioneer is the agent for both parties at a public sale for the purpose of signing (*b*). Brokers, also, as a general rule, are agents for both parties for the same purpose, and their signature to the memorandum or note of agreement is binding on both principles, if the memorandum be otherwise

Memorandum in writing.

(*u*) See *Lee* v. *Griffin*, 1 B. & S. 272; *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; *Lucas* v. *Dixon*, 22 Q. B. D. 357. An agreement, letter or memorandum made for or relating to the sale of any goods, wares or merchandise, is exempt from all stamp duty; stat. 54 & 55 Vict. c. 39, First Schedule, tit. Agreement. This exemption does not apply to hire-purchase agreements; stat. 7 Edw. VII., c. 13, s. 7. See *County of Durham Electrical &c. Co.* v. *Inland Revenue Commissioners*, 1909, 2 K. B. 606, as to cases where the price is payable by instalments.

(*x*) Stat. 56 & 57 Vict. c. 71, s. 8.

(*y*) Benjamin on Sales, 184, 2nd ed.; 204, 5th ed.

(*z*) *Ib.* 188, 2nd ed.; 269, 5th ed.

(*a*) *Ib.* 169, 171, 2nd ed.; 248, 249 5th ed.

(*b*) *Ib* 201, 2nd ed.; 280, 5th ed.

sufficient under the statute (*c*). So that an entry of a sale in a broker's book, signed by him, may be sufficient evidence of the contract (*d*), and so may a broker's bought and sold notes, or either of them, provided there be no variance between them (*e*). But one of the contracting parties to a sale cannot be the agent for the other for the purpose of signing a memorandum of the bargain (*f*). When a contract for the sale of goods is made valid solely by a memorandum in writing under the Sale of Goods Act, the memorandum must be attested and registered in accordance with the Bills of Sale Act, 1878 (*g*), in order to give it complete validity with regard to goods remaining in the seller's apparent possession, as against his creditors and subsequent assignees (*h*): but this is not necessary in the case of transfers of goods in the ordinary course of business of any trade or calling (*i*). And contracts for the sale of goods, which are complete and valid without the aid of writing, are not affected by the provisions of the Bills of Sale Act (*k*).

Effect of non-compliance with conditions of sect. 4 of Sale of Goods Act.

Contracts made for the sale of goods worth 10*l*. or more without complying with the conditions of the 4th section of the Sale of Goods Act (*l*) are not void but only unenforceable (*m*). And where such con-

(*c*) *Ib.* 203 *sq.*, 2nd ed.; 283, 284, 5th ed.

(*d*) *Thompson* v. *Gardiner*, 1 C. P. D. 777.

(*e*) *Goom* v. *Affalo*, 6 B. & C. 117; 30 R. R. 262; *Sievewright* v. *Archibald*, 17 Q. B. 115; *Parton* v. *Crofts*, 16 C. B. N. S. 11; *Thompson* v. *Gardiner*, 1 C. P. D. 777; see Benjamin on Sales, 205–224, 2nd ed.; 285–297, 5th ed.; Blackburn on Sale, ch. v. pp. 78 *sq.*, 2nd ed.

(*f*) *Farebrother* v. *Simmons*, 5 B. & Ald. 333; 24 R. R. 309; *Sharman* v. *Brandt*, L. R. 6 Q. B. 720.

(*g*) Stat. 41 & 42 Vict. c. 31; see ss. 4, 8, 10, and s. 10 of the amending Act of 1882, stated in Appendix A.; *Casson* v. *Churchley*, 53 L. J. Q. B. 335.

(*h*) *Re Roberts*, 36 Ch. D. 196; *Hopkins* v. *Gudgeon*, 1906, 1 K. B. 690.

(*i*) Stat. 41 & 42 Vict. c. 31, s. 4.

(*k*) *North Central Waggon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.*, 35 Ch. D. 191; 13 App. Cas. 554; *Ramsay* v. *Margrett*, 1894, 2 Q. B. 18.

(*l*) *Ante*, p. 80.

(*m*) See *Leroux* v. *Brown*, 12 C. B. 801; *Bailey* v. *Sweeting*, 9 C. B. N. S. 843, 859; *Maddison*

tracts are of a nature to pass the property in the goods sold (*n*), it seems that they will confer on the buyer a voidable title to the goods (*o*). The construction of the 4th section in this respect is important with reference to section 23 of the same Act enacting that, when the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect in title (*p*). For example, if specific chattels worth 10*l.* be sold by word of mouth, without delivery of possession, part payment or earnest, the buyer would appear to acquire the ownership of them until the contract be avoided. And under the 23rd section a resale of the goods by the buyer in the meantime to a second purchaser buying in good faith and without notice of the defect in title would deprive the original seller of the ownership, which would otherwise re-vest in him on the avoidance of the contract.

When the agreement is not to be performed within a year.

If the agreement is not to be performed within the space of one year from the making thereof, then, however small be the value of the goods, no action can be brought upon it, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. This is under another provision of the Statute of Frauds (*q*), and will be hereafter noticed more particularly.

v. *Alderson*, 8 App. Cas. 467, 488; *Britain* v. *Rossiter*, 11 Q. B. D. 123, 127; *Taylor* v. *Great Eastern Ry. Co.*, 1901, 1 K. B. 774.

(*n*) See *ante*, pp. 77—80.

(*o*) See *Load* v. *Green*, 15 M. & W. 216, 221; *White* v. *Garden*, 10 C. B. 919; *Pease* v. *Gloahec*, L. R. 1 P. C. 219, 229, 230; *Clough* v. *L. & N. W. Ry. Co.*, L. R. 7 Ex. 26, 34 *sq.*; *Hugill* v. *Masker*, 22 Q. B. D. 364; *Taylor* v. *Great Eastern Ry. Co.*, 1901, 1 K. B. 774.

(*p*) See *ante*, p. 25, n. (*p*).

(*q*) 29 Car. II. c. 3, s. 4; *Prested Miners Co., Ld.* v. *Gardner*, 1911, 1 K. B. 425.

Possession of goods sold.

Although the property in goods sold may pass, as we have seen (*r*), from the seller to the buyer, immediately upon the formation of a valid contract for sale, yet the possession of the goods of course remains with the vendor until he deliver them, which he is bound to do when the purchaser is ready to pay the price, but not before, unless otherwise agreed (*s*). And if the whole of the price be not duly paid or tendered, then, where the goods have been sold without any stipulation as to credit, or where the goods have been sold on credit, but the term of credit has expired, or where the buyer becomes insolvent (*t*), the seller remaining in possession of the goods has a lien upon them; that is to say, notwithstanding that the *property* in the goods may have passed to the buyer, the seller is entitled to retain *possession* of them until payment or tender of the whole of the price (*u*). And where the property in the goods has not passed to the buyer, the seller has a right of withholding delivery similar to and co-extensive with his right of lien (*x*). Formerly, the seller's lien remained so long as he retained actual or constructive (*y*) possession of the goods, notwithstanding that he had given an order upon the warehousemen or other actual custodians of the goods, authorizing them to deliver the goods to the purchaser or his assigns (*z*): although where a seller had handed over to the buyer warrants which

Vendor's lien.

(*r*) *Ante*, pp. 77, 78.

(*s*) *Rawson* v. *Johnston*, 1 East, 203; 6 R. R. 252 *Bloxam* v. *Sanders*, 4 B. & C. 941; 28 R. R. 519; stat. 56 & 57 Vict. c. 71, ss. 27, 28, 39 (2).

(*t*) A person is deemed to be insolvent within the meaning of the Sale of Goods Act, 1893, who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy (as to which, see *post*, Pt. II Ch. IV.) or not; stat 56 & 57 Vict. c 71, s. 62 (3). At common law, the term *insolvent* means being under a general inability to pay debts; *Biddlecombe* v. *Bond*, 4 A. & E. 332.

(*u*) Stat. 56 & 57 Vict. c. 71, ss. 38, 39, 41.

(*x*) Sect. 39 (2).

(*y*) *Ante*, pp. 57, 71.

(*z*) *Dixon* v *Yates*, 5 B & Ad. 313; *M'Ewan* v *Smith*, 2 H. L. C. 309; *Griffiths* v *Perry*, 1

authorized the delivery of the goods to the bearer only, and were taken to represent the goods by the usage of trade, the seller was prevented from setting up his lien against the holder of the warrant (*a*). But in this respect the law has been altered; and under the Factors Act, 1889, and the Sale of Goods Act, 1893, if the vendor hand over to the buyer any delivery order or other document of title (*b*) to the goods, and the latter transfer the same to a person who takes it in good faith and for valuable consideration, the vendor's lien will be defeated or postponed, according as the last-mentioned transfer were made by way of sale, or by way of pledge or other disposition for value (*c*). When the goods are once delivered by the vendor out of his own actual or constructive possession, his lien is gone (*d*): for lien in law is, as we have seen (*e*), merely a right to retain possession, and not to recover it when given up. But the vendor may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer (*f*). Under the Factors Act, 1889, and the Sale of Goods Act, 1893 (*g*), where a person having bought or agreed to buy goods, obtains with the consent of

Vendor's lien may be defeated under Factors Act.

Disposition of goods by buyer in possession valid under Factors Act.

E. & E. 680; *Grice* v. *Richardson* 3 App. Cas. 319; see *ante*, p. 74 and n. (*y*).

(*a*) *Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, 5 Ch. D. 205.

(*b*) Including any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented; stat. 52 & 53 Vict. c. 45, s. 1 (4). Such documents are excepted from the provisions of the Bills of Sale Acts, 1878 and 1882; stats. 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, s. 4; see *Re Hamilton, Young & Co.*, 1905, 2 K. B. 772.

(*c*) Stat. 52 & 53 Vict. c. 45, s. 10, replacing 40 & 41 Vict. c. 39, s. 5; 56 & 57 Vict. c. 71, ss. 47, 62; cf. *Mordaunt* v. *British Oil &c. Ld.*, 1910, 2 K. B. 502.

(*d*) Stat. 56 & 57 Vict. c. 71, s. 43.

(*e*) *Ante*, pp. 62, 67.

(*f*) Stat. 56 & 57 Vict. c. 71, s. 41 (2); see *ante*, p. 82.

(*g*) Stats. 52 & 53 Vict. c. 45, s. 9, see ss. 2 (1), 5; 56 & 57

the seller possession of the goods or of the documents of title thereto (*h*), the latter is liable to be deprived of his lien *or other right* in respect of the goods by the delivery or transfer over of such goods or documents for valuable consideration to any person receiving the same in good faith and without notice of the seller's lien or right. It appears that one, who has agreed to sell goods without parting with his property in them (*i*), may lose his property in the goods in this manner, if he allow the buyer to obtain possession of them or of the documents of title to them (*k*). It will be observed that the above provisions of the Factors and Sale of Goods Acts considerably modify the effect of the common law rule that, where goods are in the possession of a simple bailee, the bailor's constructive possession is not transferred merely by handing over a delivery order, without the assent of the bailee (*l*). As we have seen (*m*), under the same Acts, when a buyer of goods allows the vendor to remain in possession of them, or of the documents of title (*n*) to them, he runs the risk of having his title to the goods displaced by the delivery or transfer for value of the goods or documents by the seller to any person receiving the same in good faith and without notice of the sale.

Disposition of goods by seller in possession valid under Factors Act.

In certain circumstances, the vendor of goods has a right to resume their possession, with which he had previously parted under a contract for sale.

Vict. c. 71, s. 25 (2); *ante*, p. 23, n. (*g*).

(*h*) See *Nicholson* v. *Harper*, 1895, 2 Ch. 415.

(*i*) *Ante*, pp. 77—80.

(*k*) *Lee* v. *Butler*, 1893, 2 Q. B. 318, where possession of furniture was given under a hire-purchase agreement (cf. *Helby* v. *Matthews*, 1895, A. C. 471); *Cahn* v. *Pockett's Bec., Co.*, 1899, 1 Q. B. 643, where the seller sent the buyer a bill of lading accompanied by a draft for the price, and the buyer indorsed over the bill of lading without accepting the draft (see *ante*, p. 79).

(*l*) *Ante*, p. 74, n. (*g*).

(*m*) See *ante*, p. 23, n. (*g*).

(*n*) Stats. 52 & 53 Vict. c. 45, s. 8; 56 & 57 Vict. c. 71, s. 25 (1); see s. 48 (2).

Stoppage *in transitu*.

This right is called the right of *stoppage in transitu*; and it occurs when goods are consigned entirely or partly (*o*) on credit from one person to another, and the consignee becomes insolvent (*p*) before the goods arrive. In this event the consignor (*q*) has a right to direct the captain of the ship, or other carrier, to deliver the goods to himself or his agent instead of to the consignee, who has thus become unable to pay for them (*r*). The right of stoppage *in transitu* was first allowed and enforced only by the Court of Chancery, which in the exercise of its equitable jurisdiction, considered that, in the circumstances above mentioned, it was very allowable in equity for the consignor to get his goods again into his own hands (*s*). But the right was subsequently acknowledged and enforced by the courts of law. As this right was originally of equitable origin, it cannot be expected to depend on strictly legal principles; and the doctrines of law on this particular subject are in fact unlike its usual doctrines on other matters. Thus it is at variance with the general principles of law that a man should be allowed to transfer to another a right which he has not, or that a second purchaser should stand in a better position than his vendor (*t*); but at common law the consignee of goods may, by indorsing the bill of lading to a *nâ fide* indorsee, defeat the consignor's right to stop *in transitu* (*u*). And now, under the Factors

First allowed by Court of Chancery.

(*o*) *Hodgson* v. *Loy*, 7 T. R. 440; 4 R. R. 483.

(*p*) See *ante*, p. 86, n. (*t*).

(*q*) See stat. 56 & 57 Vict. c. 71, s. 38 (2); *Bird* v. *Brown*, 4 Ex. 786.

(*r*) The law of stoppage *in transitu* is now regulated by the Sale of Goods Act, 1893, stat. 56 & 57 Vict. c. 71, ss. 39, 44—48.

(*s*) *Wiseman* v. *Vandeputt*, 2 Vern. 203; *Snee* v. *Prescot*, 1 Atk. 245.

(*t*) *Dixon* v. *Yates*, 5 B. & Ad. 339; see *ante*, pp. 22—24.

(*u*) *Lickbarrow* v. *Mason*, 2 T. R. 63; 1 H. Bl. 357; 1 Smith, L. C.; 1 R. R. 425; *Jenkyns* v. *Usborne*, 7 Man. & Gr. 678, 699; *Roger* v. *The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393. See *Ex parte Gouding, Davis & Co., Limited, Re Knight*, 13 Ch. D. 628. The indorsement and delivery of a bill of lading by way of security for an advance of money does not absolutely defeat the consignor's right to stop the

Act, 1889 (*x*), and the Sale of Goods Act, 1893 (*y*), where *any document of title* (*z*) to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of stoppage *in transitu* can only be exercised subject to the rights of the transferee. And under other provisions of the same Acts already noticed (*a*), the seller's right of stoppage *in transitu* may be lost or postponed, if the buyer obtain with his consent possession of the bill of lading or other document of title to the goods, and deliver or transfer over the same for value to any other person receiving them in good faith and without notice of the seller's right; notwithstanding that the circumstances in which the buyer obtained possession of the document did not amount to a complete lawful transfer thereof to him (*a*). A delivery of goods to a carrier, whether named by the buyer or not, is deemed, *primâ facie*, to be a delivery of the goods to the buyer (*b*), and divests the seller's lien for unpaid purchase-money, unless he reserve the right of disposal of the goods (*c*). But until the transit is completely ended, or the goods come to the actual possession of the buyer or

goods *in transitu*. In such a case, if the consignor stop the goods, the amount due to the indorsee upon his security must first be satisfied; but, subject thereto, the consignor will be entitled to the goods, or the proceeds of sale of the goods, for his own benefit; *Re Westzinthus*, 5 B. & Ad. 817; *Spalding* v. *Ruding*, 6 Beav. 376; *Kemp* v. *Falk*, 7 App. Cas. 573.

(*x*) Stat. 52 & 53 Vict. c. 45, s. 10, replacing 40 & 41 Vict. c. 39, s. 5.

(*y*) Stat. 56 & 57 Vict. c. 71, s. 47.

(*z*) *Ante*, p. 87, n. (*b*).

(*a*) *Ante*, pp. 87, 88. *Cahn* v. *Pockett's, &c., Co.*, 1899, 1 Q. B. 643.

(*b*) Stat. 56 & 57 Vict. c. 71, s. 32 (1).

(*c*) Sect. 43.

his agent (*d*), the seller's right to stop them *in transitu* may still be exercised in the event of the buyer's insolvency (*e*), unless such right be defeated, as we have said, by a *bonâ fide* transfer of the bill of lading, or other document of title (*f*). Thus, although by the sale of the goods the property in them, involving the risk of their loss (*g*), may have passed to the purchaser, and although the possession of them have been delivered to a carrier named by him, still such possession may be resumed by the vendor during the journey, in the event of the insolvency of the vendee. As this right is a departure from legal principles on the vendor's behalf, it is allowed only in case the buyer becomes insolvent (*h*). When possession of goods has been resumed by the vendor under his right of stoppage *in transitu*, he is restored to the lien for the unpaid purchase-money which he had before he parted with such possession (*i*).

Re-sale by seller of goods.

If the whole of the price of goods be not duly paid or tendered, the seller, besides the above-mentioned rights of lien, withholding delivery and stoppage *in transitu* (*k*), has a right of re-sale as limited by the Sale of Goods Act (*l*). That is to say, where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the seller may re-sell the goods, and recover from the original buyer damages for any loss occasioned by his breach of contract (*m*). Where an unpaid seller, who has exercised his right of lien or retention or stoppage *in transitu*, re-sells the goods, the buyer acquires a

(*d*) See sect. 45.
(*e*) Sect. 44.
(*f*) Sect. 47.
(*g*) See sect. 20.
(*h*) See *ante*, p. 86, n. (*l*).
(*i*) Sect. 44; Benjamin on Sales, 723—725, 2nd ed.; 920, 5th ed.
(*k*) *Ante*, pp. 86, 89.
(*l*) Stat. 56 & 57 Vict. c. 71, ss. 38, 39.
(*m*) Sect. 48 (3).

good title thereto as against the original buyer (*n*). But the original contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu* (*o*); nor, it is submitted, by a re-sale under the seller's power of re-sale implied by law (*p*). For it is thought that the power of re-sale so given to the vendor by the Sale of Goods Act is merely to realize the price, and resembles the right of a pawnee of goods with a power of sale (*q*). If, therefore, the goods be so re-sold for more than the original price, it is thought that the original buyer will be entitled to the surplus (*r*). But where the seller *expressly* reserves a right of re-sale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, though without prejudice to any claim the seller may have for damages (*s*). In this case, therefore, the original buyer has no claim to any profit on the re-sale, for the ownership of the goods only passed to him conditionally, and on exercise of the right of re-sale reserved, his title to the goods was avoided (*t*). As, however, a sale reserving an express right of re-sale gives the purchaser a voidable title to the goods, a re-sale by him before his title is avoided to a second purchaser buying in good faith without notice of the defect in title, would appear to deprive the original seller, or the purchaser from him, of the ownership which would otherwise vest in one of them upon exercise of the seller's right of re-sale (*u*). The exercise of the seller's right of re-sale, whether

(*n*) Sect. 48 (2).

(*o*) Sect. 48 (1).

(*p*) Benjamin on Sales, 653, 2nd ed.; see pp. 934 *sq.*, 952 *s.* 5th ed.

(*q*) *Ib.*, 644, 645, 655, 2nd ed.; see pp. 952, 961, 5th ed.; *ante*, p. 57, n. (*l*).

(*r*) Benjamin on Sales, 648 2nd ed.; see pp. 952, 953, 5th ed.

(*s*) Stat. 56 & 57 Vict. c. 71, s. 18 (4).

(*t*) *Lamond* v. *Davall*, 9 Q. B. 1030; Sug. V. & P. 39, 14th ed.; Benjamin on Sales, 653, 654, 2nd ed.; see pp. 944 *sq.*, 960, 5th ed.

(*u*) Sect. 23, *ante*, p. 85.

it be implied by law or expressly reserved, is further subject to the above-mentioned provisions of the Factors and Sale of Goods Acts as to dispositions by buyers and sellers who are in possession of the goods sold, or the documents of title thereto (*x*).

Satisfaction of a judgment for the value of goods in an action for wrongful deprivation of them.

There is one case in which the property in goods passes from one person to another by payment of their value without any actual sale. On satisfaction of a judgment obtained in an action of trespass, detinue or trover (*y*) for the value of goods wrongfully taken, detained or converted, as damages, the property in the goods became completely vested in the defendant (*z*). If therefore, in any action for the wrongful deprivation of goods under the present practice (*a*), the value of the goods be assessed as damages (*b*), the defendant on payment of the amount of the damages, but not before, will be entitled to retain the goods in respect of which the action is brought; and the complete ownership of them will vest in him accordingly.

Mortgage of goods.

Goods may be the object of a mortgage, as well as of an absolute conveyance or sale. A mortgage of goods is analogous to a mortgage of land (*c*); and before the Bills of Sale Act, 1882, it usually took the form of an assignment of specified chattels by deed to a person advancing money as a loan, with a proviso for redemption of the mortgaged goods on repayment of the money lent with interest at a

(*x*) *Ante*, pp. 23, n. (*g*), 87, 88.

(*y*) *Ante*, pp. 12, 15—18.

(*z*) *Cooper* v. *Shepherd*, 3 C. B. 266, 272; *Brinsmead* v. *Harrison* L. R. 6 C. P. 584; *Ex parte Drake*, *Re Ware*, 5 Ch. D. 866.

(*a*) *Ante*, pp. 21, 53.

(*b*) The measure of damages in such actions is generally the value of the goods, unless the plaintiff should have sustained any special damage through the loss of the goods; see *Bodley* v. *Reynolds*, 8 Q. B. 779; *France* v. *Gaudet*, L. R. 6 Q. B. 199; *Mulliner* v. *Florence*, 3 Q. B. D. 484, 490; *Johnson* v. *Lancashire and Yorkshire Ry. Co.*, 3 C. P. D. 499, 506; *Hiort* v. *London and North Western Ry. Co.*, 4 Ex. D. 188.

(*c*) See Williams, R. P. 544 *sq.*, 21st ed.

specified time; and it was usual further to provide that the mortgagor should retain possession of the goods until default should be made in payment, in which case the mortgagee should be at liberty to take possession of the goods and sell them (*d*). Under such a deed the property in the mortgaged chattels passed at once to the mortgagee (*e*), the mortgagor retaining only their possession according to the terms of the deed, until he should make default in payment (*f*), with a legal right to redeem the goods by payment within the exact time specified. If the mortgagor made default in payment, the mortgagee became entitled according to the terms of the deed to take possession of the goods. If he did so, the mortgagor, having parted with the ownership as well as the possession of the goods, had no legal remedy to recover them, in case he were afterwards enabled to pay what was due from him (*g*). In equity, however, he would have been admitted to redeem the goods, notwithstanding that the appointed time for payment of his debt were past (*h*). But he would, of course, have been bound by any sale of the goods duly made by the mortgagee in accordance with the deed (*i*); and in case of such a

(*d*) See Jarman's Conveyancing, v. 244, vi. 277, 3rd ed. by Sweet; Davidson, Prec. Conv. vol. ii. pt. ii. pp. 693 *sq.*, 699, 1133, 3rd ed.; 141 *sq.*, 146, 593, 4th ed.

(*e*) *Ante*, p. 75; *Gale* v. *Burnell*, 7 Q. B. 850.

(*f*) The proviso entitling the mortgagor to possession of "goods until default gave him the time the exclusive right to their possession, and therefore disabled the mortgagee from bringing trover for the goods against a stranger until after the mortgagor had made default in payment; *Bradley* v. *Copley*, 1 C. B. 685; *Brierley* v. *Kendall*, 17 Q. B. 937; *ante*, p. 54. In this respect a mortgage of goods differs from a mere pledge, in which the property in the goods remains with the pledgor; and the pledgee, though he may have power to sell them, obtains possession only, the right to retain which enables him to maintain trover for them against all persons, while the pledge continues; *ante*, pp. 56—59.

(*g*) See *Maugham* v. *Sharpe*, 17 C. B. N. S. 443; *Johnson* v. *Diprose*, 1893, 1 Q. B. 512.

(*h*) *Ryal* v. *Roberts*, Barn. Ch. 38; *Kemp* v. *Westbrook*, 1 Ves. sen. 278; *Johnson* v. *Diprose*, 1893, 1 Q. B. 512.

(*i*) *Ex parte Official Receiver*, *Re Morrill*, 18 Q. B. D. 222, 232—236.

sale would only have been entitled, even in equity, to any surplus realized by the mortgagee beyond his debt and costs. Although mortgages of chattels have usually been made by deed of assignment (generally called a bill of sale), a mortgage of goods may be made at common law, without deed. For a mortgage of chattels is but a conditional sale of them; and the property in goods may pass to a purchaser of them under a conditional as well as an absolute sale (*k*); and there is no necessity at common law for any condition or proviso for redemption respecting personal chattels to be made by deed; it may well be made by parol (*l*). At the present time, however, all written instruments creating mortgages of goods are required to be executed in conformity to the conditions of the Bills of Sale Acts, 1878 and 1882 (*m*). For by the latter statute, all bills of sale of personal chattels given by way of security for the payment of money are absolutely void, unless duly made and registered in accordance with the forms thereby required (*n*). The same Act also makes void all such bills of sale given in consideration of any sum under thirty pounds (*o*). But, although these Acts make void (with some exceptions) (*p*), informal documents giving a right to take possession of goods as security for a debt (*q*), they do not apply to documents accompanying transactions in which the possession

Bill of sale.

Bill of Sale Acts, 1878 and 1882.

(*k*) *Ante*, pp. 77, 78 and n. (*u*). The provisions of the Sale of Goods Act, 1893, relating to contracts of sale, do not, however, apply to any transaction in the form of a contract for sale which is intended to operate by way of mortgage, pledge, charge, or other security; stat. 56 & 57 Vict. c. 71, s. 61 (4).

(*l*) Litt. s. 365; *Reeves* v. *Capper*, 5 Bing. N. C. 136; *Thomson* v. *Pettitt*, 10 Q. B. 101; *Flory* v. *Denny*, 7 Ex. 581; *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41.

(*m*) Stats. 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

(*n*) Stat. 45 & 46 Vict. c. 43, ss. 8, 9; *Davies* v. *Rees*, 17 Q. B. D. 408.

(*o*) S. et. 12.

(*p*) See sect. 4 of the Act of 1878, stat. 41 & 42 Vict. c. 31, stated in Appendix (A), *post*; *Re Hamilton, Young & Co.*, 1905, 2 K. B. 381, 772, *post*, p. 98.

(*q*) *Ex parte Parsons, Re Townsend*, 16 Q. B. D. 532.

of goods is actually transferred as security for a debt, as in the case of a pledge (*r*). And sales (*s*) and mortgages, which operate as complete assurances of the property in goods and are valid and perfect without the aid of writing, are not affected by the provisions of the Acts (*t*). The main provisions of the Bills of Sale Acts are stated in the Appendix (*u*), to which the reader is referred for more particular information concerning them. They are important but exceedingly complicated, and difficult to understand. As we shall presently see, mortgages of goods, which remain in the mortgagor's possession, order or disposition *in his trade or business*, are liable to be avoided in the event of his bankruptcy, though duly made and registered under the Bills of Sale Acts.

Transfer in equity of property in chattels.

A few words may be added with respect to the transfer in equity of property in chattels. This takes place either by the creation by one, who is both legal and beneficial owner of chattels, of a trust in favour of another, or by the assignment by one, for whom chattels are held in trust, of his equitable interest therein. As we have seen (*x*), a trust of chattels may be well declared by word of mouth, and is valid, without any transfer of possession, though not made for valuable consideration. In other respects the creation of trusts of chattels is governed by the same rules as in the case of land (*y*). Thus equity will not lend its aid to perfect

(*r*) *Ex parte Hubbard, Re Hardwick*, 17 Q. B. D. 690; *Hilton* v. *Tucker*, 39 Ch. D. 669; *Morris* v. *Dolobbel Flipo*, 1892, 2 Ch. 352; *Charlesworth* v. *Mills*, 1892, A. C. 231; *Great Eastern Ry. Co.* v. *Lord's trustee*, 1909, A. C. 109.

(*s*) *Ante*, p. 84.

(*t*) *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41; see *Re Watson, Ex parte Official Receiver*, 25 Q. B. D. 27; *Beckett* v. *Tower Assets Co.*, 1891, 1 Q. B. 638; *London and Yorkshire Bank* v. *White*, 11 Times L. R. 570; *Maas* v. *Pepper*, 1905, A. C. 102.

(*u*) Appendix (A), *post*.

(*x*) *Ante*, pp. 27, 76.

(*y*) See Williams, R. P. 183, 21st ed.

or uphold an incomplete transfer of the legal ownership of chattels intended as a gift (*z*). And trusts may be implied from the acts of parties as well as expressly declared. For instance, when particular chattels become subject to a contract to transfer them made by their owner and capable of specific enforcement, a trust will be implied in favour of the intended transferee, and the equitable ownership of the goods will pass to him accordingly (*a*). With regard to the transfer of the equitable ownership of chattels by one, on trust for whom they are held, the Statute of Frauds requires all assignments or grants of any trust or confidence to be in writing signed by the assignor, or by will (*b*); and makes no mention of any exception in the case of chattels (*c*). All written declarations of trust of chattels made without transfer, and all written agreements, by which a right in equity to any personal chattels is conferred, are now subject to the provisions of the Bills of Sale Acts, 1878 and 1882, unless made for the benefit of creditors generally or by way of marriage settlement. They must therefore be duly attested and registered under the Act of 1878, if intended to operate as an absolute equitable transfer of the chattels, or else they will be liable to be

(*z*) *Richards* v. *Delbridge*, L. R. 18 Eq. 11.

(*a*) See *Burn* v. *Carvalho*, 4 My. & Cr. 690; *Ex parte Montague*, *Re O'Brien*, 1 Ch. D. 554; *post*, p. 98.

(*b*) Stat. 29 Car. II. c. 3, s. 9.

(*c*) See Pollock on Contracts, 219, 7th ed.; Lewin on Trusts, 573, 6th ed.; 890, 12th ed. Any contract or agreement for the sale of any equitable estate or interest in any property whatsoever is now charged with the same *ad valorem* duty as if it were an actual conveyance on sale; but it may be stamped with the fixed duty of 10*s.* or 6*d.* (according as it is under seal or not), if a conveyance in conformity therewith be presented for stamping within six months after the first execution thereof or such longer period as the Commissioners may think reasonable. And, as already noted, voluntary conveyances of any property are chargeable with like stamp duty as conveyances on sale; see stats. 54 & 55 Vict. c. 39, s. 59, amended by 9 Edw. VII. c. 43, s. 7; 10 Edw VII. c. 8, ss. 73, 74; *ante*, p. 75, n. (*c*); 1 Wms. V. & P. 28, n. (*c*), 2nd ed.

avoided, as against the creditors of the transferring party, with respect to any chattels which remain in his apparent possession, for more than seven days after their execution; and if made by way of security for the payment of money, they must be duly made and registered in accordance with the forms required by the Act of 1882, or else they will be absolutely void (*d*). As we have seen (*e*), transfers of goods in the ordinary course of business of any trade or calling are excepted from the provisions of the Bills of Sale Acts; and so are delivery orders and similar documents of title to goods, including any documents used in the ordinary course of business as proof of the possession or control of goods (*f*).

A grant cannot be made of that in which a man has no actual or potential property.

Although the property in personal chattels may be freely alienced, it is impossible for a man to make a valid grant in law of that in which he has no actual or potential property, but which he only expects to have. A person who has an interest in land may grant all the fruit which may grow upon it hereafter (*g*). So a grant of the next year's wool of all the sheep which a man now has is valid, because he has a potential property in such wool (*h*). But a grant of the wool of all the sheep which a man ever shall have is void (*i*). And in the same manner the assignment of a man's stock-in-trade passes the *property*, or legal ownership, in such articles only as are his at the time he executes such assignment, and does not pass the property in any

(*d*) See stats. 41 & 42 Vict. c. 31, ss. 4, 8, 10, 11; 45 & 46 Vict. c. 43, ss. 3, 4, 8–10; stated in Appendix (A), *post*.

(*e*) *Ante*, p. 84; see Appendix (A), *post*.

(*f*) See *Re Hamilton, Young & Co.*, 1905, 2 K. B. 381, 772.

(*g*) *Grantham* v. *Hawley*, Hob. 132; *Petch* v. *Tutin*, 15 M. & W. 110; see also *Clements* v. *Matthews*, 11 Q. B. D. 808; cf. Williams, R. P. 69 and n. (*l*), 21st ed.

(*h*) *Per* Pollock, C. B., 15 M. & W. 116; see *ante*, p. 8 and n. (*m*).

(*i*) Com. Dig. tit. Grant (D).

other articles which he may afterwards purchase (*j*); not even if the instrument of assignment should purport to convey all goods which should at any time thereafter be in or upon his dwelling-house (*k*). But a man may contract to transfer the property in chattels, which may afterwards come to belong to him; and, if the contract be made for valuable consideration and the chattels be sufficiently identified, he may be compelled, under the equitable jurisdiction of the court to enforce the specific performance of contracts, to transfer his ownership in such chattels, when he shall have acquired them (*l*). And any instrument purporting to assign chattels to be afterwards acquired can only take effect as a contract to transfer the legal ownership in such chattels, when they shall have been acquired (*m*). But in consequence of the doctrine of equity treating as actually accomplished what is agreed to be done (*n*), when any chattels become

Contract to assign after acquired chattels.

(*j*) *Tapfield* v. *Hillman*, 6 Man. & Gr. 245; S. C. 6 Scott, N. R. 967.

(*k*) *Lunn* v. *Thornton*, 1 C. B. 379; *Gale v. Burnell*, 7 Q. B. 850; *Belding* v. *Read*, 11 Jur. N. S. 547; 3 H. & C. 955; *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Hallas* v. *Robinson*, *ib.* 288.

(*l*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Blake* v. *Izard*, 16 W. R. 108; *Clements* v. *Matthews*, 11 Q. B. D. 808; *Joseph* v. *Lyons*, 15 Q. B. D. 280; *Re Clarke*, 35 Ch. D. 109; 36 Ch. D. 348; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Re Reis*, 1904, 2 K. B. 769, affirmed nom. *Clough* v. *Samuel*, 1905, A. C. 442. It is a question whether a contract, that *all* the personal property which a man may afterwards acquire shall be charged with a debt, is not void; *Re Count D'Epineuil*, 20 Ch. D. 758; see 36 Ch. D. 352, 357; 13 App. Cas. 530, 533, 535. But a contract made in consideration of marriage by an intended husband to convey all the personal property, to which he might afterwards become entitled, upon the trusts of the marriage settlement has been held to be a valid contract; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48; 7 R. R. 10; *Hardy* v. *Green*, 12 Beav. 182; *Fyfe* v. *Arbuthnot*, 1 De G. & J. 406; *Re Turcan*, 40 Ch. D. 5; *Re Reis*, *ubi supra*.

(*m*) *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Collyer* v. *Isaacs*, 19 Ch. D. 342; *Joseph* v. *Lyons*, 15 Q. B. D. 280; stat. 56 & 57 Vict. c. 71. s. 5; *Re Ellenborough*, 1903, 1 Ch. 697; *Clegg* v. *Bromley*, 1912, 3 K. B. 474.

(*n*) See Williams, R. P. 186, 187, 21st ed.

subject to a contract to assign them, which is capable of being specifically enforced, the equitable interest therein passes to the intended assignee so soon as the intending assignor has acquired the legal ownership of them (*o*). For directly the intending assignor comes to be the legal owner of any such chattels as he has contracted to assign, a trust is imposed upon him by the rules of equity in favour of the intended assignee. Thenceforward the former is in the position of a trustee, holding his legal rights for the benefit of the latter. The latter will not, however, be invested with the *legal* ownership of such chattels, until it be transferred to him by delivery of possession, or other effectual means (*p*). The Bills of Sale Act of 1882 now makes void (with certain specified exceptions), except as against the grantor, all written assignments, made by way of security for the payment of money, of

(*o*) *Langton* v. *Horton*, 1 Hare, 549; *Holroyd* v. *Marshall*, 10 H. L. C. 191; *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Blake* v. *Izard*, 16 W. R. 108; *Clements* v. *Matthews*, 11 Q. B. D. 808; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Pullan* v. *Koe*, 1913, 1 Ch. 9.

(*p*) See *Lunn* v. *Thornton*, 1 C. B. 379; *Clements* v. *Matthews*, 11 Q. B. D. 808; *Joseph* v. *Lyons* 15 Q. B. D. 280; *Hallas* v. *Robinson*, *ib.* 288. Thus under a mortgage of chattels to be afterwards acquired, coupled with a licence to seize them, the property in such chattels is completely transferred upon actual seizure thereof in pursuance of the licence; *Congreve* v. *Evetts*, 10 Ex. 298; *Carr* v. *Acraman*, 11 Ex. 568; *Hope* v. *Hayley*, 5 E. & B. 830; *Allatt* v. *Carr*, 6 W. R. 578; *Chidell* v. *Galsworthy*, 6 C. B. N. S. 471; *Reeve* v. *Whitmore*, 4 De G. J. & S. 1. Under contracts assigning chattels, which shall afterwards come into the *assignee's* possession, the legal ownership of the chattels passes as soon as they are delivered into such possession; *Reeves* v. *Barlow*, 12 Q. B. D. 436; *Morris* v. *Delobbel Flipo*, 1892, 2 Ch. 352. As we have seen (*ante*, pp. 78—80), on a contract for the absolute sale of chattels to be afterwards acquired or manufactured by the buyer, the property passes, as a rule, when goods of the description sold are unconditionally appropriated to the contract with the assent of both parties. But in this last case, unless the contract be for the sale of some specific chattel to be afterwards acquired by the seller, no equitable interest will pass to the buyer upon the mere acquisition by the seller of goods of the description sold; for the court will not enforce the specific performance of a contract for the sale of goods, unless they be specified or ascertained; see *ante*, p. 20, note (*k*), and cases cited in note (*l*), above.

any tangible goods, of which the grantor is not the true owner at the time (*q*).

Personal incapacity

Certain exceptions are made to the general right of alienating chattels on account of personal incapacity. By the common law, an *alien* or foreigner was under great restrictions as to the acquirement of real estate (*r*); but was under no disability with respect of the acquirement of property in chattels personal (*s*). And at common law, an alien, if not an enemy, might bring personal actions (*t*). Under the Naturalization Act, 1870 (*u*), an alien now stands on the same footing as a natural-born British subject with regard to real as well as personal property, save only in respect of owning a British ship (*v*). At common law, the gift or conveyance of an *infant* (that is, a person under the age of twenty-one) is voidable (*x*): but by the effect of the Infants Relief Act, 1874 (*y*), an infant's conveyance of any lands or goods by way of mortgage or otherwise to secure the repayment of money lent to him, is absolutely void (*z*). The voluntary gift or conveyance of an *idiot* or *lunatic* seems to be absolutely void (*a*): but conveyances made by a lunatic or an idiot for valuable consideration appear to be voidable only on his part, if the other party knew of his mental condition, and to be valid, if the other party were dealing with him in good

The Naturalization Act, 1870.

Infant, idiot and lunatic.

(*q*) Stat. 45 & 46 Vict. c. 43, ss. 5, 6, stated in Appendix (A); see *Kelly* v. *Kellond*, 20 Q. B. D. 569, 574; *S. C.* sub. nom. *Thomas* v. *Kelly*, 13 App. Cas. 506.

(*r*) Williams, R. P. 301, 21st ed.

(*s*) And. 25; 1 Black. Comm. 360.

(*t*) Dyer, 2 b; P. & M. Hist. Eng. Law, i. 442—448.

(*u*) Stat. 33 Vict. c. 14, repealing 7 & 8 Vict. c. 66, 10 & 11 Vict. c. 83, and other statutes, and amended by 33 & 34 Vict. c. 102, and 35 & 36 Vict. c. 39.

(*v*) See next chapter.

(*x*) Bac. Abr. Infancy and Age (I.), 3; 2 Wms. V. & P. 871, and n. (*m*), 2nd ed.

(*y*) Stat. 37 & 38 Vict. c. 62, s. 1.

(*z*) *Thurstan* v. *Nottingham, &c., Bldg. Soc.*, 1902, 1 Ch. 1; 1903, A. C. 6.

(*a*) Bac. Abr. Idiots and Lunatics (F.).

faith and without knowledge of or reasonable cause to suspect his infirmity of mind (*b*). In all these respects the law of chattels personal is the same as that of real estate and chattels real (*c*). Before the Married Women's Property Act, 1882 (*d*), came into operation, married women also were incapable of making any disposition of personal chattels, except such as might have been settled in equity in trust for their own *separate use*; for marriage was an absolute gift in law of all the wife's choses in possession to her husband, as well those she was possessed of at the time of the marriage, as those which came to her during her coverture (*e*). Where a person is outlawed, or put out of the protection of the law, as he may be by due process, if he fly from justice upon criminal proceedings against him, his goods and chattels become forfeited to the Crown (*f*). An outlaw, therefore, cannot make any valid disposition of his chattels after the title of the Crown to have them has accrued; and any previous disposition of them made with intent to avoid the forfeiture will be void (*g*). Formerly, the goods of a person convicted of treason or felony were forfeited on conviction to the Crown (*h*); but an Act of 1870

Married women.

Outlaw.

(*b*) *Molton* v. *Camroux*, 2 Ex. 487; 4 Ex. 17; *Price* v. *Berrington*, 3 Mac. & G. 486, 495—498; *Bearan* v. *M'Donnell*, 9 Ex. 309; *Elliot* v. *Ince*, 7 De G. M. & G. 475, 487, 488.

(*c*) See Williams, R. P. 296—299, 21st ed.; 2 Wms. V. & P. 870 *sq.*, 887 *sq.*, 2nd ed.

(*d*) Stat. 45 & 46 Vict. c. 75.

(*e*) Co. Litt. 300 a; 1 Rop. Husb. and Wife, 169. See *post*, the chapter on Husband and Wife; Williams' Conveyancing Statutes, 373—392.

(*f*) 4 Black. Comm. 319. In practice, however, outlawry is rarely resorted to: Short and Mellor's Crown Practice, 384. Outlawry might formerly take place in civil proceedings also: 3 Black. Comm. 283, 284; *ante*, p. 18, n. (*d*); but this having become obsolete in practice, was abolished by stat. 42 & 43 Vict. c. 59.

(*g*) See 3 Rep. 82 b.; 4 Black. Comm. 387, 388; *Perkins* v. *Bradley*, 1 Hare, 219, 227; *Chowne* v. *Baylis*, 38 Beav. 351, 356.

(*h*) Black. Comm. ii. 421, iv. 386; see also stat. 9 Geo. II. c. 32, s. 3; *Roberts* v. *Wall*, 1 Russ. & M. 752, 766; 32 L. R. 318; *Stokes* v. *Holden*, 1 Keen. 145; *Re Thompson's Trusts*, 22 Beav. 506. Felons might dispose of their goods in good faith and for value, but not otherwise,

abolished the forfeiture of chattels in this case (*i*). By the same Act (*k*), however, convicts, or persons against whom judgment of death or penal servitude has since the Act been pronounced or recorded for treason or felony, are incapable, while subject to the operation of the Act, of alienating or charging any property, or of making any contract. And an administrator of any convict's property may be appointed, in whom all his real and personal property shall vest, to re-vest in the convict or his representatives, on his death, bankruptcy, completion of his term of punishment, or pardon (*l*). But these disabilities on the part of a convict are suspended while he is lawfully at large under any licence (*m*). Convicts.

There is no prohibition on the alienation of chattels personal to a corporation, such as exists in the case of land (*n*), nor is the alienation of chattels personal for charitable purposes placed under any restriction (*o*). But conveyances of chattels tending to defraud creditors are liable to become void, as against them, as we shall presently see; and so are voluntary conveyances in the event of the bankruptcy of the conveying party within ten years after their making (*p*). Gifts to corporations or in charity.

§ 2. *Of Alienation for Debt.*

Choses in possession have long been liable to involuntary alienation for the payment of the debts of their owner, both in his lifetime and after his

after the crime and before conviction; see previous note. Forfeiture of chattels for flight (*ante*, p. 9), having become practically obsolete (4 Black. Comm. 387), was abolished by stat. 7 & 8 Geo. IV. c. 28, s. 5.

(*i*) Stat. 33 & 34 Vict. c. 23, s. 1.

(*k*) Sects. 6, 8.

(*l*) Sects. 7, 9, 10, 18.

(*m*) Sect. 30.

(*n*) See Williams, R. P. 76, 303, 21st ed.; 2 Wms. V. & P. 943 *sq.*, 2nd ed.

(*o*) See Williams, R. P. 77, 21st ed.; 1 Wms. V. & P. 445 *sq.*, 2nd ed.

(*p*) Stats. 13 Eliz. c. 5; 46 & 47 Vict. c. 52, ss. 4, 47, 48.

death. As a rule, the contracting of a debt merely gives the creditor the right to sue the debtor personally for the money due, and it is not until the former has obtained the judgment of a court of justice in his favour that he can proceed to obtain satisfaction of his claim out of the debtor's property (*q*). There are, however, certain cases in which chattels may be distrained and sold to satisfy a claim against their owner, without his having been sued for payment (*r*). The most important are the following:—In the case of rent service (*s*) being in arrear, the landlord is entitled by the common law to distrain all chattels (except those privileged from distress) which are found upon the premises in respect of which the rent is due (*t*), and he is enabled by statute to have the distrained goods sold to satisfy his claim (*u*). At common law, goods are liable to be distrained for rent in respect of their *locality*, that is, by reason of their being on the demised premises, and not in respect of their *ownership*; and the goods of any stranger to the tenancy might be distrained on as well as the tenant's own goods. But the law has been so altered by the Law of Distress Amendment Act, 1908 (*x*), that it may be said that the goods of any other person than the tenant cannot now be distrained on unless they are exempted from the protection given by that Act or otherwise by law (*y*). A list of the things privileged from distress is given in the table annexed.

Distress.

For rent service.

For a rent-charge.

A rentcharge, that is, a rent granted to issue out

(*q*) See Williams, R. P. 268, 21st ed.; *ante*, pp. 19, 31.

(*r*) 3 Black. Comm. 6 *sq.*

(*s*) See Williams, R. P. 67, 335, 336, 21st ed.

(*t*) 3 Black. Comm. 8; *Lyons* v. *Elliott*, 1 Q. B. D. 210; *Challoner* v. *Robinson*, 1908, 1 Ch 49.

(*u*) Stat. 2 Wm. & Mary, sess. 1, c. 5; see *ante*, p. 67.

(*x*) Stat. 8 Edw. VII. c. 53; see Table annexed.

(*y*) See *Rogers* v. *Martin*, 1911, 1 K. B. 19; *Hackney Furnishing Co.* v. *Watts*, 1912, 3 K. B. 225.

CE.

I.—Things absol

(A) At common law—

(1) Fixtures; Co. Li
Crossley Bros., Ld. v. *L*
Iron Co., 1909, 2 K. B.
(2) Things which can
3 Black. Comm. 9; *Mc*
(3) Animals *ferœ natu*
(4) Things in actual
Wilks, 512, 516, 517.
(5) Things delivered
worked-up or managed
Simpson v. *Hartopp*, W
Clarke v. *Millwall Docks*
(6) Things in the cust
362; *Wharton* v. *Nayle*
(7) Things belonging
2 K. B. 845.
(8) Money, if not in
Bac. Abr. Distress (B),
(9) Beasts that stra
thereof (as by not main
on the land; Co. Litt
5 B. & C. 647.

(B) By statute—

(10) The goods of a
(11) Machines, mate
specified in the Hosier
c. 40, ss. 18, 19, 34, 3
(12) Gas meters and
meters, fittings and ap
water or electric lighti
provisions of the Gasw
1847 or 1863, or the E
s. 14; 34 & 35 Vict. c
10 & 11 Vict. c. 17,
s. 25; 9 Edw. VII. c.
(13) Railway rolling
Rolling Stock Protecti
(14) The wearing a
and implements of his
Act, 1888, stat. 51 & 5
v. *Harris*, 1900, 1 Q. B
(15) On holdings sa
other machinery not be
ment with him for the
not belonging to the t
stat. 8 Edw. VII. c. 2
(16) Subject to ob
Amendment Act, 1908
a declaration of owner
(a) any undertenant
actual or customabled, upon the grant of a rent with power of
year the full an
in the underten
(b) any lodger;
(c) any other person
thereof and no
or any part the

wife of the tenant whose rent is in arrear, or
, hire-purchase agreement or settlement made
11, 1 K. B. 19, deciding that goods comprised
y the tenant's wife are protected; *Hackney*
225), or
r disposition of such tenant by the consent
r such circumstances that such tenant is the

he Agricultural Holdings Act, 1908, applies, or
late tenant, or
er) upon premises where any trade or business
ediate tenant and the undertenant have an

ger) on premises used as offices or warehouses
or one calendar month after notice to remove

offices of any company or corporation on pre-
a director or officer, or in the employment of

lertenancy has been created in breach of any
een the landlord and his immediate tenant, or
ted under a lease existing at the date of the
h of the landlord in that behalf, expressed in
thin a reasonable time after the circumstances
l have come, to his knowledge.

tionally only, if there be no other
ses :—

s trade or profession and implements of hus-
Litt. 47 a; *Simpson* v. *Hartopp*, Wilks, 512,
kner, 4 T. R. 565.
see authorities last cited; *Piggott* v. *Birtles*,

tural Holdings Act, 1908, live stock belonging
nant to be fed at a fair price; stat. 8 Edw. VII.

heaves or cocks of corn were not distrainable;
at sheaves or cocks of corn, or corn loose or in
granary, or upon any hovel, stack or rick, or
arged with the rent were made distrainable by
And all sorts of corn and grass, hops, roots,
on any part of the land demised were made
ss. 8, 9; see *Clark* v. *Gaskarth*, 8 Taunt. 431;

common law against distress for a rentcharge
service; see cases cited above and in n. (*a*),
protection, it appears to be a question in each
Act extend to alter the common law respecting
ss for a rentcharge as well as distress for rent
of a rent with power of
stress than is at the time of the grant available
see *Miller* v. *Green*, 8 Bing. 92, 107; *Johnson*
Law of Distress Amendment Act, 1888, applies
ns only to distresses levied by a landlord or
53, ss. 1, 2, 9.

To face p. 104.

I.—Things absolutely privileged:—

(A) At common law—

(1) Fixtures; Co. Litt. 47 b; 3 Black. Comm. 10; *Darby* v. *Harris*, 1 Q. B. 895; *Crossley Bros., Ld.* v. *Lee*, 1908, 1 K. B. 86; *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, 1909. 2 K. B. 344.

(2) Things which cannot be restored in as good plight as when taken; Co. Litt. 46 b; 3 Black. Comm. 9; *Morley* v *Pincombe*, 2 Ex. 101.

(3) Animals *feræ naturæ*; Co. Litt. 47 a; 3 Black. Comm. 7, 8.

(4) Things in actual use; Co. Litt. 47 a; 3 Black. Comm. 8; *Simpson* v. *Hartopp*, Willes, 512, 516, 517.

(5) Things delivered to a person exercising a public trade, to be carried, wrought, worked-up or managed in the way of his trade; Co. Litt. 47 a; 3 Black. Comm. 8; *Simpson* v. *Hartopp*, Willes, 512, 514, 515; *Gilman* v. *Elton*, 3 Brod. & B. 75; cf. *Clarke* v. *Millwall Dock Co.*, 17 Q. B. D. 498; *Challoner* v. *Robinson*, 1908, 1 Ch. 49.

(6) Things in the custody of the law; Co. Litt. 47 a; *Peacock* v. *Purvis*, 2 Brod. & B. 362; *Wharton* v. *Naylor*, 12 Q. B. 673; *Re Mackenzie*, 1899, 2 Q. B. 566, 573, 574.

(7) Things belonging to the Crown; *Secretary of State for War* v. *Wynne*, 1905, 2 K. B. 845.

(8) Money, if not in a sealed bag or other closed receptacle, which cannot be identified; Bac. Abr. Distress (B), ii. 697, 7th ed.

(9) Beasts that stray on to the land through the default of the tenant or landlord thereof (as by not maintaining proper fences), until they have been *levant* and *couchant* on the land; Co. Litt. 47 b and n. (2), (3); 3 Black. Comm. 8, 9; *Jones* v. *Powell*, 5 B. & C. 647.

(B) By statute—

(10) The goods of an ambassador; stat. 7 Anne, c. 12, s. 3.

(11) Machines, materials, tools or apparatus used in the textile manufactures as specified in the Hosiery Act, 1843, and not belonging to the tenant; stat. 6 & 7 Vict. c. 40, ss. 18, 19, 34, 35.

(12) Gas meters and fittings, water pipes, meters and apparatus, and electric light meters, fittings and apparatus not belonging to the tenant, but supplied by the gas, water or electric lighting company or other statutory "undertakers," subject to the provisions of the Gasworks Clauses Acts, 1847 or 1871, the Waterworks Clauses Acts, 1847 or 1863, or the Electric Lighting Acts, 1882 or 1909; stats. 10 & 11 Vict. c. 15, s. 14; 34 & 35 Vict. c. 41, s. 18; *Gaslight and Coke Co.* v. *Hardy*, 17 Q. B. D. 619; 10 & 11 Vict. c. 17, s. 44; 26 & 27 Vict. c. 93, s. 14; 45 & 46 Vict. c. 56, s. 25; 9 Edw. VII. c. 34, s. 16.

(13) Railway rolling stock not belonging to the tenant as provided in the Railway Rolling Stock Protection Act, 1872; stat. 35 & 36 Vict. c. 50, s. 3.

(14) The wearing apparel and bedding of the tenant and his family and the tools and implements of his trade to the value (in all) of £5; Law of Distress Amendment Act, 1888, stat. 51 & 52 Vict. c. 21, s. 4, referring to 51 & 52 Vict. c. 43, s. 147; *Davis* v. *Harris*, 1900, 1 Q. B. 729; *Boyd, Ld.* v. *Bilham*, 1909, 1 K. B. 14.

(15) On holdings subject to the Agricultural Holdings Act, 1908, agricultural or other machinery not belonging to the tenant and being on the holding under an agreement with him for the hire or use thereof in the conduct of his business, and live stock not belonging to the tenant and being on the holding solely for breeding purposes; stat. 8 Edw. VII. c. 28, ss. 29 (4), 48 (1).

(16) Subject to observance of the conditions specified in the Law of Distress Amendment Act, 1908 (stat. 8 Edw. VII. c. 53, ss. 1, 4, 5), as to serving on the landlord a declaration of ownership and otherwise, the goods of—

(a) any undertenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the undertenancy;

(b) any Lodger;

(c) any other person whatsoever not being a tenant of the premises or of any part thereof and not having any beneficial interest in any tenancy of the premises or any part thereof.

But this Act does not apply to—

(i.) goods belonging to the husband or wife of the tenant whose rent is in arrear, or

(ii.) goods comprised in any bill of sale, hire-purchase agreement or settlement made by such tenant (see *Rogers* v. *Martin*, 1911, 1 K. B. 19, deciding that goods comprised in a hire-purchase agreement made by the tenant's wife are protected; *Hackney Furnishing Co.* v. *Watts*, 1912, 3 K. B. 225), or

(iii.) goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, or

(iv.) any live stock to which s. 29 of the Agricultural Holdings Act, 1908, applies, or

(v.) goods of a partner of the immediate tenant, or

(vi.) goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the undertenant have an interest, or

(vii.) goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice to remove the goods and vacate the premises, or

(viii.) goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation, or

(ix.) any undertenant, where the undertenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant, or where the undertenancy has been created under a lease existing at the date of the passing of the Act contrary to the wish of the landlord in that behalf, expressed in writing and delivered at the premises within a reasonable time after the circumstances have come, or with due diligence would have come, to his knowledge.

II.—Things privileged conditionally only, if there be no other sufficient distress on the premises:—

(A) At common law—

(1) Tools and instruments of a man's trade or profession and implements of husbandry, though not in actual use; Co. Litt. 47 a; *Simpson* v. *Hartopp*, Willes, 512. 515; 3 Black. Comm. 9; *Gorton* v. *Falkner*, 4 T. R. 565.

(2) Beasts of the plough and sheep; see authorities last cited; *Piggott* v. *Birtles*, 1 M. & W. 441, 452.

(B) By statute—

(3) On holdings subject to the Agricultural Holdings Act, 1908, live stock belonging to another person and taken in by the tenant to be fed at a fair price; stat. 8 Edw. VII. c. 28, s. 29 (1).

At common law growing crops and sheaves or cocks of corn were not distrainable; Co. Litt. 47 a; 3 Black. Comm. 10. But sheaves or cocks of corn, or corn loose or in the straw, or hay lying in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land charged with the rent were made distrainable by stat. 2 Wm. & Mary, sess. 1, c. 5, s. 3. And all sorts of corn and grass, hops, roots, fruit, pulse or other product growing on any part of the land demised were made distrainable by stat. 11 Geo. II. c. 19, ss. 8, 9; see *Clark* v. *Gaskarth*, 8 Taunt. 431; *Piggott* v. *Birtles*, 1 M. & W. 441.

The same things are protected by the common law against distress for a rentcharge as are privileged from distress for rent service; see cases cited above and in n. (*a*), p. 105. But with respect to statutory protection, it appears to be a question in each case whether the words of the particular Act extend to alter the common law respecting and to confer protection against distress for a rentcharge as well as distress for rent service, and whether a landowner is enabled, upon the grant of a rent with power of distress, to confer any larger power of distress than is at the time of the grant available by law to recover arrears of rent service; see *Miller* v. *Green*, 8 Bing. 92, 107; *Johnson* v. *Faulkner*, 2 Q. B. 925, 934, 935. The Law of Distress Amendment Act, 1888, applies in terms to "distress for rent" (without express qualification); but the Law of Distress Amendment Act, 1908, applies in terms only to distresses levied by a landlord or superior landlord; stat. 8 Edw. VII. c. 53, ss. 1, 2, 9.

To face p. 104.

of certain land belonging to the grantor, with power given by agreement for the grantee of the rent to distrain therefor (*z*), is recoverable by distraining on any goods found on the land charged with the rent in the same manner as for rent service (*a*). And the statutory power of sale extends to goods distrained for any rent due upon any contract whatsoever (*b*), thus including a rentcharge (*c*).

For rent seek.

The same remedy by distress and sale is given by statute (*d*) in the case of rent seek, as in the case of rent reserved upon lease. And a distress may be levied under an order of the county court for recovery of a tithe rentcharge upon the lands charged therewith, if in the occupation of their owner (*e*). Chattels may also be seized and sold, without suit, under prerogative process duly issued for the purpose, to satisfy a debt due from their owner to the Crown (*f*). And under various statutes, the defaulter's own chattels (*g*) may be distrained and sold to satisfy parochial or borough

For tithe rentcharge.

For Crown debts.

For rates and taxes.

(*z*) See Williams, R. P. 429 *sq.*, 21st ed.

(*a*) *Saffery* v. *Elgood*, 1 A. & E. 191; *Muspratt* v. *Gregory*, 3 M. & W. 677, 678; *Johnson* v. *Faulkner*, 2 Q. B. 925. As to the goods privileged from such distress, see the Table annexed.

(*b*) Stat. 2 Will. & Mary, sess. 1, c. 5, s. 2.

(*c*) Co. Litt. 47 b, n. (7).

(*d*) Stat. 4 Geo. II. c. 28, s. 5; see Williams, R. P. 428, 21st ed.

(*e*) Stats. 54 Vict. c. 8, s. 2; 6 & 7 Will. IV. c. 71, s. 81; see Williams, R. P. 448, 449 and n. (*r*), 21st ed. The question what goods are privileged from such distress appears to be similar to that raised in the case of any other rentcharge; see Table annexed.

(*f*) See Manning's Exchequer Practice, pt. i. bk. i., 2nd ed.; Chitty on the Prerogatives of the Crown, ch. xii.; stat. 28 & 29 Vict. c. 104, s. 47.

(*g*) Not excepting those protected at common law from distress for rent service; *Hutchins* v. *Chambers*, 1 Burr. 570, 588; see *Stevens* v. *Evans*, 2 Burr. 1152, 1157, 1 W. Black 284, 285; *Re Marriage, Neave & Co.*, 1896, 2 Ch. 663. A registered bill of sale given by way of security for the payment of money does not protect the goods comprised therein from being seized under a distress levied for taxes or poor and other parochial rates upon the goods of the mortgagor; stat. 45 & 46 Vict. c. 43, s. 14; *ante*, pp. 93—95; *post*, Appendix (A).

rates unpaid after a summons for their payment (*h*); and land tax, income tax, and inhabited house duty unpaid after demand may be recovered by distraining upon the premises charged with the amount of such tax (*i*), or by distraining the person so charged by his goods and chattels, and all such other chattels as are by such statutes authorised to be distrained, and by selling such distress (*k*).

Under the Summary Jurisdiction Acts.

A distress may likewise be levied by a justice's warrant under the Summary Jurisdiction Acts on the goods of a person liable to pay a pecuniary penalty, compensation or a sum of money as provided in those Acts, and the goods sold to raise the amount due (*l*).

Execution against goods.

Except in the case of seizure under a distress or prerogative process, chattels are only liable to involuntary alienation for debt, in the owner's lifetime, in execution of a judgment obtained against him, and upon his bankruptcy. If judgment be obtained in the High Court of Justice for

(*h*) Stats. 43 Eliz. c. 2, s. 4 (as to poor rate); 5 & 6 Will. IV. c. 50, s. 34 (as to highway rate); 12 & 13 Vict. c. 14 (procedure); 38 & 39 Vict. c. 55, s. 256 (as to the general district rate); 45 & 46 Vict. c. 50, ss. 144—148 (borough rates).

(*i*) These words appear to give the like power as landlords have for rent service of distraining all chattels which are upon the premises; *Juson* v. *Dixon*, 1 M. & S. 601. It is presumed, however, that the common law exceptions do not apply in the case of the taxpayer's own chattels (see note (*g*), above), and it is a question whether they apply in the case of other persons' goods. It is thought that none of the statutory exceptions is applicable unless by reason of the express terms of the particular Act, or unless it should be considered that this power of distress should be no greater than the landlord's power of distress for the time being; see annexed Table of things privileged from distress.

(*k*) Stat. 43 & 44 Vict. c. 19, ss. 85, 86; *Lumsden* v. *Burnett*, 1898, 2 Q. B. 177; *Elliott* v. *Yates*, 1900, 2 Q. B. 370. See note (*g*), above, as to bills of sale.

(*l*) Stats. 11 & 12 Vict. c. 43, s. 19; 47 & 48 Vict. c. 43, s. 5. The wearing apparel and bedding of a person and his family and, to the value of 5*l*., the tools and implements of his trade, are not to be taken under a distress issued by a court of summary jurisdiction; stat. 42 & 43 Vict. c. 49, s. 21 (2).

the recovery or payment of a sum of money, the judgment debtor's goods and chattels may be taken in execution and sold under the writ of *fieri facias* (*fi. fa.*) (*m*). This writ is of very ancient date, and is usually said to be given by the common law; though some suppose that its name arose from the wording of the statute of Edward I. (*n*), by which the writ of *elegit* was provided (*o*). The writ directs the sheriff to cause the amount of the judgment debt to be realized out of the goods and chattels of the debtor, *quod fieri facias de bonis et catallis*, &c.; and a sale of the goods is made by the sheriff accordingly (*p*). Goods, however, are not, as lands formerly were, affected by the mere entry of a *judgment* of a court of law against the owner. The debtor was always allowed to alienate his goods until the writ of execution was issued; although by a fiction of law all judicial proceedings, writs of execution included, formerly related back to the first day of the term to which they belonged (*q*). Goods, therefore, which had been sold after the first day of a term, might yet practically have been seized under a writ of *fi. fa.* relating back to that

Writ of fieri facias.

(*m*) See Rules of the Supreme Court, 1883, Order XLII. r. 3, and Appx. H. No. 1, where the form of the writ of *fi. fa.* is given.

(*n*) Stat. 13 Edw. I. c. 18, called the Statute of Westminster the Second. See Williams, R. P. 269, 23rd ed.

(*o*) Bac. Abr. Execution (C).

(*p*) The common law rule was that, under the writ of *fi. fa.*, the sheriff could only seize such things as he could sell; *Legg* v. *Evans*, 6 M. & W. 36, 41; but by stat. 3 & 4 Vict. c. 110, s. 12, the sheriff was empowered to seize money and bank notes as well, and also tangible securities for money, such as bills of exchange, notes, cheques, or bonds, all of which were formerly exempt from seizure; Bac. Abr. Execution (C. 2); see *Johnson* v. *Pickering*, 1908, 1 K. B. 1. By stat. 8 Anne, c. 18 (r. 14 in Ruffhead), s. 1, amended by 7 & 8 Vict. c. 96, s. 67, the landlord is given a right to be paid one year's arrears of rent, or not more than four weeks' arrears where the tenement is let at a weekly rent, or not more than four terms' arrears where the tenement is let for any other term less than a year, before any goods taken in execution against his tenant are removed from off the premises; see *Re Mackenzie*, 1899, 2 Q. B. 566; *Cox* v. *Harper* 1910, 1 Ch. 480.

(*q*) Com. Dig. tit. Execution (D. 2); *Anon.*, 2 Vent. 218. See 2 Sugd. Vend. & Pur. 9th ed. 198.

Statute of Frauds.

day, but subsequently issued. To remedy this evil, it is enacted in the Sale of Goods Act, 1893 (*r*), in place of one of the sections of the Statute of Frauds (*s*), that a writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff (*t*) to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same. And it is further provided in the same Act of 1893 (*u*), in place of an enactment of 1856 (*x*), that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff. Goods and chattels may therefore be safely alienated, although judgment exist against their owner, provided a writ of execution be not actually in the hands of the sheriff; and even in this last event, a good title will be acquired by any person, who takes them in good faith and for valuable consideration, without notice of a writ of execution having been delivered to the sheriff and

Judgments of inferior courts.

remaining unexecuted in his hands (*y*). Chattels

(*r*) Stat. 56 & 57 Vict. c. 71, s. 26.

(*s*) Stat. 29 Car. II. c. 3, s. 16.

(*t*) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(*u*) Stat. 56 & 57 Vict. c. 71, s. 26.

(*x*) Stat. 19 & 20 Vict. c. 79, s. 1; *Gladstone* v. *Padwick*, L. R. 6 Ex. 203. See *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642, *qu.?*

(*y*) Formerly, besides the sale of goods under the writ of *fieri facias*, there might also be a writ of *levari facias*, by which the sheriff levied the corn and other present profit which grew on the judgment debtor's land, together with the rents then due, and the cattle thereon; 2 Wms.

may be seized and sold in execution of judgments obtained in inferior courts (*z*), of which the county courts (*a*) are now the most important, as well as under a writ of *fi. fa.* issuing out of the High Court (*b*). And the seizure of the goods of any person under process in an action in any court, or in any civil proceeding in the High Court, followed by the sale of the goods or their retainer by the sheriff for twenty-one days, is now an act of bankruptcy (*c*). But an execution levied by seizure and sale of the debtor's goods is not invalid for this reason only; and a purchaser of goods in good faith on a sale by the sheriff in all cases acquires a good title to them as against the debtor's trustee in bankruptcy (*d*). As we shall hereafter see, under the bankruptcy law, a judgment creditor is liable, in certain cases, to be deprived of the fruits

Sale or retainer for twenty-one days under execution an act of bankruptcy.

Saunders, 68 a, n. (1). But this writ, having long fallen out of use, was abolished in civil proceedings by the Bankruptcy Act, 1883; 3 Black. Comm. 417; stat. 46 & 47 Vict. c. 52, s. 146, sub-s. 2. And formerly goods might be taken in execution under the writ of *elegit*, by which the goods of the debtor were delivered to his creditor at an appraised value, together with possession of his lands; *Pullen* v. *Purbecke*, 1 Ld. Raym. 346; *Ex parte Abbot, re Gourlay*, 15 Ch. D. 447; *Hough* v. *Windus*, 12 Q. B. D. 244, see Williams, R. P. 269, 21st ed. But under the Bankruptcy Act, 1883, the writ of *elegit* no longer extends to goods; stat. 46 & 47 Vict. c. 52, ss. 146 (sub-s. 1), 169 and Fifth Schedule.

(*z*) As to local inferior courts, see 3 Steph. Comm. 316 *sq.*, 11th ed.; Elphinstone & Clark on Searches, 54.

(*a*) See stat. 51 & 52 Vict. c. 43 ss. 146 *sq.*; and as to the time from which a writ of execution in the county court binds the goods; *Murgatroyd* v. *Wright*, 1907, 2 K. B. 333; *Birstall Candle Co.* v. *Daniels*, 1908, 2 K. B. 254.

(*b*) As to the removal of judgments of the inferior courts into the High Court, in order that execution may be had thereunder against the debtor's freehold lands, see Williams, R. P. 278, 21st ed. Under stat. 31 & 32 Vict. c. 54, certificates of judgments of the superior courts of England, Scotland or Ireland may be registered in a superior court in the other parts of the United Kingdom, when the same proceedings may be taken on such certificate as if it were a judgment of the court in which it is registered; see *Re Watson*, 1893, 1 Q. B. 21; *Re Low*, 1894, 1 Ch. 147.

(*c*) Stat. 53 & 54 Vict. c. 71, s. 1; *Figg* v. *Moore*, 1894, 2 Q. B. 690.

(*d*) Stat. 46 & 47 Vict. c. 52, s. 46, sub-s. 3.

of an execution in favour of the creditors generally (*e*).

Debtor's own goods only can be taken in execution.

Under the writ of *fi. fa.*, the sheriff can only seize or sell chattels of which the judgment debtor is the legal owner (*f*). The sheriff cannot therefore so take any goods in the debtor's possession, of which he has effectually assigned over the legal ownership by bill of sale or otherwise (*g*).

The court may order a sale.

But when goods or chattels have been seized in execution under process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or a judge may order a sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just (*h*). And if in such case the proceeds of sale be sufficient to satisfy the amount owing to the claimant, the balance will be ordered to be paid to the execution creditor (*i*).

Execution against equitable interests in chattels.

Formerly, if the judgment debtor were merely entitled to an equitable interest in goods, as when they were held on trust for him or he had only an equity of redemption, and execution against the goods were thus prevented at law, the judgment creditor might sue in a court of equity for assistance, and so obtain a lien in equity on his debtor's interest in the goods (*k*).

(*e*) See stats. 46 & 47 Vict. c. 52, s. 45; 53 & 54 Vict. c. 71, s. 11, stated in the chapter on Bankruptcy, *post*.

(*f*) Bac. Abr. Execution (C. 3); *Scott* v. *Scholey*, 8 East, 467; 9 R. R. 487; see *post*, Part IV. The things mentioned in ss. 1. (B.) 11, 12, of the Table of things privileged from distress (*ante*, p. 104) are, however, expressly exempted from process of execution against the person in whose possession they are.

(*g*) See *Scarlett* v. *Hanson*, 12 Q. B. D. 213; *ante*, pp. 75—77, 93—95.

(*h*) Ord. LVII. r. 12. This rule reproduces in effect stat. 23 & 24 Vict. c. 126, s. 33, which was repealed by stat. 46 & 47 Vict. c. 49, saving the jurisdiction thereby established, and reserving the power of making rules of court as to the matters contained therein.

(*i*) See *Stern* v. *Tegner*, 1898, 1 Q. B. 37.

(*k*) Lewin on Trusts, 645 *sq.*, 6th ed.; 1029 *sq.*, 12th ed.

And since the Judicature Acts, the same relief may be obtained by the appointment of a receiver, where any impediment exists against taking goods in execution at law (*l*). If the judgment debtor be the legal owner of the goods in his possession, but has created equitable interests therein in favour of other persons, the sheriff seizing the goods in execution of the judgment takes them subject to all such equities (*m*). The wearing apparel and bedding (*n*) of any judgment debtor or his family, and the tools and implements of his trade (not exceeding in the whole the value of five pounds), are protected from seizure under any execution or order of any court against his goods and chattels (*o*).

Bankruptcy.

Property now vests in the trustee.

Choses in possession are also liable to alienation for debt in their owner's lifetime in the event of his bankruptcy. When a debtor is adjudged bankrupt, all such property as may belong to or be vested in him at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge, becomes divisible among his creditors, and vests in the official receiver as trustee for the purposes of the Bankruptcy Act, 1883, until a trustee is appointed by the creditors, and then vests in the trustee so appointed (*p*). The only exceptions are property held by the bankrupt on trust for any other person, and the tools (if any) of his trade, and the necessary wearing apparel and bedding of himself, his wife and children, to a value not

(*l*) *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 22 Q. B. D. 173; *Lemasseur*, v. *Mason and Barry*, 1891, 2 Q. B. 73, where the judgment debtor's goods were in the possession of a third party having a lien thereon; and see *Harris* v. *Beauchamp*, 1894, 1 Q. B. 801.

(*m*) *Re Standard Manufacturing Co.*, 1891, 1 Ch. 627, 641; *Davey* v. *Williamson*, 1898, 2 Q. B. 194, 200; *Simultaneous &c. Syndicate* v. *Fowcraker*, 1901, 1 Q. B. 771.

(*n*) See *Davis* v. *Harris*, 1900, 1 Q. B. 729.

(*o*) Stats 8 & 9 Vict. c. 127, s. 8; 51 & 52 Vict. c. 43, s 147.

(*p*) Stat. 46 & 47 Vict. c. 52, ss. 20, 21, 44, 54; see the chapter on Bankruptcy below.

Goods in the possession, order, or disposition of a bankrupt as reputed owner.

exceeding twenty pounds in the whole (*q*). And the bankruptcy law further provides (*q*) that the property of the bankrupt divisible amongst his creditors shall comprise all goods (*r*) being at the commencement of the bankruptcy in the *possession, order or disposition* of the bankrupt, in his trade or business (*s*), by the consent and permission of the true owner, under such circumstances that he is the *reputed owner* thereof (*t*); and all such goods vest in the trustee in bankruptcy along with the bankrupt's own property (*u*). The true owner thus loses his property in the goods: but he is entitled to prove in the bankruptcy for their value (*x*). In order to bring the "reputed ownership" clauses of the bankruptcy law into operation, it must be established that the bankrupt was the reputed owner of the goods of another as well as that such goods were in the bankrupt's possession, order or disposition with the consent of the true owner (*y*). For the object of these provisions is to prevent traders and men of business from obtaining false credit from the possession of property which is not their own. If, therefore, there be in any trade or business a notorious custom for persons engaged therein to have the possession, order or disposition of goods which are not their own, such goods will not pass to the trustee in bankruptcy of the person

(*q*) Stat. 46 & 47 Vict. c. 52, s. 44.

(*r*) Not including things in action other than debts due or growing due to the bankrupt in the course of his trade or business.

(*s*) See *Re Wallis, Ex parte Sully*, 14 Q. B. D. 950; *Re Jenkinson*, 15 Q. B. D. 441; *Sharman* v. *Mason*, 1899, 2 Q. B. 679.

(*t*) See *Ex parte Lovering, Re Jones*, L. R. 9 Ch. 621; *Ex parte Brookes, Re Fowler*, 23 Ch. D. 261; decided under the Bankruptcy Act, 1869.

(*u*) Stat. 46 & 47 Vict. c. 52, ss. 44, 54. For the previous law, see stats. 32 & 33 Vict. c. 71, ss. 15, 17; 12 & 13 Vict. c. 106, s. 125; 5 & 6 Vict. c. 122, s. 59 *sq.*; 1 & 2 Will. IV. c. 56, s. 7; 6 Geo. IV. c. 16, s. 72; 21 Jac. I. c. 19, s. 11; *Heslop* v. *Baker*, 6 Ex. 740.

(*x*) *Ante*, p. 25, n. (*p*); *Re Baton*, 1907, 2 K. B. 180.

(*y*) *Re William Watson & Co.*, 1904, 2 K. B. 753.

so in possession of them. For in such a case he obtains no credit from the possession of the goods (*z*). As we have seen (*a*), goods mortgaged by bill of sale or otherwise usually remain in the mortgagor's possession until default be made in payment according to the terms of the agreement; and a mortgagor does not lose the reputation of being owner of such goods, although all property in them may have passed to the mortgagee. If, therefore, any mortgaged goods remain in the mortgagor's possession, order or disposition, *in his trade or business*, they will, in the event of his bankruptcy, vest in the trustee for the benefit of his creditors generally (*b*); and the mortgagee will be deprived of his ownership of the goods (*c*). A considerable disadvantage is thus attached to mortgages of goods employed in the mortgagor's trade or business; and this is not removed by due registration of the mortgage under the present Bills of Sale Acts (*d*). Absolute assign-

Goods remaining in a mortgagor's possession in his trade or business.

(*z*) See *Whitfield* v. *Brand*, 16 M. & W. 282 (books deposited with a bookseller to be sold on commission); *Hamilton* v. *Bell*, 10 Ex. 545 (clocks left with a clockmaker to be cleaned); *Holderness* v. *Rankin*, 4 De G. F. & J. 258, 273. 274 (an unfinished ship in a shipbuilder's possession); *Ex parte Watkins, Re Conston*, L. R. 8 Ch. 520 (whisky left in the vendor's bonded warehouse till wanted, according to the custom of the trade in Liverpool); *Ex parte Wingfield, Re Florence*, 10 Ch. D. 591 (a horse left with a horse-dealer on sale or return); *Crawcour* v. *Salter*, 18 Ch. D. 30; *Ex parte Turquand, Re Parker*, 14 Q. B. D. 636 (both cases of furniture hired by hotel-keepers according to their usual custom)

(*a*) *Ante*, p. 94.

(*b*) *Ryall* v. *Rolle*, 1 Atk. 165, 170; S. C. 1 Ves. sen. 348; *Freshney* v. *Carrick*, 1 H. & N. 653; *Speckman* v. *Miller*, 12 C. B. N. S. 659; *Hornsby* v. *Miller*, 1 E. & E. 192; *Stansfield* v. *Cubitt*, 2 De G. & J. 222; *Badger* v. *Shaw*, 2 E. & E. 472; *Ex parte Harding*, L. R. 15 Eq. 223.

(*c*) *Ante*, p. 25, n. (*p*).

(*d*) *Re Ginger*, 1897, 2 Q. B. 461; and cases cited in note (*z*), above. By the Bills of Sale Act, 1878, grantees under bills of sale duly registered in accordance with the Act were protected against the inconvenience abovementioned. But this protection was withdrawn by the Bills of Sale Act, 1882, from all bills of sale given by way of security for the payment of money and not duly registered before the commencement of that Act; stats. 41 & 42 Vict. c. 31, s. 20; 45 & 46 Vict. c. 43, ss. 1—3, 15 (commenced 1st Nov. 1882); see *Ex parte Izard, Re Chapple*, 23 Ch. D. 409.

ments of chattels (*e*) duly registered under the Bills of Sale Act, 1878, are however protected from the operation of the "reputed ownership" clauses of the bankruptcy law, notwithstanding that the goods remain in the assignor's possession after the assignment (*f*).

Alienation for debt after death.

On the decease of any person, his chattels have always been liable to the payment of his debts of every kind (*g*). The creditor's remedy is either to sue the executor or administrator (*h*) of the deceased, when execution can be had against the goods of the testator or intestate, or to apply under the equitable jurisdiction of the court for the administration by the court of the deceased debtor's estate (*i*). A creditor may also take proceedings to have the insolvent estate of his deceased debtor administered in bankruptcy. When an order is made for the administration in bankruptcy of a deceased debtor's estate, his personal as well as his real property vests first in the official receiver as trustee, and then in the trustee appointed by the creditors; and the trustee is empowered to realize the same by sale or otherwise, and to distribute the proceeds among the creditors of the deceased (*k*). If a deceased debtor's goods be distributed by his executor or administrator without payment of his debts, whether through ignorance of them or otherwise, his creditors have the right to follow the goods in the hands of all persons, who may acquire them otherwise than for valuable consideration without notice of the creditor's claims (*l*).

(*e*) *Ante*, pp. 75, 76.

(*f*) *Swift* v. *Pannell*, 24 Ch. D. 210.

(*g*) *Ante*, p. 2; Williams, R. P. 20, 21st ed.

(*h*) *Ante*, p. 3.

(*i*) See 2 Wms. Exors. 1029 *sq.*, 7th ed.; 1505 *sq.*, 10th ed.; *Harrison* v. *Kirk*, 1903, A. C. 1, 5 *sq.*

(*k*) Stat. 46 & 47 Vict. c. 52 s. 125, amended by 53 & 54 Vict. c. 71, s. 21.

(*l*) *March* v. *Russell*, 3 My. Cr. 31, 40—42; *Spackman* v. *Timbrell*, 8 Sim. 253; *Dilkes* v.

Conveyances tending to defraud creditors.

By a statute of the reign of Elizabeth (*m*), the gift or alienation of any lands, tenements, hereditaments, *goods and chattels*, made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them unless made upon *good*, which here means *valuable*, consideration, and *bond fide* to any person not having at the time of such gift any notice of such fraud. No such gift or alienation of chattels is therefore of any avail against the claim of a judgment creditor to take the same in execution, or the title of the debtor's trustee in bankruptcy, or against creditors who take proceedings to secure payment of their debts out of the debtor's estate after his death (*n*). The fraudulent purpose intended by the statute of Elizabeth can of course only be judged of by circumstances. Thus it has been held that if the owner of goods make an absolute assignment of them by deed to one of his creditors, and yet remain in the possession of the goods, such remaining in possession is a badge of fraud, which renders the assignment void, by virtue of the statute, as against the other creditors (*o*). But if the assignment be made by way of mortgage to secure the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods until he shall make default in payment (*p*), the possession of the debtor, being then consistent with the terms of the deed, is not regarded in modern times as rendering the transaction fraudulent within the meaning of the statute (*q*). It has been decided

Broadmead, 2 Giff. 113; 2 De G. F. & J. 560; *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Hunter* v. *Young*, 4 Ex. D. 256; see *Hooper* v. *Smart*, 1 Ch. D. 90; *Blake* v. *Gale*, 32 Ch. D. 571; *Worthington & Co., Ld.* v. *Abbott*, 1910, 1 Ch. 588, 591, 593; *Re Eustace*, 1912, 1 Ch. 561.

(*m*) Stat. 13 Eliz. c. 5.

(*n*) *Richardson* v. *Smallwood*, Jac. 552.

(*o*) *Twyne's case*, 3 Rep. 80 b; 1 Smith's Leading Cases, 1; *Edwards* v. *Harben*, 2 T. R. 587; 1 R. R. 548.

(*p*) *Ante*, p. 94.

(*q*) *Edwards* v. *Harben*, 2 T. R. 587; 1 R. R. 548; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Reed* v.

that a *bonâ fide* sale or alienation of chattels, though made to secure or satisfy a creditor, is not void under the statute of Elizabeth, merely because it is made with the intention of defeating an expected execution at suit of another creditor (*r*). Under the bankruptcy law, however, conveyances of property made by any person unable to pay his debts as they become due out of his own money, with a view of giving one of his creditors a preference over the others, becomes void, as against his trustee in bankruptcy, if he be adjudged bankrupt on a petition presented within three months after the conveyance (*s*). And under the bankruptcy law (*t*), fraudulent conveyances of property are void, as against a trustee in bankruptcy; and voluntary settlements of any property become void, if the settlor be adjudged bankrupt within two years after making them, and are further liable to become void, if he be adjudged bankrupt within ten years after making them, unless it can be proved that at the time of making the settlement he was able to pay all his debts without the aid of the property comprised in the settlement, and that his interest in such property passed to the trustee of such settlement on the execution thereof. The protection of creditors against secret mortgages or assignments of chattels is also one of the objects of the Bills of Sale

Fraudulent preference of one creditor over others.

Wilmot, 7 Bing. 577. If the mortgagor should retain possession *after* default in payment at the time specified, it may possibly be doubted whether the security would not then be void as against creditors under the statute of Elizabeth, for, by the terms of the deed, the mortgagor is only to enjoy possession *until* default. But the better opinion is that the deed will still be good. See Davidson's Precedents, vol. ii. part 2, pp. 145—147, 4th ed; *Ex parte Sparrow*, 2 De G. M. & G. 907.

(*r*) *Wood* v. *Dixie*, 7 Q. B. 892; *Hale* v. *Saloon Omnibus Co.*, 4 Drew. 492; *Gladstone* v. *Padwick*, L. R. 6 Ex. 203, 209, 211; and see *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Mason* v. *Briton, &c. Assn., Lim.*, 4 Times, L. R. 755.

(*s*) Stat. 46 & 47 Vict. c. 52, s. 48.

(*t*) Sects. 4, 47; see the chapter on Bankruptcy, below.

Bills of Sale Acts.

Acts (*u*), to which we have before referred (*x*). As we have seen, their scheme is to secure the publicity of registration for all written assurances of the property in goods, which remain in the assignor's possession. We may add that assignments of chattels required to be registered under the Bills of Sale Act, 1878 (*y*), may become void, for want of compliance with the Act, not only as against the assignor's execution creditors and trustee in bankruptcy, but also as against his assignees under any assignment for the benefit of his creditors.

(*u*) Stats. 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43, replacing an Act of 1854; see *post*, Appendix (A).

(*x*) *Ante*, pp. 75, 84, 95—98.

(*y*) *Ante*, pp. 75, 97.

CHAPTER III.

OF SHIPS.

THERE is one important class of choses in possession which the policy of the law has rendered subject to peculiar rules, namely, ships and vessels. The law on this subject is now contained in the Merchant Shipping Act, 1894 (*a*), which replaced the Merchant Shipping Act, 1854 (*b*), and the Acts amending it. Every British ship, with a few unimportant exceptions, is required to be registered (*c*); and no ship is to be deemed a British ship unless owned wholly by natural-born British subjects, persons duly naturalized or made denizens who have thereupon or subsequently taken the oath of allegiance to the King and are either resident in His Majesty's dominions or partners in a firm actually carrying on business in His Majesty's dominions, or bodies corporate established under and subject to the laws of some part of His Majesty's dominions and having their principal place of business in those dominions (*d*). Nothing contained in the Naturalization Act, 1870 (*e*), is to qualify an alien to be the owner of a British ship; and any natural-born British subject, who has become a citizen or subject of any foreign state, is not qualified to be the owner of a British ship, unless he has subsequently taken the oath of allegiance to the King and is either resident in His Majesty's dominions or partner in a firm actually carrying on

British ships.

(*a*) Stat. 57 & 58 Vict. c. 60.
(*b*) Stat. 17 & 18 Vict. c. 104.
(*c*) Stat. 57 & 58 Vict. c. 60, ss. 2, 3, replacing 17 & 18 Vict. c. 104, s. 19.
(*d*) Stat. 57 & 58 Vict. c. 60, s. 1, replacing 17 & 18 Vict. c. 104, s. 18.
(*e*) Stat. 33 Vict. c. 14, s. 14; *ante*, p. 101.

business there (*f*). The registration of ships is made by the chief officer of customs at any port in the United Kingdom or Isle of Man approved by the commissioners of customs for the registry of ships, and by other officers in the colonies and possessions abroad (*g*).

Property in British ships divided into sixty-four shares.

The property in every ship is divided into sixty-four shares; and, subject to the provisions of the Merchant Shipping Act with respect to joint owners or owners by transmission, not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial title of any number of persons, or of any company represented by or claiming under or through any registered owner or joint owner. A person shall not be entitled to be registered as owner of any fractional part of a share in a ship; but any number of persons not exceeding five may be registered as joint owners of a ship, or of a share or shares therein. And joint owners shall be considered as constituting one person only, as regards the number of persons entitled to be registered as owners, and shall not be entitled to dispose in severalty of any interest in any ship, or in any share therein in respect of which they are registered. A Corporation may be registered as owner by its corporate name (*h*).

No trusts entered on the register.

No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of a ship, or of a share therein, shall have

(*f*) Stat. 57 & 58 Vict. c. 60, s. 1, replacing 17 & 18 Vict. c. 104, s. 18.

(*g*) Stat. 57 & 58 Vict. c. 60, s. 4, replacing 17 & 18 Vict. c. 104, s. 30.

(*h*) Stat. 57 & 58 Vict. c. 60, s. 5, replacing 17 & 18 Vict. c. 104, s. 37, as amended by 43 & 44 Vict. c. 18.

power absolutely to dispose, in manner provided in the Act, of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration (*i*). But the intention of the Act is, that without prejudice to the provisions contained in the Act, for preventing notice of trusts from being entered on the register, and without prejudice to the powers of disposition and of giving receipts conferred by the Act on registered owners and mortgagees, and without prejudice to the provisions contained in the Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interests therein, in the same manner as in respect of any other personal property (*k*). It is held, that although under these provisions the Courts may recognize and give effect to equitable interests in ships (*l*), they cannot (in the absence of fraud) allow an equitable title to prevail over a title obtained from the registered owner by an assurance duly made and registered in accordance with the Act. Thus an unregistered equitable charge upon a ship will be postponed to a subsequent legal mortgage made and registered as provided in the Act, even though the mortgage were taken with notice of the charge (*m*).

But equities may be enforced.

Upon the completion of the registry of a ship, a certificate of registry is given (*n*); which is kept

Certificate of registry.

(*i*) Stat. 57 & 58 Vict. c. 60, s. 56, replacing 17 & 18 Vict. c. 104, s. 43.

(*k*) Stat. 57 & 58 Vict. c. 60, s. 57, replacing 25 & 26 Vict. c. 63, s. 3; see *The Venture*, 1908, P. 218, 230; *Burgis* v. *Constantine*, 1908, 2 K. B. 484.

(*l*) *Ward* v. *Beck*, 13 C. B. N. S. 668; *Stapleton* v. *Haymen*, 2 H & C. 918.

(*m*) *Black* v. *Williams*, 1895, 1 Ch. 408; *Barclay & Co., Ld.* v. *Poole*, 1907, 2 Ch. 284.

(*n*) Stat. 57 & 58 Vict. c. 60, s. 14, replacing 17 & 18 Vict. c 104, s. 44.

in the custody of the master, and is to be used only for the lawful navigation of the ship, and is not subject to detention by reason of any title, lien, charge, or interest whatever had or claimed by any owner, mortgagee or other person to, on, or in the ship (*o*). Any change occurring in the registered ownership of a ship is required to be endorsed on her certificate of registry either by the registrar of the ship's port of registry, or by the registrar of any port at which the ship arrives who has been advised of the change by the registrar of her port of registry (*p*). Provision is made for granting a new certificate in the place of any which may be delivered up, or may be mislaid, lost or destroyed (*q*).

Transfer of ships.

A registered ship or a share therein, when disposed of to a person qualified to own a British ship, must be transferred by bill of sale made in the form prescribed by the Act, or as near thereto as circumstances permit, and executed by the transferor in the presence of and attested by a witness or witnesses (*r*). But the transferee of a registered ship, or a share therein, is not entitled to be registered as owner thereof until he has made a declaration of transfer stating his qualification to own a British ship, and that no unqualified person or body of persons is entitled as owner to any legal or beneficial interest in the ship or any share therein (*s*). The bill of sale, together with the declaration of transfer,

(*o*) Stat. 57 & 58 Vict. c. 60, s. 15, replacing 17 & 18 Vict. c. 104, s. 50

(*p*) Stat. 57 & 58 Vict. c. 60, s. 20, replacing 17 & 18 Vict. c. 104, s. 45.

(*q*) Stat. 57 & 58 Vict. c. 60, ss. 17 18, 21, amended by 6 Edw. VII., c. 48, s. 52, and replacing 17 & 18 Vict. c. 104, ss. 47, 48, 53.

(*r*) Stat. 57 & 58 Vict. c. 60, ss. 24, 65 (2), replacing 17 & 18 Vict. c. 104, s. 55, and 18 & 19 Vict. c. 91, s. 11. See *Chasteauneuf* v. *Capeyron*, 7 App. Cas. 127.

(*s*) Stat. 57 & 58 Vict. c. 60. s. 25, replacing 17 & 18 Vict. c. 104, s. 56. In the case of a corporation the declaration must be made by the secretary or other officer authorized by the corporation for the purpose; stat. 57 & 58 Vict. c. 60, s. 61 (2).

must then be produced to the registrar of the ship's port of registry, who thereupon enters in the register the name of the transferee as owner of the ship or share comprised in the bill of sale, and also endorses on the bill of sale the fact of such entry having been made with the date and hour thereof. All bills of sale are entered in the register book in the order of their production to the registrar (*t*).

Mortgage of ships.

All mortgages of any ship, or share therein, are to be in the form prescribed by the Act, or as near thereto as circumstances permit; and on the production of any such instrument, the registrar of the ship's port of registry is to record the same in the register book. Mortgages shall be recorded by the registrar in the order of time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that the same has been recorded by him, stating the day and hour of that record (*u*). If there are more mortgages than one registered in respect of the same ship or share, the mortgagees are entitled in priority one over the other according to the date at which each mortgage is recorded in the register book, and not according to the date of each mortgage itself, notwithstanding any express, implied or constructive notice (*v*). As we have seen (*x*), a legal mortgage duly made and registered in accordance with the Act has priority over an unregistered equitable charge, previously created, notwithstanding that the mortgage were taken with notice of the charge. Except as far as shall be necessary for making a mortgaged ship or share

(*t*) Stat. 57 & 58 Vict. c. 60, s. 26, replacing 17 & 18 Vict. c. 104, s. 57

(*u*) Stat. 57 & 58 Vict. c. 60, ss. 31, 65 (2), replacing 17 & 18 Vict. c 104, ss. 66, 67, and 18 & 19 Vict. c. 91, s. 11.

(*v*) Stat. 57 & 58 Vict. c. 60, s. 33, replacing 17 & 18 Vict. c. 104, s. 69.

(*x*) *Ante*, p. 120.

available as a security for the mortgage debt, the mortgagee shall not by reason of his mortgage be deemed to be the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof (*y*). Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money; but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee (*z*). A registered mortgage of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the record of the mortgage, notwithstanding that the mortgagor at the commencement of the bankruptcy had the ship or share in his possession, order or disposition, or was reputed owner thereof (*a*), and the mortgage shall be preferred to any right, claim, or interest of the bankrupt's other creditors or their trustee (*b*). The transfer of a mortgage of a ship or a share therein is required to be made in the form prescribed by the Act, and to be registered (*c*). And where a registered mortgage is discharged, the registrar shall, on production of the mortgage deed with a receipt for the mortgage money endorsed thereon, duly signed and attested, make an entry of the discharge

(*y*) Stat. 57 & 58 Vict. c. 60, s. 34, replacing 17 & 18 Vict. c. 104, s. 70. See *European Co.* v. *Royal Mail Co.*, 4 K. & J. 676; *Dickinson* v. *Kitchen*, 8 E. & B. 789; *Marriott* v. *The Anchor Reversionary Company, Limited*, 2 Giff. 457; *Collins* v. *Lamport*, 4 De G. J. & S. 500; *Rawden* v. *Pope*, L. R. 3 Ex. 269; *The Heather Bell*, 1901, P. 143, 272; *The Manor*, 1907, P. 339.

(*z*) Stat. 57 & 58 Vict. c. 60, s. 35, replacing 17 & 18 Vict. c. 104, s. 71.

(*a*) *Ante*, p. 112.

(*b*) Stat. 57 & 58 Vict. c. 60, s. 36, replacing 17 & 18 Vict. c. 104, s. 72.

(*c*) Stat. 57 & 58 Vict. c. 60, ss. 37, 65 (2), replacing 17 & 18 Vict. c. 104, s. 73, and 18 & 19 Vict. c. 91, s. 11.

of the mortgage in the register book; and on that entry being made, the estate, if any, which passed to the mortgagee, shall vest in the person in whom (having regard to intervening acts and circumstances, if any) it would have vested if the mortgage had not been made (*d*). A mortgage of a ship passes to the mortgagee, under the word "ship," all articles necessary to the navigation of the ship or the prosecution of the adventure, which are on board at the date of the mortgage; and will further pass to the mortgagee all articles which may subsequently be brought on board in substitution for them (*e*).

Certificates of sale and mortgage.

The Merchant Shipping Act contains provisions enabling any registered owner to empower any other person or persons to sell any entire ship, or to mortgage any ship or any share therein, at any place out of the country or possession in which the port of registry of the ship is situate. For this purpose what are called certificates of sale or mortgage are granted by the registrar on the conditions mentioned in the Act (*f*). Besides requiring the registration of absolute conveyances, mortgages and transfers of mortgage of ships, the Act further provides that the transmission of the property or of the interest of a mortgagee in any registered ship or share therein on marriage, death or bankruptcy or by any lawful means other than a transfer under the Act, shall be authenticated and registered in manner therein prescribed (*g*). The above are the

(*d*) Stat. 57 & 58 Vict. c. 60, s. 32, replacing 17 & 18 Vict. c. 104, s. 68.

(*e*) *Coltman* v. *Chamberlain*, 25 Q. B. D. 328.

(*f*) Stat. 57 & 58 Vict. c. 60, ss. 39—46, amended by 6 Edw. VII. c. 48, s. 52, and replacing 17 & 18 Vict. c. 104, ss. 76 *sq.* See *Orr* v. *Dickinson*, John. 1.

(*g*) Stat. 57 & 58 Vict. c. 60, ss. 27, 38, replacing 17 & 18 Vict c. 104, ss. 58, 74. On such transmission of the property in a ship or share to a person not qualified to own a British ship, he may obtain an order for sale thereof; see s. 28 of the Act of 1894, replacing s. 62 of the Act of 1854.

principal provisions of the Act so far as relate to the conveyance of ships. For more particular information the reader must be referred to the Act itself which is of great length. It may, however, be added, that all instruments used in carrying into effect that part of the Act, which relates to the registration of British ships and the transfer or mortgage thereof, are exempt from stamp duty (*h*). And that, if any conveyance of a ship be procured to be registered by fraud, the court may rectify the register by ordering the entry to be expunged (*i*). Transfers or assignments of any ship or vessel or any share thereof are excepted from the provisions of the Bills of Sale Acts (*j*). A ship, or any share therein, may be taken in execution and sold under the writ of *fi. fa.* (*k*). And a trustee in bankruptcy may transfer the bankrupt's share in ships to the same extent as the bankrupt himself might have transferred the same (*l*).

Exempt from stamp duty.

Registration procured by fraud.

The most striking difference that there is in point of law between ships and other chattels is owing to the fact that ships have been subject to maritime law, as administered by the High Court of Admiralty, of which the jurisdiction is now vested in the High Court of Justice. According to the law administered under the admiralty jurisdiction of the Court, there are certain claims which attach upon a ship herself, irrespective of the ownership thereof. Such claims may be enforced by proceedings and process *in rem*,

Ships subject to maritime law.

Admiralty action *in rem*.

(*h*) Stat. 57 & 58 Vict. c. 60, s. 721, replacing 17 & 18 Vict. c. 104, s. 9; cf. *Deddington Steamship Co., Ld.* v. *Inland Revenue Commissioners*, 1911, 2 K. B. 1001 (debenture of a shipping company creating a marketable security must be stamped as such).

(*i*) *Bronk* v. *Broomhall*, 1906, 1 K. B. 571.

(*j*) Stats. 41 & 42 Vict. c. 31, s. 4; 45 & 46 Vict. c. 43, s. 3; *ante*, pp. 75, 84, 95—98.

(*k*) *Ante*, p. 107; *Harley* v. *Harley*, 11 Ir. Ch. 451; *The Gemma*, 1899, P. 285.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 50, sub-s. 3.

that is, by an action in the Admiralty Division arresting the ship herself when lying at a port within the jurisdiction, and by sale of the ship, and application of the proceeds of sale in default of the owner's appearance to answer for the demand (*m*). One foundation of proceedings *in rem* against a ship is a maritime lien, which is not a mere right to retain possession, like a common law lien (*n*), but is a claim or privilege upon a thing to be carried into effect by legal process. This claim or privilege travels with the thing into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached (*o*). Collision (*p*) at sea, for which the shipowner is responsible, gives rise to a maritime lien for damages attaching upon the ship in fault; and such a lien may be enforced against the ship, even though she may have been sold after the collision to a *bonâ fide* purchaser without notice of any such liability (*q*). Salvage services rendered to

Maritime lien.

Collision.

Salvage.

(*m*) *The Tremont*, 1 W. Rob. 163, 164; *The Westmoreland*, 4 Notes of Cases, 173; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; Rules of the Supreme Court, 1883, Order XIII., rules 12, 13; *The Nautik*, 1895, P. 121; *The Crimdon*, 1900, P. 171; *The Burns*, 1907, P. 137.

(*n*) See *ante*, pp. 62—68.

(*o*) *Harmer* v. *Bell* (*The Bold Buccleuch*), 7 Moo. P. C. 267, 284, 285; *The Henrich Bjorn*, 10 P. D. 54; *The Ripon City*, 1897, P. 226, 241; *Currie* v. *McKnight*, 1897, A. C. 97; *The Tergeste*, 1903, P. 27; see *The Tasmania*, 13 P. D. 110; *The Kong Magnus*, 1891, P. 223. The better opinion seems to be that the doctrine of a maritime lien upon a ship herself, as distinguished from a claim against her owner, is a late development of English Admiralty law out of the early practice of arresting the goods within the Admiral's jurisdiction of any person sued in the Admiralty Court in order to compel his appearance; Marsden, Select Pleas of the Court of Admiralty (Selden Socy.), i., lxxi., lxxii.; *The Dictator*, 1892, P. 304, 311; *The Ripon City*, 1897, P. 226, 239 *sq.*; Marsden on Collisions, 70 *sq.*, 6th ed.; *The Dupleix*, 1912, P. 8, 13.

(*p*) See *The Normandy*, 1904, P. 187.

(*q*) *Harmer* v. *Bell*, *ubi sup.*; *The Nymph*, Swab. 86; *The Charles Amelia*, L. R. 2 A. & E. 330; *The Utopia*, 1893, A. C. 492, 499; see *The Henrich Bjorn*, 11 App. Cas. 282—284; *The Zeta*, 1893, A. C.

a ship also give rise to a maritime lien (*r*). And a maritime lien attaches upon a ship for mariners' wages (*s*). A similar lien has been given by statute for a master's wages (*t*), and his disbursements for which the shipowner is liable (*u*). But it is now settled that by the law of England there is no maritime lien for necessaries supplied to a ship (*x*). No admiralty action *in rem* can be maintained against any ship (whether man-of-war or not) which is the property of the Crown (*y*) or of any foreign sovereign (*z*); and such vessels cannot be made subject to any maritime lien.

Mariners' and master's wages.

King's and foreign sovereign's ships exempt.

A maritime lien upon a ship may also be created

468 By the admiralty as well as by the common law of England the owner of a ship was fully responsible for all damages caused by her improper navigation. But other countries having in modern times introduced the rule, that the shipowner's liability in such cases should be limited to the value of the ship and freight, the principle of limitation of liability was adopted in this country by the legislature; and the shipowner's liability, on events occurring without his actual fault or privity, is now limited by statute to an amount varying with the tonnage of his vessel. See *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; *The Dictator*, 1892, P. 304, 313—321; stat. 57 & 58 Vict. c. 60, s. 503, amended by 63 & 64 Vict. c. 32, ss. 1, 3, and 6 Edw. VII., c. 48, ss. 69, 71, and replacing 17 & 18 Vict. c. 104, ss. 504, 506, amended by 25 & 26 Vict. c. 63, s. 54; and 53 Geo. III. c. 159; Marsden on Collisions, 146 *sq.*, 6th ed.; *The Hopper*, No. 66, 1908, P. 126; *The Duplex*, 1912, P. 8.

(*r*) See *The Henrich Bjorn*, 10 P. D. 44, 52; 11 App. Cas. 270, 279, 282.

(*s*) Abbott on Merchant Shipping, 476, 5th ed., 283 *sq.*, 14th ed.; *The Elin*, [illegible] 30, 129); *R.* v. *Judge of [illegible] London Court*, 25 Q. B. [illegible]

(*t*) Stat. 57 [illegible] Vict. c. 60, s. 167 (1, 3). [illegible] Vict. c. 104 [illegible] 10, s. 10.

(*u*) Stat. [illegible] 57 & 58 Vict. [illegible] 167, 2, 3; [illegible] act, 40, s. [illegible] *Insurance Company* [illegible] 38; *The Ottawa*, [illegible] 48; *The Bann*, [illegible] 1867, 223.

(*x*) *The Newman*, [illegible]; *The Ocean*, 2 W. Rob. 365; *The India*, [illegible] N. S., P. M. & A. 85; *The Ripon City*, 4 App. Cas. 356; *The Henrich Bjorn*, 10 P. D. 44; 11 App. Cas. 270. The civil law and the laws of those countries which have adopted its principles, give a maritime lien for necessaries supplied to a ship; Abbott on Merchant Shipping, 108, 5th ed., 177, 14th ed.; 1 Maude & Pollock on Merchant Shipping, 96, 4th ed. The American law gives a maritime lien for necessaries supplied to foreign ships: see *The General Smith*, 4 Wheaton, 438; *The Brig Nestor*, 1 Summer, 73. The Scotch maritime law appears to be the same as our own; *Currie* v. *McKnight*, 1897, A. C. 97.

(*y*) *The Scotia*, 1903, A. C. 501.

(*z*) *The Parlement Belge*, 5 P. D. 197; *The Jassy*, 1906, P. 270.

Bottomry.

by a bottomry bond. Bottomry is a contract whereby a vessel is hypothecated by her owner or master for the payment, in the event of her voyage terminating successfully, of money advanced to him for the necessary use of the vessel, together with interest; which interest in consideration of the risk incurred, is generally far beyond five per cent., formerly the legal rate, and is known as maritime interest. The name of bottomry is given to such a contract because the ship's bottom or keel is said to be pledged thereby (*a*). It is of the essence of bottomry that the lender should take upon himself the maritime risk; that is, that the money should be repayable only in the event of the ship's safe arrival (*a*). A bottomry bond does not pass the property in the ship, but attaches a claim upon her enforceable, like any other maritime lien, by an admiralty action *in rem* (*b*). Bottomry bonds are usually given by the masters of ships at foreign ports to raise money not procurable otherwise for necessary repairs to the vessel (*c*). The master of a ship may charge her with the repayment of money advanced upon bottomry in a case of necessity, but not otherwise; and only after communicating with her owner, if communication be practicable (*d*). And to give validity to a bottomry bond given by a ship's master there must be not only the necessity of obtaining what is requisite to enable the ship to proceed on her voyage, but also the necessity of raising the money upon bottomry on account of the impossibility of procuring it in any other way (*e*). A bottomry

Maritime interest.

(*a*) *The Atlas*, 2 Hagg. 48, 52, 57, 73; *Stainbank* v. *Fenning*, 11 C. B. 51, 87–89; *Stainbank* v. *Shepard*, 13 C. B. 418.

(*b*) *Stainbank* v. *Shepard*, 13 C. B. 418, 441, 442.

(*c*) *The Zodiac*, 1 Hagg. 325.

(*d*) *Kleinwort & Co.* v. *Cassa Marítima of Genoa*, 2 App. Cas. 156.

(*e*) *The Nelson*, 1 Hagg. 169, 175; *The Reliance*, 3 Hagg. 74; *The Prince of Saxe Coburg*, 3 Moo. P. C. 1; *The Karnak*, L. R. 2 A. & E. 289, 2 P. C. 505; *The Pontida*, 9 P. D. 102, 177.

bond given by the owner of a ship must be based on a like necessity in order to create a lien giving the bondholder priority to mortgagees (*f*). Either the owner or master may make himself personally liable as well as the ship upon a bottomry contract (*g*). But the master has no authority to make the owner, as well as the ship, liable upon a bottomry bond; he can bind the ship only when the necessity arises (*h*). The master of a ship has no authority to sell her except in a case of urgent necessity (*i*).

Sale of ship by master.

It may be mentioned that the general principles on which the priority of competing maritime liens will be determined (*k*) are that, of liens arising *ex contractu* or *quasi ex contractu* for services voluntarily rendered to the ship, the last created in order of time shall first be satisfied, whilst liens arising *ex delicto* for damage done by the ship rank in the order in which they were in point of time incurred, and that for the purposes of the attachment of a maritime lien, the *res* affected thereby is the ship with all the claims thereon, whether by way of mortgage or previous maritime lien, which

Priority of maritime liens between themselves.

(*f*) *The Duke of Bedford*, 2 Hagg. 294; *The Royal Arch*, Swab. 269.

(*g*) *Willis* v. *Palmer*, 7 C. B. N. S. 390, 361; Williams & Bruce's Admiralty Practice, 37, n. (*b*), 3rd ed.

(*h*) *Stainbank* v. *Fenning*, 11 C. B. 51, 88, 89; *Stainbank* v. *Shepard*, 13 C. B. 418. The master may, however, render the owner personally liable to repay money advanced on bottomry, by giving bills of exchange drawn on the owner as a collateral security; in which case, if the bills are honoured, the bottomry is discharged, and, though the ship arrive, the maritime interest is not payable; *Stainbank* v. *Shepard*, 13 C. B. 343, 444.

(*i*) As where a ship has put into port in need of extensive repairs and the master can raise no money on bottomry or otherwise, and communication with the owner is impracticable; see *The Segredo*, otherwise *Eliza Cornish*, 1 Spk. Ecc. & Ad. 30, 46; *The Glasgow*, Swab. 115; *The Margaret*, *ibid.* 382.

(*k*) As to the question how far these principles may be modified by priority in instituting proceedings and obtaining judgment, see *The Saracen*, 6 Moo. P. C. 56, 75; *The Markland*, L. R. 3 A. & E. 330; *The Africano*, 1894, P. 141; *The Veritas*, 1901, P. 304, 307.

together constitute the full ownership thereof (*l*). For example, of bottomry bonds the last created is the first to be paid (*m*); a bottomry bond takes precedence of a prior mortgage (*n*) and a maritime lien for prior salvage of the ship (*o*), but is postponed to a maritime lien for subsequent salvage (*p*). Maritime liens for collision appear to rank as between themselves, according to the date of the collision (*q*): but a lien for collision takes precedence of all previous mortgages and of all maritime liens for services previously rendered (*r*); though it is postponed to any increase in the value of the vessel owing to repairs effected under a subsequent bottomry bond (*s*) and apparently to a lien for subsequent salvage (*t*). The lien for mariners' wages has, however, a special priority and is preferred to a lien for a subsequent bottomry bond (*u*); and the lien for the master's wages and disbursements ranks next to that for mariners' wages and appears to enjoy a similar preference (*x*): but these liens must give place to a lien for collision (*y*). A shipwright's possessory lien at common law for repairs (*z*) is subject to all maritime liens attaching upon the vessel at the time when it comes into his possession, but not to the maritime liens for

(*l*) *Harmer* v. *Bell* (*The Bold Buccleugh*), 7 Moo. P. C. 267, 285; *The Veritas*, 1901, P. 304, 312, 313.

(*m*) *The Sydney Cove*, 2 Dodson Adm. 1; *The Constancia*, 10 Jur. 845.

(*n*) *The Duke of Bedford*, 2 Hagg. Adm. 294.

(*o*) *The Selina*, 2 Notes of Cases, 18.

(*p*) *The William F. Safford*, Lush. Adm. 69, 71.

(*q*) Maclachan on Merchant Shipping 788, 5th ed.

(*r*) *The Veritas*, 1901, P. 304, 313.

(*s*) *Harmer* v. *Bell* (*The Bold Buccleugh*), 7 Moo. P. C. 267, 285.

(*t*) See *The Veritas*, 1901, P. 304, 313, 315; Maclachan on Merchant Shipping, 790, 5th ed.

(*u*) *The Constancia*, 10 Jur. 845; *The Union* Lush. Adm. 128.

(*x*) *The Tagus*, 1903, P. 44; see *The Daring*, L. R. 2 A. & E. 260, 262.

(*y*) *The Elin*, 8 P. D. 39, 129, deciding that a lien on a foreign ship for collision takes precedence over a lien for mariners' wages subsequently earned.

(*z*) *Ante* p. 63.

mariners' and master's wages subsequently earned (*a*).

There are also claims which may be enforced against a ship under the admiralty jurisdiction as extended by statute (*b*), but do not give rise to any maritime lien: as claims for towage (*c*) or for necessaries supplied to a foreign ship; or to any ship whose owner is not domiciled in England or Wales, elsewhere than in the port to which she belongs (*d*). Such claims do not attach upon the ship at the time they arise or until the ship is arrested in the action to enforce them (*e*). They cannot therefore be enforced against the ship, if her ownership be transferred before her arrest. For the ship can only be arrested on such claims while she remains the property of an owner personally liable to satisfy them (*f*).

Claims against a ship giving no maritime lien.

The Court of Admiralty also had jurisdiction, exercisable by process *in rem*, in a cause of possession to take a ship out of the possession of a wrong-doer, and put her into the possession of the rightful owner (*g*). And a statute of the year 1840 gave to

Admiralty jurisdiction to give possession of a ship.

(*a*) *The Turgeste*, 1903, P. 26, 33.

(*b*) Stats. 3 & 4 Vict. c. 65, s. 6; 24 Vict. c. 10, s. 5; 1 & 2 Geo. V. c. 41, ss. 1, 3.

(*c*) *The Princess Alice*, 3 W. Rob. 138; see *The Henrich Bjorn*, 10 P. D. 52, 53; 11 App. Cas. 283; *Westrup* v. *Great Yarmouth Steam Carrying Co.*, 43 Ch. D. 241.

(*d*) *The Alexander*, 1 W. Rob. 346, 360; *The Sophie*, *ibid.* 368, 369; *The Pacific*, Br. & L. 243; *The Two Ellens*, L. R. 4 P. C. 161; *The Rio Tinto*, 9 App. Cas. 356; *The Henrich Bjorn*, 10 P. D. 44, 54; 11 App. Cas. 270, 277; *The Mecca*, 1895, P. 95; *Foong Tai* v. *Buckmeister*, 1908, A. C. 158.

(*e*) See *The Celia*, 13 P. D. 82; *The Africano*, 1894, P. 141.

(*f*) See note (*d*), above.

(*g*) *Re Blanchard*, 2 B. & C. 214; *The Lagan*, 3 Hagg. Adm. Rep. 118. Formerly this jurisdiction did not extend to the decision of questions of title or ownership, but was confined to effecting transfer of possession. It could not therefore be exercised in cases where conflicting claims of title or ownership were asserted in good faith; *The Warrior*, 3 Dod. 288; *The Pitt*, 1 Hagg. A. R. 240; *The John*, 2 Hagg. A. R. 305; see also *The Guardian*, 3 Rob. 93; *The Aurora*, *ibid.* 133; *The Sisters*,

the Court of Admiralty jurisdiction to decide all questions as to the title to or ownership of any ship or vessel arising in any cause of possession, salvage, damage, wages, or bottomry, which should thereafter be instituted in the said Court (*h*). The rightful owner of a ship in the possession of another is thus enabled to assert his title thereto in an admiralty action *in rem* obtaining the arrest of the ship, and to recover possession of her upon establishing his claim (*i*). The Court of Admiralty also possessed an exceptional jurisdiction in the case of part owners of a ship, to give possession of the ship to the owners of a majority of the shares, but to restrain them from sending the ship on a voyage against the will of the owners of the minority of shares, without giving security for her safe return. This jurisdiction was enforceable by arrest of the ship in a cause of possession or restraint as the case might be (*k*). And the Admiralty Court Act, 1861 (*l*), conferred on the Court of Admiralty jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered in any port of England or Wales, or any share thereof; and it empowered that court to settle all accounts outstanding and unsettled between the parties in relation thereto, and to

Admiralty jurisdiction between co-owners of a ship.

ibid. 213. The Court would, however, in a cause of possession, decide questions of title depending on the law of prize: *The Countess of Lauderdale*, 1 Rob. 283; *The Victoria*, Edw. 97.

(*h*) Stat. 3 & 4 Vict. c. 65, s. 4.

(*i*) See *The Segredo*, otherwise *Eliza Cornish*, 1 Spk. Ecc. & Ad. 36; *The Glasgow*, Swab. 145; *The Empress*, *ibid.* 160; *The Margaret Mitchell*, *ibid.* 282; Rules of the Supreme Court, 1883, Appendix A. Pt. III. s. 6, II. No. 9.

(*k*) *Re Blanchard*, 2 B. & C. 244, 248; *The Apollo*, 1 Hagg. 306; *The Calcutt*, 1 W. Rob. 61; *The Kent*, Lush. 395; *The England*, 12 P. D. 32; *The Condor*, 1900, P. 47. The original jurisdiction of the Court of Admiralty did not extend to the determination of questions of account or title between co-owners; *Hall v. Goodson*, 2 Mer. 77; *The Apollo*, 1 Hagg. 313; *Castelli v. Cook*, 7 How. 89, 97.

(*l*) Stat. 24 Vict. c. 10.

direct the ship or any share thereof to be sold, and to make such order in the premises as to the court should seem fit (*m*). The same Act also gave the Court of Admiralty jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854 (*n*).

Admiralty jurisdiction of High Court of Justice.

By the Judicature Act of 1873 the jurisdiction of the High Court of Admiralty was transferred to and vested in the High Court of Justice (*o*), as from the 1st of November, 1875 (*p*); and all matters and causes which would have been within the exclusive cognizance of the Court of Admiralty were assigned to the Probate, Divorce and Admiralty Division of the High Court (*q*). All suits which were commenced by a cause *in rem* or *in personam* in the Court of Admiralty are now instituted by a proceeding called an action (*r*). Some of the county courts now possess Admiralty jurisdiction (*s*). Under the Maritime Conventions Act, 1911 (*t*), proceedings in respect of damages for loss of life or personal injury caused by any ship (*u*) may be brought in any court of Admiralty jurisdiction either in *rem* or *in personam*.

County courts.

Loss of life or personal injury caused by a ship.

Charter-party.

Sometimes a vessel is hired for a given voyage. The instrument by which such hiring is effected is termed a charter-party (*x*). Whether the legal

(*m*) Sect. 8; *The Hermaud*, 1895, P. 281.

(*n*) Sect. 11.

(*o*) Stat. 36 & 37 Vict. c. 66, s. 16.

(*p*) Stat. 37 & 38 Vict. c. 83.

(*q*) Stat. 36 & 37 Vict. c. 66, s. 31.

(*r*) Rules of the Supreme Court, 1883, Order I., rule 1.

(*s*) Stats. 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51.

(*t*) Stat. 1 & 2 Geo. V. c. 57, s. 5; *The Caliph*, 1912, P. 213. As regards loss of life (as to which see next chapter), such proceedings could not previously be brought *in rem*: *The Vera Cruz* (*No. 2*), 9 P. D. 96, affirmed, 10 App. Cas. 59.

(*u*) See stat. 24 Vict. c. 10 s. 7; *The Sylph*, L. R. 2 A. & E. 24; *The Theta*, 1891, P. 280; *The Rigel*, 1912, P. 99.

(*x*) The stamp duty on a charter-party is now sixpence; stat. 54 & 55 Vict. c. 39, First Schedule.

possession of the ship passes to the hirer (or charterer, as he is called) ends on the stipulations contained in the charter-party, such as whether the charterer or the owner is to provide the seamen, and keep the vessel in order (*y*). Where a merchant ship is open to the conveyance of goods generally, it is called a *general ship*. The receipt for the goods given by the master is called the *bill of lading*: it states that the goods are to be delivered to the consignee or his assigns; and by the custom of merchants, the bill of lading, when endorsed by the consignee with his name, becomes a negotiable instrument the delivery of which passes the property in the goods (*z*): but it was formerly held that the right to sue upon the contract contained in the bill of lading to carry and deliver the goods did not pass by the indorsement (*a*). It is, however, now enacted that every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to and vested in him all right of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself (*b*). The money payable for the hire of a ship, or for the carriage of goods in it, is the *freight*, which, whether accrued or accruing, is assignable in the same manner as any other ordinary chose in action (*c*). But in the case of a mortgage of a ship,

General ship.

Bill of lading.

Freight.

Right of mortgagee to freight.

(*y*) *Dean* v. *Hogg*, 10 Bing. 345; 33 R. R. 443; *Fenton* v. *City of London Steam Packet Company*, 8 Ad. & Ell. 835.

(*z*) *Caldwell* v. *Ball*, 1 T. Rep. 205, 216; 1 R. R. 187; see *ante*, p. 74.

(*a*) *Thompson* v. *Dominy*, 14 Mee. & Wels. 403.

(*b*) Stat. 18 & 19 Vict. c. 111, s. 1. It has been held that this enactment does not place the indorsee of a bill of lading, to whom it has been delivered by way of pledge only, in the position of a party to the contract contained therein; *Sewell* v. *Burdick*, 10 App. Cas. 74.

(*c*) *Douglas* v. *Russell*, 4 Sim. 524; 1 M. & K. 488; 33 R. R.

the mortgagee whose mortgage is first registered, obtains, by taking actual (*d*) or constructive (*e*) possession, a legal right to the freight, with all the advantages which equity gives to a legal owner, in the event of a conflict of claims (*f*). The delivery of goods imported from foreign parts, and the lien of the shipowner for their freight, are now regulated by the provisions of the Merchant Shipping Act, 1894 (*g*).

Bottomry bond on ship, freight and cargo.

The necessity, which authorizes the master of a ship to bind her by way of bottomry, may authorize him to hypothecate freight and cargo along with the ship by a bottomry bond. But he can only so bind the cargo, with prospect of benefit to the cargo (*h*); and before doing so he must communicate with the cargo owners if practicable (*i*).

Respondentia.

Respondentia is a contract of similar nature to bottomry, but entered into with respect to cargo only. At common law a contract of respondentia confers no right of property in or lien upon the goods hypothecated, the borrower only being personally liable in the event of the safe termination of the voyage (*k*). But the holder of a respondentia bond given by the master of a ship and warranted by the necessity of the case, may enforce it against the cargo under the admiralty jurisdiction of the Court (*l*).

Sale of cargo by ship's master.

The master of a ship has no authority to sell any part of the

135; *Leslie* v. *Guthrie*, 1 New Cases, 697; *Lindsay* v. *Gibbs*, 22 Beav. 522.

(*d*) *Brown* v. *Tanner*, L. R. 3 Ch. 597.

(*e*) *Rusden* v. *Pope*, L. R. 3 Ex. 269.

(*f*) *Liverpool Marine Credit Company* v. *Wilson*, L. R. 7 Ch. 507; *Wilson* v. *Wilson*, L. R. 14 Eq. 32; *Keith* v. *Burrows*, 2 C. P. D. 163; 2 App. Cas. 636.

(*g*) *Ante*, p. 64.

(*h*) *The Gratitudine*, 3 Rob. 240; *The Lizzie*, L. R. 2 A. & E. 254; *The Karnak*, *ib.* 289; 2 P. C. 505; *The Onward*, L. R. 4 A. & E. 38; *The Pontida*, 9 P. D. 102, 177; *The Chioggia*, 1898, P. 1.

(*i*) *Kleinwort & Co.* v. *Cassa Maritima of Genoa*, 2 App. Cas. 156.

(*k*) 2 Black. Comm. 457; *Busk* v. *Fearon*, 4 East, 319.

(*l*) *Cargo Ex Sultan*, Swab. 504.

cargo, except in a case of necessity, where he cannot communicate with the cargo-owner (*m*).

General average.

An incident of the carriage of goods by sea is the liability of the several persons interested in the ship, freight, and cargo to contribute rateably to indemnify a person who has suffered loss by any extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure (*n*). Such a contribution is called a general average contribution. The *jettison*, or throwing overboard of part of the cargo in order to save the ship, is the simplest instance of a case of general average (*o*). But the principle extends to all loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo (*p*). The shipowner has a lien on cargo liable to contribution for general average (*q*). But no maritime lien arises from liability to general average contribution (*r*). Where sacrifices are made or expenses incurred to preserve particular articles only—for instance, the cargo but not the ship—the owners of the articles saved are liable to what is called particular average; for which a like lien is given as in the case of general average (*s*).

Jettison.

Lien for general average.

Particular average.

(*m*) *Australian Steam Navigation Company* v. *Morse*, L. R. 4 P. C. 222, 228; *Atlantic Mutual Insurance Company* v. *Huth*, 16 Ch. D. 474, 481.

(*n*) Stat. 6 Edw. VII. c. 41, s. 66 (2), codifying the law of marine insurance.

(*o*) See *Butler* v. *Wildman*, 3 B. & Ald. 398; 22 R. R. 435; *Hallett* v. *Wigram*, 9 C. B. 580; *Strang, Steel & Co.* v. *Scott & Co.*, 14 App. Cas. 601.

(*p*) *Birkley* v. *Presgrave*, 1 East 220; 6 R. R. 256; *Stevenson* v. *Wallace*, 13 Q. B. D. 69; 10 App. Cas. 404; *The Roma*, 1895, P. 125; *Montgomery* v. *Indemnity, &c., Insurance Co.*, 1902, 1 K. B. 734, 740; see n. (*n*) above.

(*q*) *Simonds* v. *White*, 2 B. & C. 811; 26 R. R. 560; See *Huth* v. *Lamport*, 16 Q. B. D. 442, 735.

(*r*) *The North Star*, Lush. 45.

(*s*) *Hingston* v. *Wendt*, 1 Q. B. D. 367; stat. 6 Edw. VII. c. 41, s. 64 (2).

CHAPTER IV.

OF CHATTELS WHICH DESCEND TO THE HEIR.

THERE are some kinds of choses in possession which form exceptions to the general rules governing the ownership of goods, and their devolution upon their owner's death. These consist of certain chattels so closely connected with land that they partake of its nature, pass along with it, whenever it is disposed of, and, at common law, descended along with it, when undisposed of, to the heir of the deceased owner. Under the Land Transfer Act, 1897 (*a*), freehold estates in fee simple now devolve on the tenant's death upon his executors or administrators, who hold them, subject to the payment of his debts, on trust for his heir or devisee. And the devolution on death of such chattels as at common law descended to the heir is of course modified so as to correspond with the devolution of the land to which they relate. The chattels which thus form exceptions are the subject of the present chapter: they consist principally of *title deeds*, *heirlooms*, *fixtures*, *chattels*, *vegetable*, and *animals feræ naturæ*. Of each in their order.

Exceptions to the general rules.

Title deeds, though movable articles, are not strictly speaking chattels. They have been called the sinews of the land (*b*), and are so closely connected with it that they will pass, on a conveyance of the land, without being expressly mentioned: the property in the deeds passes out of the vendor to the purchaser simply by the grant of the land

Title deeds pass by the conveyance of the lands

(*a*) Stat. 60 & 61 Vict. c. 65, ss. 1–4; Williams, R. P. 20, 87, 219 *sq.*, 21st ed.

(*b*) Co. Litt. 6 a.

itself (*c*). In like manner a devise of lands by will entitled the devisee to the possession of the deeds; and if a tenant in fee simple died intestate, the title deeds of his lands descended along with them to his heir at law (*d*). Title deeds of freehold estates in fee simple now devolve in the same manner as the estates themselves. In former times, when warranty was usually made on the conveyance of land (*e*), the rule was that the feoffor should retain all deeds containing warranties made to himself or to those through whom he claimed, and also all such deeds as were material for the maintenance of the title to the land (*f*). But if the feoffment was made without any warranty, the feoffee was entitled to the whole of the deeds; for the feoffor could receive no benefit by keeping them, nor sustain any damage by delivering them (*g*). Warranties have now fallen into disuse; but the principle of the rule above stated still applies when the grantor has any other lands to which the deeds relate, or retains any legal interest in the lands conveyed; for in either of these cases he has still a right to retain the deeds (*h*). And it is now expressly enacted (*i*), that where the vendor retains any part of an estate, to which any documents of title relate, he shall be entitled to retain such documents. If the grantor should retain merely an equitable right to redeem the lands, as in the case of a mortgage in fee simple, it has been said that this equitable right is a sufficient interest

(*c*) *Harrington* v. *Price*, 3 B. & Ad. 170; *Philips* v. *Robinson*, 4 Bing. 106; 37 R. R. 374; S. C. 12 Moore 308; *Williams & Duchess of Newcastle's Contract*, 1897, 2 Ch. 144, 148.

(*d*) Wentworth's Office of an Executor, 14th ed. 153; Wms. Exors., 724, 7th ed.; 548, 10th ed.

(*e*) See Williams, R. P. 588, 21st ed.

(*f*) *Buckhurst's case*, 1 Rep. 1 b.

(*g*) 1 Rep. 1 a.

(*h*) Bro. Abr. tit. Charters de Terre, pl. 53; *Yea* v. *Field*, 2 T. Rep. 708; 1 R. R. 603; see however Sugd. Pend. and Pur. 367, 13th ed.; 441, 442, 14th ed.; 2 Prest. Conv. 466.

(*i*) Stat. 37 & 38 Vict. c. 78, s. 2, sub-s. 5; see 1 Wms. V. & P. 681 *sq.*, 2nd ed.

in the lands to authorize him to withhold the deeds, unless they are expressly granted to the mortgagee (*j*). It is very questionable, however, whether a legal right ought to be attached to an interest merely equitable. And the doctrine last mentioned is opposed by more recent decisions (*k*). If anyone obtained title deeds, from a person other than the legal owner, by purchase for value without notice of any informality in the other's title, a court of equity would not order him to deliver up the deeds, even to their legal owner (*l*). But the plea of purchase for value without notice is no defence to a claim by the owner of title deeds to recover possession of them at law (*m*); and, since the Judicature Acts (*n*), such a claim may be enforced in any Division of the High Court (*o*).

When the conveyance is by way of use.

If a conveyance of lands should be made by way of use, thus, if lands should be granted to A. and his heirs to the use of B. and his heirs, it has been said that the title deeds of the land will belong to A., the grantee; because, although the Statute of Uses (*p*) conveys the legal estate in the lands from A. to B., it does not affect the title deeds, which must consequently still remain vested in A. (*q*). But this doctrine has been justly questioned, on the ground that the legislative conveyance from A. to B., effected by the Statute of Uses, ought to be at least as powerful as the common law conveyance of the lands to A.; and if the latter conveyance can carry with it the deeds relating to the land, the

(*j*) *Davies* v. *Vernon*, 6 Q. B. 443, 447.

(*k*) *Goode* v. *Burton*, 1 Exch. Rep. 189; *Newton* v. *Beck*, 3 H. & N. 220; see Williams's Conveyancing Statutes, 150; *Re Ingham*, 1893, 1 Ch. 352, 361.

(*l*) *Head* v. *Egerton*, 3 P. W. 280; *Heath* v. *Crealock*, L. R. 10 Ch. 22.

(*m*) See *Newton* v. *Beck*, 3 H. & N. 220.

(*n*) *Ante*, p. 28.

(*o*) *Re Cooper*, 20 Ch. D. 611; *Re Ingham*, 1893, 1 Ch. 352, 361.

(*p*) 27 Hen. VIII. c. 10.

(*q*) 1 Sand. Uses, 4th ed. 119; 5th ed. 117.

former conveyance should be considered as powerful enough to do the same (*r*); and it has accordingly been so decided in a case in Ireland (*s*).

When the lands are settled.

The tenant of an estate in fee simple in lands possesses the highest interest which the law of England allows to any subject; and such a tenant possesses also an absolute property in the title deeds, which he may destroy at his pleasure, or sell for the value of the parchment (*t*). But if the lands to which deeds relate should be settled on any person for life or in tail, a qualified ownership will arise with respect to the deeds, different in its nature from that simple property which is usually held in chattels personal. As the lands are now held for a limited estate, so a limited interest in the deeds belongs to the tenant. The tenant for life or in tail, when in possession of the lands, being the freeholder for the time being, is entitled also to the possession of the deeds (*u*); whereas the tenant for a mere term of years of whatever length, not having the freehold or fendal possession of the lands, has no right to deeds which relate to such freehold (*x*); although deeds relating only to the term belong to such a tenant, and will pass, without any express grant, to the assignee of the term (*y*). The tenant for life or in tail in possession, though entitled to the possession or custody of the deeds which relate to the inheritance, has no right to injure or part

(*r*) Sugd. Vend. & Pur. 366, 13th ed.; 440, 14th ed.; Co. Litt. 6 a, n. (4).

(*s*) *Malone* v. *Minoughan*, 14 Ir Com. Law. Rep. 540, dissentiente Hayes, J.

(*t*) Cro. Eliz. 496.

(*u*) *Ford* v. *Peering*, 1 Ves. jun. 76; *Strode* v. *Blackburne*, 3 Ves. 225; *Garner* v. *Hannyngton*, 22 Beav. 627; *Allwood* v. *Heywood*, 1 H. & C. 745; *Leathes* v. *Leathes*, 5 Ch. D. 221. It is now held that an equitable tenant for life is entitled to the custody of the title deeds; *Re Burnaby's Settled Estates*, 42 Ch. D. 621; *Re Wythes*, 1893, 2 Ch. 369.

(*x*) *Churchill* v. *Small*, 8 Ves. 323; *Harper* v. *Faulder*, 4 Mad. 129, 138; 20 R. R. 279; *Wiseman* v. *Westland*, 1 You. & Jer. 117; 30 R. R. 765; *Hotham* v. *Somerville*, 5 Beav. 360.

(*y*) *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

with them (*z*); he has an interest in the title deeds correspondent only to his estate in the lands: and if he should part with the deeds, even for a valuable consideration, the remainder-man, on coming into possession of the lands, will nevertheless be entitled to the possession of the deeds, just as if the tenant for life or in tail had kept them in his own custody (*a*).

Heir-looms. Heir-looms, strictly so called, are now very seldom to be met with. They may be defined to be such personal chattels as go, by force of a *special custom*, to the heir, along with the inheritance, and not to the executor or administrator of the last owner (*b*). The owner of an heir-loom cannot by his will bequeath the heir-loom, if he leave the land to descend to his heir; for in such a case the force of the custom will prevail over the bequest, which, not coming into operation until after the decease of the owner, is too late to supersede the custom (*c*). But the owner of an heir-loom may dispose of it in his lifetime (*d*). According to some authorities heir-looms consist only of bulky articles, such as tables and benches fixed to the freehold (*e*); but such articles would more properly fall within the class of fixtures, of which we shall next speak. The ancient jewels of the crown are heir-looms (*f*). Crown jewels. And if a nobleman, knight or esquire be buried in a church, and his coat armour or other ensigns of honour belonging to his degree be set up, or if a tombstone be erected to his memory, his heirs may maintain an action against any person who may take Coat armour. Tombstone.

(*z*) Bro. Abr. tit. Charters de Terre, pl. 36. As to production see *Davies* v. *Earl of Dysart*, 20 Beav. 105; Williams' Conveyancing Statutes, 13.

(*a*) *Davies* v. *Vernon*, 6 Q. B. 443; *Easton* v. *London*, 12 W. R. 53; 33 L. J. Exch. 34.

(*b*) See Co. Litt. 18 b.; *Pollgreen* v. *Evans*, 1 Cal. xxxix.; 1 Vern. 273.

(*c*) Co. Litt. 185 b.

(*d*) 2 Black. Comm. 429.

(*e*) Spelman's Glossary, voce Heir-looms. See Wms. Exors., 720 *sq.*, 7th ed.; 545, 10th ed.

(*f*) Co. Litt. 18 b.

Deed boxes.

or deface them (*g*). The boxes in which the title deeds of land are kept are also in the nature of heir-looms, and will belong to the heir or devisee of the land; for such boxes "have their very creation to be the houses or habitations of deeds" (*h*); and accordingly a chest made for other uses will belong to the executor or administrator of the deceased, although title deeds should happen to be found in it. It appears that heir-looms and things in the nature of heir-looms that would descend to the heir along with certain land, will now devolve in the same way as the land (*i*).

Popular use of the term "heir-loom."

In popular language the term "heir-loom" is generally applied to plate, pictures or articles of property which have been assigned by deed of settlement or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed. Of this kind of settlement more will be said hereafter (*k*).

Fixtures.

Fixtures are such movable articles or chattels personal as are fixed to the ground or soil, either directly or indirectly by being attached to a house or other building. The ancient common law, regarding land as of far more consequence than any chattel which could be fixed to it, always considered everything attached to the land as part of the land itself,—the maxim being *quicquid plantatur solo, solo cedit* (*l*). Hence it followed that houses themselves, which consist of aggregates of chattels personal (namely, timber and bricks) fixed to the

(*g*) Co. Litt. 18 b.

(*h*) Wentworth's Office of an Executor, 15, 14th ed.

(*i*) *Ante*, pp. 2, n. (*i*), 137.

(*k*) See *post*, Part IV. ch. i.

(*l*) See 4 Rep. 64 a; 1 Lord Raym. 738; *Mackintosh* v. *Trotter*, 3 M. & W. 184, 186; Wms. on Exors., 727 *sq.*, 7th ed.; 551 *sq.*, 10th ed.; *Re Chesterfield's Settled Estates*, 1911, 1 Ch. 237, 241; *ante*, p. 25, n. (*m*).

land, were regarded as land, and passed by a conveyance of the land without the necessity of express mention; and this is the case at the present day (*m*). So now, a conveyance of a house or other building, whether absolutely or by way of mortgage, and whether taking effect at law or in equity only (*n*), will comprise all ordinary fixtures, such as stoves, grates, shelves, locks, &c. (*o*), and also fixtures erected for the purposes of trade (*p*), without any express mention, unless an intention to withhold the fixtures can be gathered from the context (*q*). And where fixtures are attached by or with the concurrence of a mortgagor of land to any building or soil comprised in the mortgage, they become subject to the mortgagee's security, whether it were a legal mortgage or merely an equitable charge (*r*). So on the decease of a tenant in fee simple, the devisee of the house, or the heir at law in case of intestacy, will in general be beneficially entitled to

(*m*) See Williams, R. P. 34, 21st ed.

(*n*) *Ex parte Barclay*, 5 De G. M. & G. 403; *Meux* v. *Jacobs*, L. R. 7 H. L. 481. It has been held that, where fixtures are attached to land in such circumstances that some other person than the landowner has the right in equity to remove them (as under a hire-purchase agreement), this right of removal will be preferred in equity to the claim of a third person entitled to the land under a subsequent conveyance taking effect *in equity* only from the landowner; *Re Samuel Allen & Sons, Ltd.*, 1907, 1 Ch. 575. Such a right of removal would not, however, take priority over the right of a third person taking the land under a subsequent conveyance *at law*, unless he took with notice of it; see *S.C.*; *ante*, p. 27, Williams, R. P. 181—182, 571, 572, 21st ed.

(*o*) *Colegrave* v. *Dias Santos*, 2 B. & C. 76; S. C. 3 Dowl. & Ry. 255; *Longstaff* v. *Meagoe*, 2 A. & E. 167; *Hitchman* v. *Walton*, 4 M. & W. 409; *Ex parte Barclay*, 5 De G. M. & G. 403; *Mather* v. *Fraser*, 2 K. & J. 536.

(*p*) *Climie* v. *Wood*, L. R. 3 Ex. 257; 4 Ex. 328; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Meux* v. *Jacobs*, L. R. 7 H. L. 481; *Southport and West Lancashire Banking Co.* v. *Thompson*, 37 Ch. D. 64; *Re Yates*, 38 Ch. D. 112.

(*q*) *Hare* v. *Horton*, 5 B. & Ad. 715.

(*r*) *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Cullwick* v. *Swindell*, L. R. 3 Eq. 249; *Longbottom* v. *Berry*, L. R. 5 Q. B. 123; *Hobson* v. *Gorringe*, 1897, 1 Ch. 182; *Monti* v. *Barnes*, 1901, 1 Q. B. 205; *Reynolds* v. *Ashby*, 1904, A. C. 466; *Ellis* v. *Glover and Hobson, Ltd.*, 1908, 1 K. B. 388; cf. *ante*, n. (*a*).

the fixtures set up in it (*s*). These rules, however, apply only to things set up on land as fixtures and so as to be an improvement to the inheritance, and not to chattels temporarily affixed to land or a building in their owner's possession for their more convenient use as chattels: but it is sometimes difficult to determine into which class some particular thing attached to land should fall (*t*).

Fixtures of tenants for years.

The ancient rule respecting fixtures has been greatly relaxed in favour of tenants for terms of years, who are now permitted to remove articles set up by them for the purposes of trade or of ornament or domestic convenience (*u*), provided they remove them before the expiration of their tenancy (*x*).

Agricultural fixtures.

But the old rule long prevailed with regard to agricultural fixtures, which, though set up by the tenant, became, by being fixed to the soil, the property of the landlord (*y*). But by the Landlord and Tenant Act, 1851 (*z*), any farm or other building, engine or machinery erected with the consent *in writing* of the landlord for the time being, either for agricultural purposes or for the purposes of trade and agriculture, shall be the property of the tenant, and shall be removable by him on giving to the landlord or his agent one month's previous

(*s*) Shep. Touch. 470; see 1 Wms. Exors. 731 *sq.*, 7th ed.; 555 *sq.*, 10th ed.; *Elwes* v. *Maw*, 2 Smith, L. C. and notes thereto; *Re Chesterfield's Settled Estates*, 1911, 1 Ch. 237; *ante*, p. 137.

(*t*) See cases cited in notes (*p*), (*r*), above; *Re De Falbe*, 1901, 1 Ch. 523, affd. nom. *Leigh* v. *Taylor*, 1902, A. C. 157; *Lyon* v. *London City & Midland Bank*, 1903, 2 K. B. 135; *Reynolds* v. *Ashby*, 1903, 1 K. B. 87; 1904, A. C. 466; *Crossley, Bros., Ltd.* v. *Lee*, 1908, 1 K. B. 86.

(*u*) *Grymes* v. *Bowyer*, 6 Bing. 437; 34 R. R. 460; *Lambourn* v. *McLellan*, 1903, 2 Ch. 268.

(*x*) *Lyde* v. *Russell*, 1 B. & Ad. 394; 35 R. R. 327; *Weeton* v. *Woodcock*, 7 M. & W. 14; *Leader* v. *Homewood*, 5 C. B. N. S. 546; *Pugh* v. *Arton*, L. R. 8 Eq. 626; *Ex parte Stephens*, 7 Ch. D. 127; *Ex parte Brook*, *In re Roberts* 10 Ch. D. 100; *Leschallas* v. *Woolf*, 1908, 1 Ch. 641; see *Re Glamlir Copper Works, Ltd.*, 1904, 1 Ch. 819.

(*y*) *Elwes* v. *Maw*, 3 East, 38; 6 R. R. 523.

(*z*) Stat. 14 & 15 Vict. c. 25, s. 3.

notice in writing of his intention so to do, subject to the landlord's right to purchase the same by valuation in the manner provided by the Act. And now by the Agricultural Holdings Act, 1908 (*a*), any engine, machinery, fencing or other fixture affixed to a holding within the meaning of the Act (*b*) by a tenant and any building erected by him thereon, for which he is not under this Act or otherwise entitled to compensation (*c*), and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy. But before the removal of any fixture or building, the tenant must pay all rent owing by him, and satisfy all his other obligations to the landlord in respect to the holding; he must not, in such removal, do any avoidable damage to any other building or other part of the holding, and he must make good all damage so occasioned thereby; and he must not remove any fixture or building without giving one month's previous notice in writing to the landlord of his intention to remove it. And at any time before the expiration of such notice, the landlord may elect to purchase any fixture or building comprised therein; when the same shall be left by the tenant, and shall become the property of the landlord, who shall pay to the

Agricultural Holdings Act, 1908.

(*a*) Stat. 8 Edw. VII. c. 28, s. 21 (1), replacing the Agricultural Holdings (England) Act, 1883, stat. 46 & 47 Vict. c. 61, s. 34.

(*b*) In this Act "holding" means any parcel of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral, or in whole or in part cultivated as a market garden, and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord; stat. 8 Edw. VII. c. 28, s. 48 (1). The provisions in the text do not apply to any fixture or building affixed or erected before the 1st Jan., 1884; sect. 21 (2).

(*c*) See ss. 1—9; Williams, R. P. 530—532, 21st ed.

tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by arbitration (*d*). These provisions apply equally to a fixture or building *acquired* by a tenant since the 31st December, 1900 (*e*).

Landlord's interest in fixtures removable by tenant for years.

Fixtures set up and removable by a tenant for years are part of the landlord's reversion, so long as they remain affixed to the land; and it is said that in strictness of law the tenant has only *the right* to remove them before the end of the term (*f*).

Nature of the tenant's interest in such fixtures.

In virtue of this right, however, the tenant is enabled to sell (*g*) or mortgage (*h*) such fixtures as *his fixtures*, either separately from the land, to which they are attached, or together with his own interest in the land. And such fixtures can be seized, sold and severed in execution of a writ of *fi. fa.* against him (*i*); and they will pass in case of his bankruptcy to the creditors' trustee (*k*). But if the trustee in bankruptcy disclaim the lease (*l*), he will lose his right to sever the fixtures (*m*). It has been held that fixtures of this kind, while remaining actually attached to the land, though removable, are not the tenant's goods and chattels strictly so called (*n*), nor an interest in land; and that they might therefore well be sold by oral agreement,

(*d*) Stat. 8 Edw. VII. c. 28, s. 21 (1).

(*e*) Sect. 21 (2), replacing 63 & 64 Vict. c. 50, s. 4.

(*f*) *Heap* v. *Barton*, 12 C. B. 274, 278; *Gibson* v. *Hammersmith Ry. Co.*, 32 L. J. Ch. 337, 342, 343; *Meux* v *Jacobs*, L. R. 7 H. L. 480, 490, 491; *Lee* v. *Gaskell*, 1 Q. B. D. 700, 702. The landlord cannot distrain on them for rent; *Darby* v. *Harris*, 1 Q. B. 895; *Crossley Bros., Ld.* v. *Lee*, 1908, 1 K. B. 86; *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, 1909, 2 K. B. 344; see *ante*, p. 104, and Table annexed.

(*g*) *Hallen* v. *Runder*, 1 C. M. & R. 266.

(*h*) *Meux* v. *Jacobs*, L. R. 7 H. L. 481.

(*i*) *Poole's case*, Salk. 368; see *ante*, p. 107.

(*k*) *Lee* v. *Gaskell*, 1 Q. B. D. 700; *Lambourn* v *McLellan*, 1903, 2 Ch. 268.

(*l*) See Williams, R. P. 522, 21st ed.

(*m*) *Ex parte Stephens*, 7 Ch. D. 127; *Ex parte Brook*, 10 Ch. D. 100.

(*n*) *Lee* v. *Risdon*, 7 Taunt. 191.

without any of the formalities prescribed by the 4th or the 17th section of the Statute of Frauds (*o*). But goods, as defined in the Sale of Goods Act, 1893 (*p*), include things attached to or forming part of land which are agreed to be severed before sale or under the contract of sale; so that sales of such things so to be severed of the value of 10*l*. and upwards appear now to be regulated by the 4th section of that Act (*q*). Any instrument *in writing*, by which fixtures are separately assigned, or charged, upon a sale or mortgage thereof, apart from any interest in the land to which they are attached, is a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882 (*r*), and must be executed and registered in the manner and form provided in those Acts, in order to attain complete validity (*s*). These Acts do not apply to any assignment of fixtures together with a *freehold or leasehold* interest in any land or building to which they are affixed; except only in the case of trade machinery as defined in the Acts, which is to be deemed to be personal chattels, and whereof any disposition, which would be a bill of sale as to any other personal chattels, is to be deemed to be a bill of sale (*t*). But it has been decided that even such trade machinery may well pass, as an accession to the land by the mere conveyance of the land, to which it is attached, and although the land be *copyhold*; and that, if such machinery be conveyed in this way and not by virtue of any express assignment thereof

Written assignment of fixtures, separately from the land is a bill of sale.

(*o*) Stat. 29 Car. II. c. 3; *Lee* v. *Gaskell*, 1 Q. B. D. 700. See as to s. 17, *ante*, p. 81; s. 4 requires contracts for the sale of any interest in land to be put into writing and signed; see *post*, Part II., Ch. II.

(*p*) Stat. 56 & 57 Vict. c. 71, s. 61 (2); *James Jones & Sons, Ld.* v. *Tankerville*, 1909, 2 Ch. 440, 445.

(*q*) See *ante*, p. 81; but cf. *post*, p. 152.

(*r*) Stats. 41 & 42 Vict. c. 31, ss. 4, 5, 7, 8, 10, 11; 45 & 46 Vict. c. 43, ss. 3, 8, 9; all stated in Appendix (A), *post*.

(*s*) See *ante*, pp. 75, 84, 95–98.

(*t*) See stat. 41 & 42 Vict. c. 31, ss. 4, 5, stated in Appendix (A), *post*.

as a separate subject of transfer, the instrument of conveyance is not a bill of sale within the meaning of the Acts (*u*). If a tenant for years sell or mortgage fixtures removable by him, he cannot by surrendering the term deprive the purchaser or mortgagee of the right to remove them within a reasonable time thereafter (*v*). And such fixtures, being an accession to the land, will pass, without express mention, upon any conveyance taking effect at law or in equity of the tenant's interest in the land demised to him, or will become subject to any mortgage of his interest in the land made before the fixtures were set up (*x*); so that if the tenant put up removable fixtures and then mortgage his term, or if he mortgage his term and afterwards put up such fixtures, he will have no right to remove the fixtures as against the mortgagee of the term, though they remain removable as against the landlord (*y*).

Surrender of the term by the tenant.

Such fixtures are an accession to the land in favour of an assignee or mortgagee of the term.

A relaxation of the old rule has also been made in favour of the executors of a tenant for life, who are allowed to remove fixtures set up by their testator for the purposes of trade or of ornament or domestic convenience (*z*). But the rule of the common law still retains much of its force as between the devisee or heir of a tenant in fee simple and his executor or administrator (*a*). Thus a tenant for

Fixtures of tenant for life.

Fixtures of tenant in fee.

(*u*) *Re Yates*, 38 Ch. D. 112; *Re Brooke*, 1894, 2 Ch. 600; cf. *Small* v. *National Provincial Bank of England*, 1894, 1 Ch. 686.

(*v*) *London and Westminster Loan and Discount Co.* v. *Drake*, 6 C. B. N. S. 798; *Saint* v. *Pilley*, L. R. 10 Ex. 137; *Re Glasdir Copper Works, Ld.*, 1904, 1 Ch. 819, 824; see Williams, R. P. 526, 527, 21st ed.

(*x*) *Ante*, p. 143, notes (*n*), (*o*), (*p*), (*r*).

(*y*) *Reynolds* v. *Ashby*, 1903, 1 K. B. 87, 99, affd. 1904, A. C. 466.

(*z*) *Lawton* v. *Lawton*, 3 Atk 14; *Re De Falbe*, 1901, 1 Ch. 523, affd. nom. *Leigh* v. *Taylor* 1902, A. C. 157; *Re Hulse*, 1905 1 Ch. 406; 1 Wms. Exors. 741 *sq.*, 7th ed.; 563 *sq.*, 10th ed

(*a*) See 1 Wms. Exors. 731 *sq.*, 7th ed.; 555 *sq.*, 10th ed.; *Norton* v. *Dashwood*, 1896, 2 Ch 497.

years may remove ornamental chimney-pieces set up by him during his tenancy (*b*); but if erected by a tenant in fee simple, they will pass with the house to the devisee or heir (*c*). So machinery employed in carrying on iron works or collieries may be removed by a lessee for years, if erected by him; but if erected by a tenant in fee simple, such machinery, even though removable without injury to the freehold, will belong to the heir or the devisee of the land (*d*). However it seems that pier glasses fixed by nails, and not let into panels, and hangings fastened up for ornament, will now belong to the executor or administrator of a tenant in fee simple as part of his personal estate (*e*).

When fixtures are demised.

Where fixtures are demised to a tenant along with the house, mill or other building in which they may happen to be, the property in the fixtures still remains in the landlord, subject to the tenant's right to the possession and use of them during his term (*f*); and if they should be severed from the building by the tenant or any other person, or should be separated by accident, the landlord will acquire an immediate right to the possession of them (*g*). In this respect they are subject to the same rules as timber, which, as we shall see, is equally a part of the inheritance until severed, and when cut becomes the personal property of the owner of the fee (*h*). Fixtures, which would descend with the house or building to the heir of the owner

500; *Re D'Falbe, ubi sup.*; *Re Whaley*, 1908, 1 Ch. 65; *Re Chesterfield's Settled Estates*, 1911, 1 Ch. 237.

(*b*) *Bishop* v. *Elliot*, 11 Ex. 113.

(*c*) *Dudley* v. *Warde*, Amb. 113.

(*d*) *Fisher* v. *Dixon*, 12 Cl. & Fin. 312.

(*e*) *Squire* v. *Mayor*, 2 Eq. Ca. Abr. 430, pl. 7; S. C. 2 Freem. 239; *Re D'Falbe, ubi sup.*; cf. *Re Whaley*; *Re Chesterfield's Settled Estates, ubi sup.*

(*f*) *Boydell* v. *M'Michael*, 1 C. M. & R. 177; *Hitchman* v. *Walton*, 4 M. & W. 409.

(*g*) *Farrant* v. *Thompson*, 5 B. & Ald. 826; 24 R. R. 571.

(*h*) *Re Aindle*, 30 Ch. D. 485.

of the fee on intestacy, are not in fact his goods and chattels properly so called (*i*).

Chattels vegetable.

Chattels vegetable consist, as their name imports, of movable articles of a vegetable origin, such as timber, underwood, corn and fruit. All these articles, so long as they remain unsevered from the land, are for many purposes considered as part of it, and are regarded as real, and not as personal, estate accordingly (*k*); and they will pass by a conveyance or devise of the land without express mention (*l*). If, however, the trees should be expressly excepted out of the conveyance, they will remain the personal property of the grantor, although severed only in contemplation of law (*m*); and in like manner the trees alone may be granted by a tenant in fee simple, and will then form the personal property of the grantee, even before they are cut down (*n*). But if a tenant of lands in fee simple should die without having sold or devised them (*o*), the law then draws a distinction between such vegetable products as are the annual results of agricultural labour, and such as are not. The former class are called by the name of *emblements*, and the right to reap them belongs to the executor or administrator of the deceased in exclusion of the heir (*p*); whilst the latter class descend to the heir along with the land (*q*). The reason of the distinction appears to be that as annual crops are mainly the result of labour incurred at the expense of the

Emblements.

(*i*) *Winn* v. *Ingilby*, 5 B. & Ald. 625; 24 R. R. 503; *Hallen* v. *Runder*, 1 C. M. & R. 266; *Lee* v. *Gaskell*, 1 Q. B. D. 700.

(*k*) *Re Ainslie*, 36 Ch. D. 485.

(*l*) Com. Dig. tit. Biens (H).

(*m*) *Herlakenden's case*, 4 Rep. 63 b.

(*n*) Wentworth's Office of an Executor, 14th ed. 148; 1 Wms. Exors. 707, 7th ed.; 534, 10th ed.; *Marshall* v. *Green*, 1 C. P. D. 35; *James Jones & Sons, Ld.* v. *Tankerville*, 1909, 2 Ch. 449.

(*o*) As to a devisee, see *Rudge* v. *Winnall*, 12 Beav. 357; *Cooper* v. *Woolfit*, 2 H. & N. 122.

(*p*) Com. Dig. tit. Biens (G); 1 Wms. Exors. 709 *sq.*, 7th ed.; 536 *sq.*, 10th ed.

(*q*) See *ante*, p. 137.

owner's personal estate, his personal estate ought to reap the benefit of the crop which results (*r*). Accordingly crops of corn, and grain of all kinds, flax, hemp, and everything yielding an artificial annual profit produced by labour, belong to the executor or administrator as against the heir; whilst timber, fruit trees, grass, and clover, which do not repay within the year the labour by which they are produced, belong to the heir as part of the land (*s*). The right to emblements also belongs to the executor or administrator of a tenant for life (*t*), and to a tenant at will if dismissed from his tenancy before harvest (*u*). The claims of tenants at rack rent, whose tenancies may determine by the death or cesser of the estate of tenants for life, or for any other uncertain interest, are now provided for by the Landlord and Tenant Act, 1851, giving the tenants at rack rent a right to continue to hold until the expiration of the current year of their tenancy (*x*).

Emblements seizable under *fi. fa.*

Growing crops, which are emblements, are seizable at common law under the writ of *fi. fa.* (*y*) in execution of a judgment against their owner (*z*): but standing timber and crops, which are not emblements, are not so seizable (*a*). In the Sale

Sale of emblements, timber, etc.

(*r*) Wentworth's Office of an Executor, 14th ed. 147.

(*s*) See *Graves* v. *Weld*, 5 B. & Ad. 105; 39 R. R. 419; *ante*, p. 137.

(*t*) Williams, R. P. 130, 21st ed.

(*u*) *Ibid.* p. 500.

(*x*) Stat. 14 & 15 Vict. c. 25, s. 1. See Williams, R. P. 130 21st ed.

(*y*) *Ante*, p. 107.

(*z*) *Wharton* v. *Naylor*, 12 Q. B. 673. 690; and cases cited in next note. Such seizures are subject to the provisions of stat. 56 Geo. III. c. 50. By stat. 14 & 15 Vict. c. 25, s. 2, growing crops of the tenant of any farm or lands seized and sold under a writ of *fi. fa* are liable, so long as they remain on such farm or lands, in default of sufficient distress of the tenant's goods, to the rent accruing due to the landlord after such seizure and sale; see *ante*, p 107, n. (*p*). As to distraining on growing crops for rent, see *ante*, p. 104, and Table annexed thereto.

(*a*) Holt, C. J., *Poole's case*, 1 Salk. 368; *Evans* v. *Roberts*,

of Goods Act, 1893 (*b*), unless the context or subject matter otherwise requires, the term *goods* includes emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. And it appears that the sale of emblements (*c*) or of standing timber to be cut down at once is a sale of goods within the meaning of that Act (*d*). But it has been held that this enactment does not prevent a sale of things, which are part of the land, as of slag and cinders forming part of the soil and to be removed by the purchaser under the contract, from being a sale of an interest in land (*e*), if the terms of the contract require this construction to be placed upon it (*f*). Having regard to this decision, it appears to be a question whether a sale immediately vesting the property in the purchaser of timber to be left to grow (*g*), or of growing crops, which are not emblements, to be left to ripen (*h*), or of a building to be taken down and the materials removed (*i*) is not still a sale of an interest in land, as it was under the previous law (*k*). Growing crops when separately assigned or charged, and not assigned together with any interest in the land on which they grow, are personal chattels within the meaning of the Bills of Sale Acts of 1878 and 1882, and all documents, which are bills of sale within the meaning of those Acts of

Bills of Sale of growing crops

5 B. & C. 829, 832, 835, 841; *Jones* v. *Flint*, 10 A. & E. 753, 758, 760; *Rodwell* v. *Phillips*, 9 M. & W. 501, 505.

(*b*) Stat. 56 & 57 Vict. c. 71, s. 62 (1); see *ante*, pp. 76—81, 147.

(*c*) See *Jones* v. *Flint*, 10 A. & E. 753, 758.

(*d*) *James Jones & Sons, Ld.* v. *Tankerville*, 1909, 2 Ch. 437, 445; see *Marshall* v. *Green*, 1 C. P. D. 35.

(*e*) See *ante*, p. 147, n. (*o*).

(*f*) *Morgan* v. *Russell*, 1909, 1 K. B. 357.

(*g*) *Teal* v. *Auty*, 2 Brod. & B. 99; *Scorell* v. *Boxall*, 1 Y. & J. 396.

(*h*) *Crosby* v. *Wadsworth*, 6 East, 602; *Rodwell* v. *Phillips*, 9 M. & W. 501.

(*i*) *Lavery* v. *Pursell*, 39 Ch. D. 508.

(*k*) Benjamin on Sale, 99, 2nd ed.; and cases cited in three previous notes.

such growing crops, must be attested and registered as thereby required (*l*).

When lands are let for years or life.

When lands are let to a tenant for years or life, if no exception is made of the timber, the property in the timber will still remain in the owner of the inheritance, subject to the tenant's right to have the mast and fruit growing upon it, and the loppings for fuel, and the benefit of the shade for his cattle (*m*). Accordingly, all fruit which may be plucked, or bushes or trees, not being timber, which may be cut or blown down, will belong to the tenant (*n*); but timber trees, which may be cut or blown down, will immediately become the property of the owner of the first estate of inheritance in the land, whether in fee simple or in tail (*o*). Timber trees are oak, ash, and elm in all places; and in some particular parts of the country, by local custom, where other trees are generally used for building, they are for that reason considered as timber (*p*). But if the tenant should be a tenant *without impeachment of waste* (*sine impetitione vasti*), timber cut down by him in a husband-like manner will become his own property when actually severed (*q*), but not before (*r*); for the words "without impeachment of waste" imply a release of all *demands* in respect of any waste which may be committed (*s*). If,

Timber trees.

Tenant without impeachment of waste.

(*l*) See stats. 41 & 42 Vict. c. 31, ss. 4, 7, 8, 10, 11; 45 & 46 Vict. c. 43, ss. 3, 6, 8, 9, 10; all stated in Appendix (A.), *post*: *ante* pp. 75–84, 95–98, 113, 114, 117.

(*m*) *Liford's case*, 11 Rep. 48 b.

(*n*) *Channon* v. *Patch*, 5 B. & C. 897; *Brimman* v. *Peacock*, 9 Bing. 384; 35 R. R. 568; *Pidgley* v. *Rawling*, 2 Coll. 275.

(*o*) *Herlakenden's case*, 4 Rep. 63 a; *Whitfield* v. *Bewit*, 2 P. Wms. 240; 3 P. Wms. 248; *Lushington* v. *Boldero*, 15 Beav. 1; *Honywood* v. *Honywood*, L. R. 18 Eq. 306, 311. See *Lowndes* v. *Norton*, 6 Ch. D. 139; *Hartley* v. *Pendarves*, 1901, 2 Ch. 498.

(*p*) 2 Black. Comm. 281; *Dashwood* v. *Magniac* 1891, 3 Ch. 306.

(*q*) *Lewis Bowles' case*, 11 Rep. 82 b; *Baker* v. *Sebright*, 13 Ch. D. 179. See Williams, R. P. 118, 21st ed.

(*r*) *Cholmeley* v. *Paxton*, 3 Bing. 207; 10 B. & C. 564; 28 R. R. 619; *Re Llewellin*, 37 Ch. D. 317.

(*s*) 11 Rep. 82 b.

however, the words should be merely *without being impleaded for waste*, the property in the trees when cut would still remain in the landlord, and the action only would be discharged, which he might otherwise have maintained against the tenant for the waste committed by the act of felling the timber (*t*).

Animals *feræ naturæ*.

Animals *feræ naturæ*, or wild animals, including game, are exceptions from the rules which relate to other movables, on the ground that until they are caught there is no property in them (*u*). If therefore the owner of land in fee simple should die, the game on his land, or the fish in any river or pond upon the land, will not belong to his executor or administrator as part of his personal estate (*x*). And if a man should have a park or warren, he has no true property in the deer, conies, pheasants, or partridges; but they belong to him only "*ratione privilegii* for his game and pleasure so long as they remain in the privileged place" (*y*). But a property in wild animals may be obtained by reclaiming or catching them (*propter industriam*), or by reason of their being unable to get away (*propter impotentiam*) (*z*). Thus deer, even though in a legal park, may be so tame and reclaimed as to pass to the executors of the owner of the park on his decease (*a*); so rabbits in a hutch, fish in a box, and young pigeons in a dove-house, unable to fly, will belong to the executor or administrator of the owner, and not to his heir. It appears to have been formerly thought that hawks and hounds were not subjects of personal property, but would descend with the

Hawks and hounds.

(*t*) *Walter Idle's case*, 11 Rep. 83 a.

(*u*) *Ante*, p. 49.

(*x*) Co. Litt. 8 a; *The case of Swans*, 7 Rep. 17 b; *ante*, p. 137.

(*y*) 7 Rep. 17 b; Year-Book, 3 Hen. VI. 55 b, 56 a; F. N. B. 87, n (*a*); *R.* v. *Townley*, L. R. 1 C. C. R. 315.

(*z*) 2 Black. Comm. 391, 394; Wms. Exors. 704, 7th ed.; 532, 10th ed.

(*a*) *Morgan* v. *The Earl of Abergavenny*, 8 C. B. 768.

lands to the heir; but this opinion is not now law. "For," observes the author of the Office of an Executor (*b*), "although they be for the most part but things of pleasure, *that* hindereth not but they may be valuable as well as instruments of music, both tending to delight and exhilarate the spirit, a cry of hounds hath to my sense more spirit and vivacity than any other music."

The occupier of land for the time has now the sole right of killing and taking the game upon the land, unless such right be reserved to the landlord or any other person (*c*). And under the Ground Game Act, 1880 (*d*), every occupier of land has, as incident to and inseparable from his occupation of the land, the right to kill and take hares and rabbits thereon, concurrently with any other person who may be entitled to kill and take such animals on the same land; but the right so conferred on the occupier is subject to the limitations specified in the Act (*e*). Where the landlord has reserved to himself the right of killing game, he may authorize any person or persons, who shall have obtained licences to kill game (*f*), to enter upon the land for the purpose of pursuing and killing game

Ground Game Act, 1880.

(*b*) Wentworth's Office of an Executor, 143, 14th ed. The author of this work is supposed to have been Mr. Justice Doddridge.

(*c*) Stat. 1 & 2 Will. IV. c. 32, see ss. 6—8. Game for the purposes of this Act includes hares, pheasants, partridges, grouse, heath or moor game, black game and bustards; s. 2. See as to poaching, stat. 25 & 26 Vict. c. 114; and as to wild birds stats. 43 & 44 Vict. c. 35; 44 & 45 Vict. c. 51.

(*d*) Stat. 43 & 44 Vict. c. 47, s. 1; see *Morgan* v. *Jackson*, 1895, 1 Q. B. 885: *Stanton* v. *Brown*, 1900, 1 Q. B. 671; *Sherrard* v. *Gascoigne*, 1900, 2 Q. B. 279; *Anderson* v. *Vicary*, *ib.* 287. This Act has been amended by stat. 6 Edw. VII. c. 21.

(*e*) Where at the date of the passing of the Act the right to kill and take ground game on any land was vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration, in some person other than the occupier, the occupier would not be entitled under the Act until the determination of that contract, to kill and take ground game on such land; see s. 5.

(*f*) Stat. 23 & 24 Vict. c. 90.

Lord of a manor.

thereon (*g*). And the lord of any manor or reputed manor has the right to pursue and kill the game upon the wastes or commons within the manor, and to authorize any other person or persons who shall have obtained licences to kill game to enter upon such wastes or commons for the same purpose (*h*).

Property in game.

When game or other wild animals were killed on any land by any other person than the rightful owner (*i*), the law, with respect to the property in the game, was formerly as follows: If a man started any game within his own grounds and followed it into another's, and killed it there, the property remained in himself. And so if a stranger started game in one man's chase or free warren, and hunted it into another liberty, the property continued in the owner of the chase or warren; this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man started game on another's private grounds, and killed it there, the property belonged to him on whose ground it was killed. Whereas, if after being started there, it was killed in the grounds of a third person, the property belonged not to the owner of the first ground, because the property was local; nor yet to the owner of the second, because it was not started in his soil; but it vested in the person who started and killed it, though guilty of a trespass against both the owners (*k*). And this appears to be still the law with respect to wild animals which are not game (*l*). But with respect to game (*m*) an

(*g*) Stat. 1 & 2 Will. IV. c. 32, s. 11.

(*h*) Sect. 30.

(*i*) See *ante*, p. 49.

(*k*) 2 Bl. Com. 119; *Churchward* v. *Studdy*, 14 East, 249; 12 R. R. 513. The last proposition is, however, doubted by Lord Chelmsford in *Blades* v. *Higgs*, 11 H. of L. Cas. 619, see also *Fitzhardinge* v. *Purcell*, 1908, 2 Ch. 139, 168.

(*l*) See *Blades* v. *Higgs*, 12 C. B. N. S. 501; 13 C. B. N. S. 844; 18 Jur. N. S. 701; aff. 11 H. of L. Cas. 621; *The Queen* v. *Reid*, 3 Q. B. D. 131; 26 W. R. 283.

(*m*) See *ante*, p. 155, n. (*c*).

alteration appears to have been made by the Game Act (*n*), which seems to vest the property in game killed on any land by strangers, in the person having the right to kill and take the game upon the land (*o*).

(*n*) Stat. 1 & 2 Will. IV. c. 32.
(*o*) Sect. 36; *Rigg* v. *Earl of Lonsdale*, 1 H. & N. 923.

PART II.

OF CHOSES IN ACTION.

CHAPTER I.

OF ACTIONS EX DELICTO.

It has been observed (*a*) that things personal are said to be in possession or in action; and that the term *choses in action* was applied to things, to recover or realize which, if wrongfully withheld, an action must have been brought. Personal things in action are of course recoverable by personal actions; and these, as we have seen (*b*), were brought to enforce an obligation imposed on the defendant personally to make satisfaction to the plaintiff for a wrong or for a breach of contract. Now, by the common law of England, the satisfaction which a man is bound to make for such a violation of right is the payment of money as *damages* (*c*). Thus the right to bring a personal action is a thing valuable in money; and in this aspect it may be included in what is called property, using the term *property* in the wide sense of all the rights a man has, which are valuable in money (*d*). It is, however, worthy of remark that the benefit of an obligation, being the right to some act or forbearance on the part of a particular person (*e*), is a right of a very different nature from the right of property or ownership, strictly so called, which is a right to some thing

Damages.

Obligation.

(*a*) *Ante*, p. 28.
(*b*) *Ante*, p. 4.
(*c*) Co. Litt. 257 a; Com. Dig. tit. Damages; Bac. Abr. tit. Damages. See *ante*, p. 4.
(*d*) *Ante*, pp. 29, 30.
(*e*) Bract. fo. 99, 102 a; Britt. liv. i. ch. 29, § 2.

availing against all the world. And the former right is included in property (in the wide sense of the word) only in so far as it is valuable in money, that is, capable of being exchanged for the ownership of money (*f*).

The principle of the payment of money as compensation for an injury appears in our earliest laws, and is perhaps the most important step in procuring the substitution of an appeal to law for the exercise of private vengeance (*g*). But actions for damages, that is, to recover a sum to be assessed in the action as proportionate to the injury suffered, appear to have been developed no earlier than in the thirteenth century (*h*). Once introduced, however, their importance quickly increased; and a personal action *sounding* (as it was said) in damages became the regular remedy for a trespass or violation of right (*i*). Damages still remain the appropriate compensation recoverable in an action at law for a wrong or breach of contract. Formerly actions for damages could only be brought in the courts of common law. The Court of Chancery, though it possessed special jurisdiction of its own to issue an injunction to restrain the commission or continuance of certain particular injuries, and to decree the specific performance of contracts of a special class (*k*), had in general no power to award damages (*l*). But by a statute of the year 1858, commonly called "Lord Cairns' Act," the Court of

(*f*) See Savigny, System des heutigen römischen Rechts, Vol. I. § 53, pp. 338–350; *ante*, p. 30.

(*g*) See Thorpe, Ancient Laws and Institutes of England, Vol. I. p. 3, n. (*f*); Holmes on the Common Law, Lect. I.

(*h*) P. & M. Hist. Eng. Law ii. 521.

(*i*) Co. Litt. 285, a, 288; Bac. Abr. Damages (A), Trespass; *ante*, pp. 4, 12, n. (*m*); 13, n. (*r*), 17, n. (*u*); 19–21.

(*k*) Chiefly for the purchase or leasing of land; see 2 Wms. V. & P. 1092, 1093 and n. (*a*), 2nd ed.

(*l*) Gilbert, Forum Romanum, ch. xii. p. 419; Story's Equity Jurisprudence, ch. xix. vol. ii. p. 122, 13th ed.

Chancery was empowered to award pecuniary damages, either in addition to or in substitution for an injunction or specific performance (*m*). By the Judicature Acts of 1873 to 1875 the original jurisdiction both of the courts of common law and the Court of Chancery, and also that of the Courts of Admiralty, Probate and Divorce and Matrimonial causes, was transferred to and vested in the High Court of Justice as from the 1st of November, 1875 (*n*). The Act of 1873 divided the High Court of Justice into five divisions, namely, the Chancery division, the Queen's Bench division, the Common Pleas division, the Exchequer division, and the Probate, Divorce, and Admiralty division. To each of the four last-named divisions were assigned all causes and matters which, if the Act had not passed, would have been within the exclusive cognizance of the Court or Courts from which the division took its name (*o*). But in 1888 the Queen's Bench, Common Pleas and Exchequer divisions of the Court were united and consolidated in one division, called the Queen's (now the King's) Bench

Judicature Acts of 1873—1875.

Divisions of High Court of Justice.

(*m*) Stat. 21 & 22 Vict. c. 27, s. 2, now repealed by stat. 46 & 47 Vict. c. 49, saving the jurisdiction thereby established, and reserving the power of making Rules of Court as to the matters contained therein: *Lowers* v. *Earl of Shaftesbury*, L. R. 2 Eq. 270; *Krehl* v. *Burrell*, 7 Ch. D. 551; 11 Ch. D. 146; *Fritz* v. *Hobson*, 14 Ch. D. 542; *Sayers* v. *Collier*, 28 Ch. D. 103, 107, 108; *Chapman, Morsons & Co.* v. *Guardians of Auckland Union*, 23 Q. B. D. 294; *Proctor* v. *Bayley*, 42 Ch. D. 390; *Shelfer* v. *City of London Electric Lighting Co.*, 1895, 1 Ch. 287; *Re R.*, 1906, 1 Ch. 730.

(*n*) Stats. 36 & 37 Vict. c. 66, ss. 3, 4, 16, 17, 18; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77. These Acts established a Supreme Court of Judicature, in which were united the previously existing Courts of Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, and Divorce and Matrimonial Causes. This Supreme Court consists of two divisions, the High Court of Justice and the Court of Appeal. To the Court of Appeal there was transferred the appellate jurisdiction of the Lord Chancellor and the Court of Appeal in Chancery, of the Chancellor and Court of Appeal in Chancery of the county palatine of Lancaster, of the Court of Exchequer Chamber, and of the Privy Council on appeal from the Court of Admiralty.

(*o*) Stat. 36 & 37 Vict. c. 66, s. 34.

division (*p*). To the Chancery division was assigned the administration of the principal matters which were previously within the exclusive jurisdiction of the Court of Chancery (including the execution of trusts (*q*) and the specific performance of contracts for the sale or leasing of real estate), and the exercise of the same Court's statutory jurisdiction (*r*). Subject to the provisions of the Judicature Acts and to any rules of Court, and to the power to transfer causes from one division to another (*s*), any plaintiff may assign his cause to such one of the divisions of the High Court as he may think fit (*t*). Each division of the Court has now equal jurisdiction to give either an injunction or damages (*u*). But, although the jurisdictions of the former courts of law and equity are thus united, so that equitable as well as legal rights may now be enforced in the same Court, no change was made by the Judicature Acts in the nature of legal or of equitable rights and remedies (*x*). The right to bring a personal action at law, in other words, a legal chose in action, is therefore still valuable as resulting in the payment of money or damages.

The infliction of a wrong, and the non-performance of a contract, are evidently the two grand sources from which personal actions ought to proceed. If one man commits a wrong against another, justice evidently requires that he should give him satisfaction; and if one man enters into a contract with

(*p*) By an order in council dated 16th Dec. 1880, made in pursuance of stat. 36 & 37 Vict. c. 66, s. 32.

(*q*) *Ante*, pp. 26—28.

(*r*) Stat. 36 & 37 Vict. c. 66, s. 34; *Rogers* v. *Jones*, 7 Ch. D. 340.

(*s*) Rules of the Supreme Court, 1883, Ord. XLIX.

(*t*) Stat. 38 & 39 Vict. c. 77, s. 11. See Rules of the Supreme Court, 1883, Ords. II., V. rr. 5—9.

(*u*) *Sayers* v. *Collier*, 28 Ch. D. 103, 108; *Re R.*, 1900, 1 Ch. 730.

(*x*) *Ante*, p. 28, n. (*f*); Williams, R. P. 167, 168, 182 and n. (*s*), 21st ed.

another, he certainly ought to keep it, or make reparation for its breach; or if the contract be to pay a sum of money, the money ought to be duly paid. Personal actions are accordingly divided by the law of England into two great classes, actions *ex delicto* and actions *ex contractu* (*y*). The former arise in respect of a wrong committed, called in law-French a *tort;* that is, an actionable injury, not being exclusively a breach of contract or of some purely equitable obligation, to a man's person, reputation or property (*z*). Assault, libel, deprivation or spoiling of goods (*a*), and trespass on land are simple instances. Actions *ex contractu* arise in respect of a breach of contract, either by non-payment of a sum of money agreed to be paid, which thus becomes a *debt* (*b*), or by some other non-performance of the duty of action or forbearance, which the contract imposed. Let us turn our attention, in the present chapter, to a right of action in *tort*, considered as part of the injured person's property. When it is viewed in this light, we are chiefly struck with the fact that it is the exception, not the rule, for the right to sue and the liability for damages for a wrong to be completely transmissible.

Actions *ex delicto* and *ex contractu.*

Transmission on death.

First, with respect to transmission on death. The ancient law, upon the principle that the right to sue and the liability for a wrong are personal to the injured party and wrong-doer respectively (*c*), confined the remedy by action for a *tort* to the joint lives of the injurer and the injured. If either party died, the right of action was at an end, the maxim being *actio personalis moritur cum per-*

Maxim *actio personalis moritur cum personâ.*

(*y*) Bract. fo. 99 a; 3 Black. Comm. 117; see Professor Maitland's note on the history of this classification in Pollock on Torts, App. A., 5th ed.

(*z*) See 3 Black. Comm. 117, 119 *sq.*; Salmond on Torts, 7, 3rd ed.; Pollock on Torts, Ch. I., 5th ed.

(*a*) See *ante*, pp. 6—21, 59—62.

(*b*) *Ante*, p. 31.

(*c*) See *ante*, p. 31, and n. (*s*).

sonà (*d*). In this rule, actions *ex delicto* only were included (*e*); of which, however, there seem to have been more than any other in early times. But by an early statute (*f*), the same action was given to the executor for any injury done to the personal estate of the deceased in his lifetime, whereby it became less beneficial to the executor, as the deceased himself might have brought in his lifetime. And by a modern statute (*g*), an action is given to the executors or administrators of any person deceased for any injury to the real estate of such person, committed within six calender months before his death, for which an action might have been maintained by him; so that the action be brought within one year after the death of such person; and the damages, when recovered, are to be part of the personal estate of such person. But the principle of the common law remains in force with regard to injuries to the person or reputation (*h*). It is, however, provided by the Fatal Accidents Act, 1846 (*i*), long known as "Lord Campbell's Act," that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof (*k*), the wrong-doer shall be liable to an action for damages, notwithstanding the death of the person injured,

Exceptions on death of the party injured.

(*d*) 1 Wms. Saund. 216 *a*, n. (1).

(*e*) *Ante*, p. 31, n. (*e*). See *Finlay* v. *Chirney*, 20 Q. B. D. 494.

(*f*) Stat. 4 Edw. III. c. 7, *De bonis asportatis in vita testatoris*, extended to executors of executors by stat. 25 Edw. III. stat. 5, c. 5.

(*g*) Stat. 3 & 4 Will. IV. c. 42, s. 2.

(*h*) See 1 Wms. Exors. Pt. II. Bk. III. Ch. I. § 1, 789–793 7th ed.; 600 *sq.*, 10th ed.

(*i*) Stat. 9 & 10 Vict. c. 93, amended by stat. 27 & 28 Vict. c. 95. See *Pym* v. *The Great Northern Railway Company*, 2 B. & S. 759.

(*k*) See *Williams* v. *Mersey Docks & Harbour Board*, 1905, 1 K. B. 804; *Clark* v. *London General Omnibus Co., Ld.*, 1906, 2 K. B. 648.

and although the death shall have been caused under such circumstances as amount in law to felony. Under this Act, one action only can lie for the same subject-matter of complaint; and such action must be commenced within twelve calendar months after the death of the deceased (*l*) in the name of his executor or administrator (*m*), and must be for the benefit of the wife, husband, parents, grandfather and grandmother, stepfather and stepmother, children, grandchildren and stepchildren of the deceased, in such shares as the jury shall direct (*n*). And if there shall be no executor or administrator of the person deceased, or, there being such executor or administrator, no action shall have been brought in his name within six calendar months from the death of the deceased, then such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by or in the name of such executor or administrator (*o*). Previously to this statute, a man who had been maimed by another could recover compensation for the injury; but if he died of his wound, his family could obtain no recompense for the loss of a life which might have been their only dependence (*p*). And even now, when the death of a person is not *caused*, no action can be brought by his executor or administrator

(*l*) Stat. 9 & 10 Vict. c. 93, s. 3. By the effect of the Maritime Conventions Act, 1911, stat. 1 & 2 Geo. V. c. 57, s. 8, the above time is extended to two years from the date when the damage or loss was caused in cases where the loss of life was caused by the fault of a ship; *The Caliph*, 1912, P. 213. See *ante*, p. 133.

(*m*) Sect. 2.

(*n*) Sects. 2, 5. An action may be brought under this Act in respect of the death of an alien, where the alien could have sued, if alive; *Davidson* v. *Hill*, 1901, 2 K. B. 606.

(*o*) Stat. 27 & 28 Vict. c. 95, s. 1.

(*p*) See, however, *Jackson* v. *Watson*, 1909, 2 K. B. 193, as to recovering in an action for breach of warranty damages for loss of the services of a person whose death was caused by such breach.

for any injury which affected him personally, if it did not touch his property (*q*). So that an executor or administrator cannot have an action for a libel published or slander uttered concerning the deceased, or for his false imprisonment, or for any assault or battery which did not cause his death (*r*).

Death of the wrong-doer.

Not only the death of the injured party, but also that of the wrong-doer, formerly put an end to every action which arose from a *tort* or wrong; and this was the case up to a very recent period; although if the executor or administrator had profited by the wrong done, the injured party was able to recover from him the money or goods he had thus gained (*s*). By a modern statute (*t*), however, an action may now be obtained against the executors, or administrators of any person deceased, for any wrong committed by him within six calendar months before his death against another person, in respect of his property, real or personal; so as such action be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person. And the damages to be recovered in such action are to be payable in the like order of administration as the simple contract debts of such person. But in all cases which do not fall within the terms of this statute, the rule of the common law remains in force. For instance, no action can be maintained against the executors of a deceased person for a *tort* committed by him more than six calendar months before his death, without

(*q*) See *Hatchard* v. *Mege*, 18 Q. B. D. 771; *Oakey & Sons* v. *Dalton*, 35 Ch. D. 700.

(*r*) *Chamberlain* v. *Williamson*, 2 Man. & Sel. 408, 415; *Pulling* v. *Great Eastern Ry. Co.*, 9 Q. B. D. 110; *London* v. *London Road Car Co.*, 4 Times L. R. 448.

(*s*) *Powell* v. *Rees*, 7 Ad. & El. 426.

(*t*) Stat. 3 & 4 Will. IV. c. 42, s. 2.

profit to his estate (*u*). The remedy afforded by this statute does not preclude such action as might have previously been brought against the executor or administrator (*x*).

Action for dilapidations.

There is one peculiar action founded on *tort*, to which, from the nature of the case, the deceased himself could not be liable, but which was maintainable formerly by the common law, and is now maintainable by statute (*y*), against his executors or administrators. This is the action for dilapidations of the houses or buildings on a benefice; and it is brought by a new incumbent, whether of a rectory, vicarage, or perpetual curacy, endowed public chapel or parochial chapelry or district (*z*), against the executors or administrators of his predecessor (*a*).

(*u*) 2 Wms. Exors. 1728, 7th ed.; 1352, 10th ed.; *Kirk* v. *Todd*, 21 Ch. D. 484; *Phillips* v. *Homfray*, 24 Ch. D. 439; *Re Duncan*, 1899, 1 Ch. 387.

(*x*) *Powell* v. *Rees*, 7 A. & E. 426; *Wright* v. *Leigh*, 4 Times L. R. 573.

(*y*) The Ecclesiastical Dilapidations Act, 1871, stat. 34 & 35 Vict. c. 43, amended by stat. 35 & 36 Vict. c. 96.

(*z*) Stat. 34 & 35 Vict. c. 43, s. 3.

Liability of incumbent.

(*a*) In estimating the sum to be recovered in an action for dilapidations, the rule is as follows:- The incumbent is bound to maintain the parsonage, farm buildings, and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and he is not bound to supply or maintain anything in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and whitewashing and papering belong; Wise v. *Metcalf*, 10 B. & C. 299. And no damages can be recovered on account of neglect to cultivate the glebe lands in a husbandlike manner; *Bird* v. *Ralph*, 4 B. & Ad. 826. If the incumbent commit any act of waste, such as could not be committed by any ordinary tenant for life, he may be restrained by an injunction out of the High Court of Justice; *Duke of Marlborough* v. *St. John*, 2 De G. & Sm. 174; *Ecclesiastical Commissioners* v. *Wodehouse*, 1895, 1 Ch. 552; but it has been decided that his executors will not be liable in an action for dilapidations for waste committed by him in digging gravel in pits which were opened by his predecessor; *Ross* v. *Adcock*, L. R. 31 C. P. 655. Whether they would be liable if the incumbent himself opened the pits appears doubtful: see *Huntley* v. *Russell*, 13 Q. B. 572; *Ross* v. *Adcock*, *ubi supra*. When any part of the premises was in the occupation of a tenant who was liable to repair, the executors of the incumbent were exempt from liability by the ancient canon law; Burn's Ecclesiastical Law, vol. 2, p. 148; Lyndewood, Edmundus, p. 250, Oxon. 1629; note of John de Otho to Constitutions of Otho, tit. 17, Improbam, &c. And the Ecclesiastical Dilapidations Act, 1871 (s. 58), accordingly

This action was formerly no exception to the rule *actio personalis moritur cum personâ*, for the deceased was not liable during his lifetime; the plaintiff was the succeeding incumbent; and an action could not be said to die which never had or could have any existence (*b*). However, in the case of resignation or exchange, the preceding incumbent was himself liable for dilapidations (*c*). But by the Ecclesiastical Dilapidations Act, 1871, the surveyor of ecclesiastical dilapidations appointed under that Act may be directed to inspect the buildings of a benefice; and it will be the duty of the incumbent, his executors or administrators, to execute the repairs prescribed in his report (*d*). And under the same Act the cost of the repairs is a debt due from the late incumbent, his executors or administrators, to the new incumbent, and is recoverable as such at law or in equity (*e*), *pari passu* with the late incumbent's other debts (*f*). Surveyor.

Next, with regard to transmission on bankruptcy. On the bankruptcy of any person, all his rights of action for any injury to his property vest in the Transmission on bankruptcy.

exempts from its provisions buildings, if any, belonging to a benefice which shall be comprised in any lease for years or lives for the time being subsisting, except so far as the lessee shall not, by virtue of such lease, be liable to insure, rebuild, or repair such buildings. The new incumbent was formerly bound to expend within two years the money required by him for dilapidations in the necessary repairs of the premises; stat. 14 Eliz. c. 11, s. 18. But he is now bound forthwith to pay the money recovered to the governors of Queen Anne's Bounty, who spend it on the works according to the certificate of the surveyor of dilapidations; stat. 34 & 35 Vict. c. 43, ss. 37, 44.

(*b*) *Sollers* v. *Lawrence*, Willes, 421.

(*c*) *Downes* v. *Craig*, 9 M. & W. 166.

(*d*) Stat. 34 & 35 Vict. c. 43, ss. 8, 12, 19, 20; *Caldow* v. *Pixell* 2 C. P. D. 562.

(*e*) Stat. 34 & 35 Vict c. 43, s. 36.

(*f*) *Re Monk*, 35 Ch. D. 583. At common law claims for dilapidations were not to be satisfied by the executor or administrator until after payment of all the late incumbent's debts, including those merely by simple contract; *Bryan* v. *Clay*, 1 E. & B. 38. But as to equitable assets, see *Bisset* v. *Burgess*, 23 Beav. 278; *post*, Part II. Ch. III.

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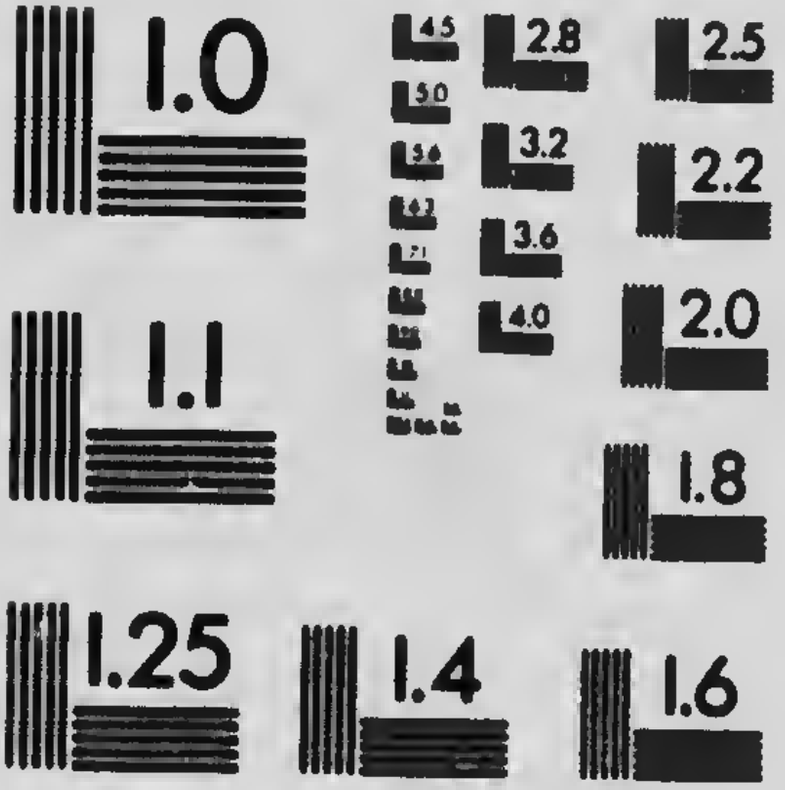

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trustee in bankruptcy, as part of the bankrupt's property (*g*). And such rights of action are saleable and assignable by the trustee, if he do not wish to pursue them himself, to any other person (*h*). Rights of action for any injury to the bankrupt's person or reputation do not pass to the trustee in bankruptcy, but remain exercisable by the bankrupt himself for his own benefit (*i*). The liability of any person, who has committed a wrong, is not discharged by his bankruptcy (*k*).

Outlawry.

If a man be outlawed (*l*), his chattels forfeitable to the Crown appear to comprise all causes of action for deprivation of, or injury to his goods, where the measure of damages is the value (*m*) or the diminution in value of the goods (*n*): but not a right of action for damages wholly uncertain (*o*).

Assignment of a right of action in *tort*.

Lastly, as to the assignment of a right of action in tort by the injured party in his lifetime. By the common law such a right of action was no more directly assignable than a right of action founded on contract (*p*). As we have seen (*q*), however, in modern times, rights of action on contract were allowed to be freely assigned by means of a power of attorney for the assignee to sue in the assignor's name; and such assignments were held to be free from all objection on account of maintenance.

(*g*) Stat. 46 & 47 Vict. c. 52, ss. 20, 44, 50 (5), 54, 57 (2), 168; *Rogers* v. *Spence*, 12 Cl. & Fin. 700, 721; *Beckham* v. *Drake*, 2 H. L. C. 579, 625, 626; *Wetherell* v. *Jones*, 10 C. B. 267; *Hodgson* v. *Sidney*, L. R. 1 Ex. 313; *Morgan* v. *Stable*, L. R. 7 Q. B. 611.

(*h*) *Seear* v. *Lawson*, 15 Ch. D. 426; *Guy* v. *Churchill*, 40 Ch. D. 481.

(*i*) See the cases cited in note (*g*) above; *Ex parte Vine*, *Re Wilson*, 8 Ch. D. 364; *Rose* v. *Buckett*, 1901, 2 K. B. 449.

(*k*) *Ex parte Baum*, *Re Edwards*, L. R. 9 Ch. 673.

(*l*) *Ante*, p. 102.

(*m*) *Ante*, p. 93, n. (*b*).

(*n*) Co. Litt. 128 b; 3 Leon. 205, pl. 261; *Bullock* v. *Dodds*, 2 B. & A. 258, 276; 20 R. R. 420.

(*o*) *Fleming* v. *Smith*, 12 Ir. Com. Law Rep. 404.

(*p*) *Ante*, p. 30.

(*q*) *Ante*, p. 34.

But no such freedom of indirect assignment has been conceded in the case of actions *ex delicto*. On the contrary, the assignment of a right of action in tort remains liable to be avoided, if it should fall within the offence either of simple maintenance (*r*), or of champerty, which is the maintenance of another person's action in consideration of receiving part of the land, debt or other thing in suit (*s*). It has, however, been established by modern decisions that the assignment *pendente lite* of the subject of a suit, which is in the nature of *property*, is not champerty or in any way illegal, even though the assignor gives the assign a power of attorney to sue in his name, and agrees that he will not impede, but will assist the assign (*t*). To what extent this later principle is applicable to the assignment of a right of action in tort, is not perfectly clear (*u*). It has been asserted as a general rule that a right of action in tort is not assignable (*x*), and that the cause of action for a personal wrong is not assignable (*y*). But it appears that a right of action for wrongfully withholding goods (where the goods themselves may be recovered, or if not, the measure of damages is, as a rule, the value of the goods (*z*)) may lawfully be assigned over (*a*). A distinction has, moreover,

Champerty.

(*r*) See *ante*, p. 35.

(*s*) Co. Litt. 368 b; Vin. Abr. Maintenance (B, C); *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481; *De Hoghton* v. *Money*, L. R. 2 Ch. 164, 169; *Ball* v. *Warwick*, 50 L. J. C. P. D. 382; *James* v. *Kerr*, 40 Ch. D. 449; *Guy* v. *Churchill*, *ib.* 481, 485.

(*t*) Kay, J., *James* v. *Kerr*, 40 Ch. D. 449, 456, 457; *Dawson* v. *Great Northern & City Ry. Co.*, 1905, 1 K. B. 260, 271. An exception occurs in the case of an assignment of the subject of a suit to the solicitor acting in the litigation, which the law will not permit to be made absolutely but only by way of mortgage or security for a loan; *Simpson* v. *Lamb*, 7 E. & B. 84; *Anderson* v. *Radcliffe*, E. B. & E. 806; cf. *Davis* v. *Freethy*, 24 Q. B. D. 519.

(*u*) See an article by the writer in L. Q. R., x. 143.

(*x*) See *May* v. *Lane*, 64 L. J. Q. B. 236—238; *Dawson* v. *Great Northern & City Ry. Co.*, 1904, 1 K. B. 277, 281, reversed 1905, 1 K. B. 260, 270; *Defries* v. *Milne*, 1913, 1 Ch. 98, 109—112.

(*y*) *Gleggy* v. *Bromley*, 1912, 3 K. B. 474, 484, 488—491.

(*z*) *Ante*, pp. 15—21, 93, n. (*b*).

(*a*) *Cohen* v. *Mitchell*, 25 Q. B. D. 262.

been taken between the assignment of a right of action in tort and the assignment of the fruits of such an action regarded as property to be afterwards required by the assignor. And the Court has upheld an assignment over of the moneys to be recovered as damages in a pending action of slander, where the assignment was made for valuable consideration and did not confer upon the assignee any right to interfere in the action but left the assignor at liberty to compromise the claim (*b*). It is also worthy of note that the transfer of a right of action in tort may take place by the effect of a contract of insurance. For the insurer of a house, a ship, or other goods, who has paid on a total or partial loss, is subrogated to all other rights of compensation which the insured may have: that is to say, he is entitled to stand in the place of the insured with respect to such rights. He is therefore entitled in equity to maintain in the name of the insured any action for damages, which the latter may have against any other person, for injuring the thing insured. For example, if a ship insured against collision at sea be run down by another owner's vessel, insurers, who have paid for the loss, are entitled to maintain in the name of the insured all the latter's remedies to recover damages for the collision, either against the ship in fault (*c*) or against her owner personally (*d*). And it seems that, where a right of action in tort has become so transferred in equity to the insurer, it may lawfully be assigned to him under section 25 of the Judicature Act of

Assignment by subrogation.

(*b*) *Clegg* v. *Bromley*, 1912, 3 K. B. 474. It will be remembered that an assignment of this kind really takes effect by way of contract only, coupled with the attachment of a trust on the property so soon as it is acquired by the assignor at law; *ante*, pp. 99, 100.

(*c*) *Ante*, p. 126.

(*d*) *Randal* v. *Cockran*, 1 Ves. sen. 98; *Mason* v. *Sainsbury*, 3 Doug. 61, 64; *Yates* v. *White*, 4 Bing. N. C. 272, 283, 284; *Simpson* v. *Thomson*, 3 App. Cas. 279, 284—286, 290—295; *Castellain* v. *Preston*, 11 Q. B. D. 380, 388, 403, 404; *King* v. *Victoria Insurance Co.*, 1896, A. C. 250.

1873 (*e*), so as to enable him to sue thereon in his own name (*f*). But it does not appear that the effect of that enactment was to authorize the assignment of any chose in action, of which the indirect assignment was previously void for maintenance, champerty or otherwise (*g*), or to legalise generally the assignment over of a right of action in tort.

Judgment for damages in tort.

When judgment has been entered up for a sum of money as damages in tort, the rights of the injured party undergo a beneficial change. He has then no longer a mere right of action liable in many cases to be lost by his own or his opponent's death (*h*): but he has a judgment *debt* (*i*), which is enforceable by his own, and against his debtor's executors and administrators (*k*), which is provable in his debtor's bankruptcy (*l*), and which is, without question, lawfully assignable (*m*).

(*e*) *Ante*, p. 39; stat. 6 Edw. VII., c. 41, s. 79.

(*f*) *King* v. *Victoria Insurance Co.*, 1896, A. C. 250, 254, 256.

(*g*) See cases cited notes (*x*) and (*y*) and the last three cases cited in note (*d*), above.

(*h*) Co. Litt. 289 a; *ante*, pp. 162—166; see *Bowker* v. *Evans*, 15 Q. B. D. 565. At common law an action abated on the death of either party before final judgment, and if the cause of action did not survive to the executor or administrator, it could never be revived; but it has long been provided by statute that if a party die after *verdict*, judgment may be entered up, notwithstanding such death, and although the cause of action do not survive; see 3 Black Comm. 302; stat. 17 Car. II c. 8, s. 1; 2 Wms. Saund. 72 k, n; *Palmer* v. *Cohen*, 2 B. & Ad. 966; *Kramer* v. *Waymark*, L. R. 1 Ex. 241; Rules of the Supreme Court, 1883, Order XVII. r. 1. But there is no debt due from the defendant to the plaintiff in an action in tort, although the latter may have had a verdict ascertaining his damages, until judgment is signed; *Ex parte Charles*, 14 East, 197. And damages in tort are not provable in the defendant's bankruptcy, even though ascertained by verdict, unless judgment were signed before he was adjudged bankrupt; *R. Newman*, *Ex parte Brooke*, 3 Ch. D. 494.

(*i*) Black. Comm. ii. 436, 438; iii. 160, 395; see below, Ch. III.

(*k*) See Wms. Exors. Pt. II. Bk. III. Ch. IV., and Pt. III. Bk. II. Ch. II. § 2.

(*l*) See Ch. IV. on Bankruptcy, below.

(*m*) *Carrington* v. *Harway*, 1 Keb. 803.

CHAPTER II.

OF CONTRACTS.

It has been observed (*a*) that personal actions may be brought to enforce an obligation arising out of contract as well as out of wrong, and that money due from another and the benefit of a contract have always been among the most important things in action. These are things valuable in money, and, as such, are included in the personal property of him who is entitled thereto (*b*). But it is important to remark that such things, like the right to recover compensation for a wrong, differ widely from rights of ownership. They are nothing more than the benefit of obligations, or rights to acts or forbearances on the part of particular persons; and they are included in what is widely termed *property* only in so far as they are capable of being exchanged for the ownership of money (*c*). For the benefit of a contract with another person is the benefit of the other's obligation to perform his contract. And a sum of money due from another —what is called a debt (*d*)—is nothing more than the benefit of an obligation arising from breach of a contract to pay money; which is in law as in fact a very different thing from a sum of money in a man's own possession (*e*).

Obligation.

Debt.

(*a*) *Ante*, pp. 4, 29, 158

(*b*) *Ante*, pp. 29, 30; *Danubian Sugar Factories, Ld.* v. *Inland Revenue Commissioners*, 1901, 1 K. B. 245.

(*c*) See *ante*, pp. 29, 30.

(*d*) *Ante*, pp. 31, 102.

(*e*) See *ante*, pp. 28—31.

Contract.

A contract is an agreement enforceable at law, made by two or more persons, whereby rights are acquired by one or more to acts or forbearances on the part of the other or others of them (*f*). To make a valid contract there must be—

(1.) Due capacity to contract on the part of the persons entering into the agreement;

(2.) The expression by all parties of a common intention to create an obligation (*g*) binding some or one of them; that is, an intention that some or one of them should do or forbear something affecting their legal relations for the benefit of the others or other of them (*h*);

(3.) Due compliance with the forms or the presence of other matter required to make a promise enforceable by English law, beyond the mere expression of a common intention;

(4.) Nothing unlawful in the object of the agreement;

(5.) True, full, and free consent of the parties; that is, consent unimpeachable as having been induced through mistake, misrepresentation, fraud, duress, or undue influence (*i*).

Let us examine each of the above elements of a valid contract more fully in turn.

Capacity to contract.

Infants' contracts.

1. Generally, all persons who have attained the age of twenty-one years enjoy full capacity to contract (*j*). At common law, the contracts of infants, or persons under that age, are generally voidable at their option (*k*), but are valid if bene-

(*f*) Anson on Contract, 11, 8th ed.; Pollock on Contract, 1, 2, 7th ed.

(*g*) *Ante*, pp 4, 30, 158—162.

(*h*) See Pollock on Contract, 3, 4, 7th ed.

(*i*) See Pollock on Contract, 438, 440, 7th ed.

(*j*) Litt. s. 259; Co. Litt. 171 b; Pollock on Contract, 52, 7 ed.

(*k*) *Edwards* v. *Carter*, 1893,

Necessaries.

ficial to the infant in the opinion of the Court (*l*), especially contracts for necessaries, or whatsoever things are reasonably necessary for the use of the infant according to his circumstances and condition of life (*m*). But by the effect of the Infants' Relief Act, 1874 (*n*), all contracts entered into by infants for the repayment of money lent or for goods supplied (otherwise than contracts for necessaries (*o*)), and all accounts stated with them, are now absolutely void (*p*). Married women were under a general incapacity to bind themselves by contract at common law (*q*). But under the Married Women's Property Acts, 1882 and 1893 (*r*), a married woman is capable of binding herself by contract in respect and to the extent of the separate property to which she is or, may become entitled without restraint on anticipation. The contract of a man who is so insane or drunk as to be incapable of understanding its effect, is voidable at his option, if the other party knew of his condition. But if the other contracted with him in good faith, and without knowledge of or reasonable cause to suspect his state of mind, he

Married women.

Lunatics; drunken men.

A. C. 360. As to the recovery of money paid by or to an infant under a voidable contract, see *Hamilton* v. *Vaughan-Sherrin, &c., Co.*, 1894, 3 Ch. 589; *Cowern* v. *Nield*, 1912, 2 K. B. 419; 2 Wms. V. & P. 884, 872, n. (*m*), 884—886, 2nd ed.

(*l*) *Clements* v. *London and North-Western Ry. Co.*, 1894, 2 Q. B. 482; see *Cowern* v. *Nield*, 1912, 2 K. B. 419.

(*m*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; *Johnstone* v. *Marks*, 19 Q. B. D. 509; *Walter* v. *Everard*, 1891, 2 Q. B. 369; see *Nash* v. *Inman*, 1908, 2 K. B. 1. But an infant cannot bind himself by a bill of exchange, though given in payment for necessaries; *Re Soltykoff*, 1891, 1 Q. B. 413.

(*n*) Stat. 37 & 38 Vict. c. 62, s. 1; see *Duncan* v. *Dixon*, 44 Ch. D. 211; *Thurstan* v. *Nottingham, &c., Building Society*, 1902, 1 Ch. 1; 1903, A. C. 6.

(*o*) See *Valentini* v. *Canali*, 24 Q. B. D. 166.

(*p*) Persons who have furnished an infant with money to buy necessaries are, however, entitled in equity to stand in the place of the persons who supplied the necessaries; *Marlow* v. *Pitfeild*, 1 P. W. 558.

(*q*) See 2 Wms. V. & P. 925, 2nd ed.

(*r*) Stats. 45 & 46 Vict. c. 75, ss. 1 (sub-s. 2), 19; 56 & 57 Vict. c. 63, s. 1; see *post*, Part III. Ch. V.

cannot avoid it (*s*). Convicts (*t*) are incapable of making any contract except while they are lawfully at large under any license (*u*). The capacity of corporations to contract is placed under certain limitations, arising from the fact that they are artificial not natural persons, and sometimes also from restrictions imposed by the power which created them (*v*). Outlaws and alien enemies are disabled by their incapacity for bringing actions from enforcing though not from making contracts (*w*).

Convicts.

Corporations.

Outlaws; alien enemies.

2. The common intention or *consent* of the parties to an agreement may be expressed either by their uniting in a set form of written or spoken words, or by the *acceptance* by some or one of them of an *offer* made to them or him by the others or other of them (*x*). In order that the acceptance of an offer may make a contract, it is essential that there should be communication of the offer and its acceptance to each party respectively (*y*). But the com-

Consent.

Offer and acceptance.

Communication.

(*s*) *Molton* v. *Camroux*, 2 Ex. 487; 4 Ex. 17; *Beavan* v. *McDonnell*, 9 Ex. 309; *Matthews* v. *Baxter*, L. R. 8 Ex. 132; *Imperial Loan Co.* v. *Stone*, 1892, 1 Q. B 599; see 2 Wms V. & P. 887 *sq.*, 895, 2nd ed. If suitable necessaries, or money to buy them, be supplied to a lunatic with the intention of receiving payment or repayment, the law will imply an obligation binding on the lunatic and his estate to make such payment or repayment; *Re Rhodes*, 44 Ch. D. 94; and persons supplying money to buy necessaries for a lunatic are entitled in equity to stand in the place of those who have furnished the necessaries; *Re Beavan*, 1912, 1 Ch. 196. By stat. 53 Vict. c. 5, s. 120, an order may be made authorizing the committee of a lunatic to perform any contract relating to the lunatic's property entered into by him before his lunacy.

(*t*) *Ante*, p. 103.

(*u*) Stat. 33 & 34 Vict c. 23, ss. 8, 30.

(*v*) On this subject, see Pollock on Contracts, 113 *sq.*, 146 *sq.*, 7th ed.; 2 Wms. V. & P. 949, 2nd ed.

(*w*) Bab. Abr. Outlawry, D (3), Aliens, D; Co. Litt. 129 b; 2 Wms. V. & P. 898, 899, 2nd ed.

(*x*) Pollock on Contract, 2, 5—7, 7th ed.; *Re New Eberhardt Co., Ex parte Menzies*, 43 Ch. D. 118.

(*y*) Anson on Contract, 19 *sq.* 8th ed.; Pollock on Contract, 11 32, 7th ed.; *Dickinson* v. *Dodds*, 2 Ch. D. 463; Blackburn, L. A., 2 App. Cas. 691, 692.

munication of an offer or its acceptance may be made by conduct as well as in words, as where a man takes up wares exposed for sale, or gets into a ferryboat or an omnibus, or hails a cab, or borrows money. In each case his acts amount to an acceptance of the terms held out by the other party, and are equivalent to the expression in words of a promise to pay a reasonable price, or the usual or a reasonable fare, or to repay the money as the case may be. Similarly, if a man does work which another employs him to do without making mention of payment, that is, in general, as good as the acceptance of an offer made in express words to pay him reasonable remuneration for his labour (*z*). So if a man offers a reward to any one who shall do a certain thing for his benefit, performance of the conditions is an acceptance of the offer (*a*). An offer is revocable until the acceptance thereof be duly communicated to the proposer (*b*); but the acceptance of an offer is irrevocable, after it has been duly communicated to the proposer (*c*). But in order to bind the proposer by the acceptance of his offer, the offer must in general be accepted within a reasonable time (*d*). And the acceptance must be absolute and identical with the terms of the offer (*e*).

3. With regard to what is required to make a

(*z*) Pollock on Contract, 11—13, 7th ed.; 2 Black Comm. 443.

(*a*) Pollock on Contract, 14 *sq.*, 7th ed.; *Carlill* v. *Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256.

(*b*) But promises made by deed are irrevocable, even before acceptance; see below.

(*c*) Pollock on Contract, 26—39, 7th ed. It has been held that, when the parties are in correspondence through the post, due communication of the acceptance of an offer is made to the proposer when the letter of acceptance is *posted* to him; see *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; *Henthorn* v. *Fraser*, 1892, 2 Ch. 27.

(*d*) *Ramsgate Victoria Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109.

(*e*) Anson on Contract, 48, 8th ed.; *Hyde* v. *Wrench*, 3 Beav. 334; *Felthouse* v. *Bindley*, 11 C. B. N. S. 869.

promise enforceable by English law, beyond the mere expression of intention to create an obligation, the main rule is that the contract must be evidenced by deed, or else there must be a consideration for the promise (*f*). Contracts are therefore said to be *special* or *simple* contracts according as they are or are not made by deed, that is, by writing under seal (*g*). There are also certain contracts which the law requires to be evidenced by writing, signed by the party to be charged therewith, or to be made in some other special form besides satisfying the conditions of the above rule, which applies to all contracts (*h*).

Special and simple contracts.

A promise made by writing under seal has been enforceable at law from the times of our earliest legal text-writers. For if a man in a writing authenticated by his seal formally expressed his consent to be bound to do some act for the benefit of another, his deed was held to be conclusive evidence of such consent on his part, unless it were shown to have been forged, or extorted by force or fraud, or to be impeachable on some ground of a like nature (*i*). The rule of law giving superiority to a writing sealed as a mode of proof remained in force after writing had come into common use, and signature in a man's own handwriting had been generally adopted as a proof of the authenticity of a written document instead of sealing. And the result has been to give to deeds a force of their own to bind those who execute them, irrespective of the matter they contain (*k*). For he who has

Special contracts.

(*f*) See Pollock on Contract, Ch. III., IV.

(*g*) *Rann* v. *Hughes*, 7 T. R. 350, n.

(*h*) See Pollock on Contract, 145 *sq.*, 7th ed.; *Rann* v. *Hughes ubi supra*.

(*i*) See Glanvil, lib. x. c. 12; Bracton, lib. iii. c. 2, § 9 fo. 100; lib. v. c. 15, fo. 396; Fleta, lib. ii. c. 56, § 20, and c. 60, § 25; Britton, liv. i. ch. 29, §§ 5, 14—24; P. & M. Hist. Eng. Law, ii. 182 *sq.*, 217—223.

(*k*) See Williams, R. P. 151. 152, 21st ed.

bound himself by deed is concluded from disputing his liability (*l*); while a man is not in general more conclusively bound by his unsealed writings than he is by his spoken words (*m*). After the doctrine had been developed that a consideration must be shown to make an informal promise enforceable at law, the superior binding force of a deed was explained by saying that in law every deed imports a consideration (*n*). This explanation has been adopted as a rule of law (*o*). But the true explanation appears to be that the legal effect of a deed was not impaired by the development of the doctrine of consideration. And the law still remains that a promise made by deed is irrevocable, even before its acceptance (*p*), and is enforceable at law against the person making it, without any necessity for showing a consideration therefor (*q*).

Simple contracts.

With respect to the promises contained in simple contracts, that is, all contracts not made by deed, the law is that, beyond the mere expression of consent to be bound, there must be a consideration for the promise, or it will not be enforced (*r*). This doctrine was not fully developed until after the introduction of the action of *assumpsit* as the means of enforcing informal agreements, a matter

Action of assumpsit.

(*l*) Litt. ss. 58, 693; Co. Litt. 45 a, 47 b, 352 a, 363 b; *Whelpdale's case*, 5 Rep. 119; 2 Black. Comm. 446.

(*m*) *Rann* v. *Hughes*, 7 T. R. 350, n.

(*n*) Bacon, Reading on the Statute of Uses.

(*o*) 2 Black. Comm. 446; 1 Fonb. Eq. 342, n.; 2 Fonb. Eq. 26.

(*p*) 3 Rep. 26 b; Cro. Eliz. 627; *Xenos* v. *Wickham*, L. R. 2 H. L. 296; see *ante*, p. 177.

(*q*) 3 Burr. 1639. The law as to the avoidance of deeds by some erasure, addition or other alteration, made in a material part of the deed after its execution without the consent of all parties thereto (as to which, see Williams, R. P. 153—155, 21st ed.; *Rudd* v. *Bowles*, 1912, 2 Ch. 61, 65) has been extended to written agreements not under seal; *Davidson* v. *Cooper*, 13 M. & W. 343; *Mollett* v. *Wackerbarth*, 5 C. B. 181; *Croockewit* v. *Fletcher*, 1 H. & N. 893, 912, 913; *Suffell* v. *Bank of England*, 9 Q. B. D. 555.

(*r*) *Rann* v. *Hughes*, 7 T. R 350, n.

Covenants.

which calls for a short explanation. In the times of our first legal writers covenants, which are formal contracts, made by deed (*s*) could be enforced in an action of covenant (*t*), or, if made to secure the payment of money, in the action of debt, which lay for the recovery of a specific sum of money. Debt could also be brought to recover money lent, the price of goods sold and delivered, and apparently, money due for work done, or upon any other executed consideration (*u*). And detinue, which is only another form of debt, and lay for chattels unlawfully detained (*x*), might be brought to recover chattels bailed (*y*). The action of account was also used to enforce money claims (*z*). But informal *executory* contracts, or agreements to perform some future act, could not be enforced at law unless their conditions chanced to fit one of the established forms of action (*a*). The remedy for this was at length found in the action of *assumpsit*. *Assumpsit* was in form an action founded on *tort* (*b*) of the technical class known as trespass on the case (*c*). Trespass on the case seems to have been first resorted to, in connection with contract, as a remedy for a man's negligence in his manner of performing something he had undertaken to do (*d*). But it was extended in the reign of Hen. VII. to meet the case of a man's non-performance of what he had promised to do. And thenceforward *assumpsit* became the established form of action for breach

Action of debt.

(*s*) Bac. Abr. tit. Covenant.

(*t*) Reg. 165; F. N. B. 145. But in practice the action of covenant was in early times almost entirely confined to covenants relating to land; P. & M. Hist. Eng. Law, ii. 214—217.

(*u*) See Glanvil, lib. x.; Fleta, lib. ii. c. 56; Britt. liv. 1, ch. 29; Pollock on Contract, 137—139, 7th ed.; Holmes on the Common Law, 251 *sq.*; P. & M. Hist. Eng. Law, ii. 182 *sq.*, 201, 219.

(*x*) *Ante*, p. 16, and n. (*l*).

(*y*) *Ante*, pp. 11, 15, 16, 21; Glanvil, lib. x. c. 13; Britt. liv. 1, ch. 29, § 34.

(*z*) Pollock on Contract, 139, 7th ed.

(*a*) See Pollock on Contract, 135, 140, 7th ed.

(*b*) *Ante*, p. 162.

(*c*) *Ante*, p. 17, n. (*u*).

(*d*) Year Book, 44 Edw. III. 33, pl. 38. See Holmes on the Common Law, 275—283.

of a simple contract (*e*). When it was settled that an action would lie for the mere breach of an informal promise, the necessity of sharply defining the conditions of an enforceable promise began to be felt. And the test was found in the rule that there must be a consideration for the promise (*f*), although it was not until late in the eighteenth century that this doctrine was finally established as unquestionable (*g*).

Consideration.

According to the law of England, then, a consideration is an essential ingredient in every *simple* contract; a promise without consideration is regarded as *nudum pactum* (unless made by deed (*h*)), and no recompense can be recovered for its breach (*i*), neither will its performance be enforced in a court of equity (*k*). Thus if a man promise to give me 100*l*., or any other of his chattels, without any consideration, he is not bound to perform his promise, and I am without remedy if he should break his word (*l*). The consideration required to support a promise is a valuable consideration. A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other (*m*). Thus it may be the payment

Valuable consideration.

Express promise founded on moral obligation

(*e*) See 1 C. P. Coop. Appx. 549—552; Pollock on Contract, 141—143, 7th ed.; Holmes on the Common Law, 282—288.

(*f*) As to the history of the doctrine of consideration, see Ames, History of Assumpsit, Law Mag. & Review, xxv. 129 *sq.*, 290 *sq.*; Select Essays in Anglo-American Legal History, iii. 259 *sq.*; Pollock on Contract, 169 *sq.*, 7th ed.; Holmes on the Common Law, 253 *sq.*

(*g*) See *Pillans* v. *Van Mierop*, 3 Burr. 1663 (A. D. 1765); *Rann* v. *Hughes*, 7 T. R. 350, n. (1778).

(*h*) It was formerly thought that an express promise, founded on a moral obligation, was sufficient to form a valid contract; but this doctrine was dispersed in the year 1840; *Eastwood* v. *Kenyon*, 11 A. & E. 447; *Beaumont* v. *Reeve*, 8 Q. B. 483.

(*i*) Doctor and Student, dial. 2 c. 24; 2 Black. Comm. 445.

(*k*) 1 Fonb. Eq. 335 *sq.*; *Dipple* v. *Corles*, 11 Hare, 183.

(*l*) See *ante*, p. 70.

(*m*) *Currie* v. *Misa*, L. R. 10 Ex. 153, 162.

of money; or the gift or conveyance of land or goods; or the marriage of the party himself or of any relative (*n*), or the forbearance to enforce a right of action (*o*), or the compromise of a *bonâ fide* claim (*p*), or anything else, either advantageous to the one or detrimental to the other, to which the parties attach a value. And the law will not enter into an inquiry as to the *adequacy* of the consideration (*q*). A consideration may be *executed*, as the payment of money or delivery of goods at the time of making the contract; or it may be *executory*, as a promise to pay money, deliver goods, or do some other act on a future day (*r*). But, as a general rule, a past consideration will not support a promise. Thus where a man sold a vicious horse and subsequently warranted him free from vice, it was held that the previous sale was no consideration for the warranty, which could not therefore be enforced (*s*). To this rule, however, certain exceptions are alleged (*t*), of which the most substantial is found in cases in which a person has been held

Consideration executed or executory.

Past consideration.

Roscorla v. *Thomas.*

(*n*) *Campion* v. *Cotton*, 17 Ves. 263; *Coverdale* v. *Eastwood*, L. R. 15 Eq. 121.

(*o*) *Fullerton* v. *Provincial Bank of Ireland*, 1903, A. C. 309, 313; *Gleeg* v. *Bromley*, 1912, 3 K. B. 474; cf. *Wigan* v. *English and Scottish Law Life Assurance Association*, 1909, 1 Ch. 291, 297, 298.

(*p*) *Lucy's case*, 4 De G. M. & G. 358; *Cook* v. *Wright*, 1 B. & S. 559; *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449; *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266. See also *Crears* v. *Hunter*, 19 Q. B. D. 341.

(*q*) *Bainbridge* v. *Firmstone*, 8 A. & E. 743; *Westlake* v. *Adams*, 5 C. B. N. S. 248, 265; *Carlill* v. *Carbolic Smoke Ball Co.*, 1893, 1 Q. B. 256; Pollock on Contract, 176, 7th ed.; and see 2 Wms. V. & P. 848, 2nd ed.

(*r*) Leake on Contract, 6, 7, 35, 533, 3rd ed.

(*s*) *Roscorla* v. *Thomas*, 3 Q. B. 234.

(*t*) It has been laid down that services rendered *at the request* of another are sufficient consideration for a promise of reward *subsequently* made by him; but the view now put forward is that such a subsequent promise can only be evidence of what the parties thought the services worth. It is also said that the voluntary doing by one party of something which the other was legally bound to do is sufficient consideration for a subsequent promise of recompense; but this appears to rest on doubtful authority. See Anson on Contract, 115—123, 8th ed.; Pollock on Contract, 181, 182, 7th ed.

capable of reviving an agreement by which he has benefited, but which by rules of law since repealed, incapacity to contract no longer existing, or mere lapse of time, is not enforceable against him (*u*)

Debt barred by the Statute of Limitations.

Thus, a simple contract debt, which would otherwise have been barred by the Statute of Limitations (*x*), from having been incurred upwards of six years, may be revived by a subsequent promise to pay, or even by an unconditional acknowledgement of the debt (*y*), but by modern statutes such promise or acknowledgement must be made or contained by or in some writing, to be signed by the party chargeable thereby or by his agent (*z*).

Contract made during infancy.

And in like manner, before the Infants Relief Act, 1874 (*a*), took effect, a contract made by a person during infancy and voidable on that account, might have been confirmed by an express promise or ratification (*b*) made when of full age. Formerly, also, a debt barred by bankruptcy might have been revived by an express promise (*c*) to pay it (*d*). But, under the present bankruptcy law, a promise to pay such a debt cannot be enforced unless it be

(*u*) Anson on Contract, 124, 8th ed.

(*x*) Stat. 21 Jac. I. c. 16, s. 3.

(*y*) Bac. Abr. tit. Limitations of Actions (E); *Prance* v. *Sympsor*, Kay 678; *Sidwell* v. *Mason*, 2 H. & N. 306, 310; *Holmes* v. *Mackrell*, 3 C. B. N. S. 789; *Cornforth* v. *Smithard*, 5 T. & M. 13; *Francis* v. *Hawkesley*, 1 E. & E. 1052; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; *Cooper* v. *Kendall*, 1909, 1 K. B. 405.

(*z*) Stat. 9 Geo. IV. c. 14, s. 1, called Lord Tenterden's Act; 19 & 20 Vict. c. 97, s. 13.

(*a*) Stat. 37 & 38 Vict. c. 62, which enacts (s. 2) that no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age, of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. See 2 Wms. V. & P. 880—883, 2nd ed.; stat. 55 Vict. c. 4, s. 5.

(*b*) Required by stat. 9 Geo. IV. c. 14, s. 5, to be made by some writing signed by the party to be charged therewith.

(*c*) Required to be in writing and duly signed, by stats. 6 Geo. IV. c. 16, s. 131; 5 & 6 Vict. c. 122, s. 43.

(*d*) *Trueman* v. *Fenton*, Cowp. 544; *Kirkpatrick* v. *Tattersall*, 13 M. & W. 766.

supported by a new consideration (*e*), or be made in such form that it is valid in law without consideration (*f*). Lastly, consideration must be legal (*g*); for, as we have seen (*h*), there must be nothing unlawful in the object of an agreement.

Contracts which are required to be in writing.

Let us now consider upon what simple contracts the law imposes some requisite beyond the element of consideration. Under certain modern statutes, simple contracts respecting various matters of importance are required to be put into writing. Of these statutes the first and most important is the Statute of Frauds (*i*), which enacts:—

Statute of Frauds, s. 4.

(Sect. 4) That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

This enactment, it will be observed, does not give to writing any validity which it did not possess

(*e*) See *Jakeman* v. *Cook*, 4 Ex. D. 26; stats. 46 & 47 Vict. c. 52, s. 30; 32 & 33 Vict. c. 71, s. 49.

(*f*) See *Re Bonacina*, 1912, 2 Ch. 394, a case of a new promise made in Italy by an Italian in a form binding by Italian law. It is a question whether a promise made by deed to pay a sum of money equal to the amount of a debt discharged by bankruptcy is valid under the present law; but it seems on principle that it should be, as this would be a new debt, on which the cause of action did not occur before the bankrupt's discharge; see *S.C.*, *ante*, pp. 177, 178; *Kidson* v. *Turner*, 3 H. & N. 581, was decided on stat. 12 & 13 Vict. c. 106, s. 204, which made all promises to pay such debts *void*, even when made for a new consideration.

(*g*) Anson on Contract, 111, 8th ed.

(*h*) *Ante*, p. 173.

(*i*) 29 Car. II. c. 3.

efore. A written promise made since this statute, without any consideration, is quite as much *nudum pactum* as it would have been before (*k*). The statute merely adds a further requisite to the validity of certain contracts, namely, that they shall, besides being good in other respects, be put into writing, otherwise no action shall be maintained upon them (*l*). And contracts, which fail to comply with the requirements of the above section, are not void, but only not enforceable (*m*).

Wain v. *Warlters.*

A great number of cases have been decided upon the above section of this celebrated statute. One of the most important is that of *Wain* v. *Warlters* (*n*), in which it was held that the statute required the whole *agreement* to be in writing, and consequently required that the *consideration*, which is part of the agreement, should be in writing, as well as the promise itself. And therefore a promise in writing to pay the debt of a third person, which did not state any consideration, was held to give no cause of action; and parol evidence of a consideration was not allowed to be given. This case was followed by many other decisions to the same effect (*o*). But the Mercantile Law Amendment Act, 1856, provides that no special promise to answer for the debt,

Consideration for promise to answer for another's debt, &c., need not now appear.

(*k*) See 2 Wms. Exors. 1776, 7th ed.; 1417, 10th ed.; 1 Wms. Saund. 211, n. (2).

(*l*) Agreements, whereof the matter is of the value of 5*l.* or upwards, are, with some exceptions (see *ante*, p. 83, n. (*u*)), liable to a stamp duty of 6*d.*, which may be denoted by an adhesive stamp, to be cancelled by the person by whom the agreement is first executed; stat. 54 & 55 Vict. c. 39, First Schedule, tit. Agreement and ss. 8, 22, replacing the Stamp Act, 1870; see *Gwynthor* v. *Gordon*, 3 Times L. R. 461; *Carlill* v. *Carbolic Smoke Ball Co.*, 1892, 2 Q. B. 484, 489, 490; affirmed 1893, 1 Q. B. 256.

(*m*) *Leroux* v. *Brown*, 12 C. B. 801; see Pollock on Contract, 649–652, 7th ed.

(*n*) 5 East, 10; 2 Smith, L. C.

(*o*) *Saunders* v. *Wakefield*, 4 B. & A. 595; 23 R. R. 499; *Morley* v. *Boothby*, 3 Bing. 107; *Clancy* v. *Piggott*, 2 A. & E. 473; 1 Wms. Saund. 211, n. (*d*); *Price* v. *Richardson*, 15 M. & W. 539.

default, or miscarriage of another person, being in writing and duly signed, shall be invalid to support an action, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document (*p*). The phrase in the statute to *answer for* the debt, default or miscarriage of another person, means to answer for a debt, default or miscarriage *for which that other remains liable* (*q*). Thus, where one party to an agreement verbally promised the other, that, in consideration of his discharging from custody a third person whom he had taken in execution for debt, he, the first party, would pay the debt, it was held that action might well be brought on this promise, although it was not put in writing (*r*). For this was not a promise to answer for the debt of another person, to which that other remained liable, but to pay a debt from which the other was discharged. It was an original promise to pay and not a collateral promise to guarantee, which is the meaning in the statute of the words "answer for." The words "any agreement, that is not to be performed within the space of one year from the making thereof," have been held to mean an agreement which appears from its terms incapable of performance within the year (*s*). Thus where one man promised another, for one guinea, to give him a certain number on

Answering for debt, default or miscarriage.

Goodman v. *Chase.*

Space of one year from the making.

Peter v. *Compton.*

(*p*) Stat. 19 & 20 Vict. c. 97, s. 3. See *Holmes* v. *Mitchell*, 7 C. B. N. S. 361; *Williams* v. *Lake*, 2 E. & E. 349; *Re Hoyle*, 1893, 1 Ch. 84.

(*q*) 1 Wms. Saund. 211 b, n. (2); Notes to *Birkmyr* v. *Darnell*, 1 Smith, L. C.; *Cripps* v. *Hartnoll*, 4 B. & S. 414; *Reader* v. *Kingham*, 13 C. B. N. S. 344; *Lakeman* v. *Mountstephen*, L. R. 7 H. of L. 17; *Harburg, &c., Co* v. *Martin*, 1902, 1 K. B. 778. A promise to indemnify a person in consideration of his accepting a liability is not within the statute; *Guild* v. *Conrad*, 1894, 2 Q. B. 885.

(*r*) *Goodman* v. *Chase*, 1 B. & A. 297; 19 R. R. 322. See also *Lane* v. *Burghart*, 1 Q. B. 933.

(*s*) See *Britain* v. *Rossiter*, 11 Q. B. D. 123; *Smith* v. *Gold Coast, &c., Ld.*, 1903, 1 K. B. 285, 538.

Wells v. *Horton.*

the day of his marriage, it was held that a writing was unnecessary, for the marriage might have happened within the year (*t*). So a contract by A. that his executor shall pay 10,000*l.* need not be in writing (*u*), for the death of A. and payment of the money may all take place within a twelve-month. But an agreement for two years' service, terminable on either side by six months' notice, must be in writing (*x*). It has also been held that, in order to bring an agreement within this clause of the statute, so as to render writing necessary, both parts of the agreement must be such as are not to be performed within a year from the making thereof. Thus where a landlord agreed to lay out 50*l.* in improvements, in consideration of the tenant undertaking to pay him 5*l.* a year during the remainder of his term (of which several years were unexpired), it was held that writing was unnecessary (*y*); for although the tenant's part of the agreement was not to be performed within a year, the landlord's part might reasonably have been so. This construction, however, has not been applied where one part of the agreement, though it might possibly be performed within the year, is not in the nature of an entire consideration to be executed or given all at one time, and the parties contemplated the continuance of the agreement beyond the year. Thus, where an oral agreement for service with a dairyman, not specifying any term but determinable by a week's notice on either side, stipulated that the servant should not carry on the business of a dairyman within a specified area for thirty six months after quitting the

Hanan v. *Ehrlich.*

Donellan v. *Read.*

Reeve v. *Jennings.*

(*t*) *Peter* v. *Compton*, Skin. 353; 1 Smith, L. C.; *Souch* v. *Strawbridge*, 2 C. B. 808.

(*u*) *Wells* v. *Horton*, 4 Bing. 40; 29 R. R. 498; *Ridley* v. *Ridley*, 34 Beav. 478.

(*x*) *Hanan* v. *Ehrlich*, 1911, 2 K. B. 1056; 1912, A. C. 39.

(*y*) *Donellan* v. *Read*, 3 B. & Ad. 899; 37 R. R. 588; *Cherry* v. *Heming*, 4 Ex. 631.

service, this stipulation was held to be unenforceable by the master for want of writing (*z*). The above decisions have considerably narrowed the operation of the statute, and have left remaining much of the mischief, arising from reliance on memory only, which it was the intention of the statute to obviate, by requiring written evidence (*a*). As we have seen, except as above provided in the case of guarantees (*b*), the whole of the agreement must be in writing; so that the memorandum must show who are the parties to the contract, or the contract cannot be enforced (*c*). But the statute only requires the writing to be signed by the party to be charged; and it is not necessary that the other party should sign it (*d*). And as the Act requires signing only, and not subscribing, it has been held that the necessary signature may be placed in any part of the document, provided that the name be inserted in such a manner as to govern the whole memorandum (*e*). The Statutory note in writing need not be contained in one document; it may be made out from several documents, if they can be connected together, and it constantly happens that a contract in writing is made out from letters or other informal memoranda (*f*). And the required note need not be written at the time of entering into the agreement, but may well be made at any

Signed by the party to be charged.

(*z*) *Reeve* v. *Jennings*, 1910, 2 K. B. 527; see also *Hanan* v. *Ehrlich*, *ubi sup.*

(*a*) See notes to *Peter* v. *Compton*, 1 Smith, L. C.

(*b*) *Ante*, p. 185.

(*c*) *Williams* v. *Lake*, 2 E. & E. 349; *Rossiter* v. *Miller*, 3 App. Cas. 1124, 1141; *Potter* v. *Duffield*, L. R. 18 Eq. 4; *Jarrett* v. *Hunter*, 34 Ch. D. 182.

(*d*) *Laythoarp* v. *Bryant*, 2 Bing. N. C. 735; *Reuss* v. *Picksley*, L. R. 1 Ex. 342.

(*e*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; *Lobb* v. *Stanley*, 5 Q. B. 574; *Caton* v. *Caton*, L. R. 2 H. L. 127, 143.

(*f*) *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Baumann* v. *James*, L. R. 3 Ch. 508; *Long* v. *Millar*, 4 C. P. D. 450; *Shardlow* v. *Cotterell*, 20 Ch. D. 90; *Studds* v. *Watson*, 28 Ch. D. 305; *Oliver* v. *Hunting*, 44 Ch. D. 205; *Pearce* v. *Gardner*, 1897, 1 Q. B. 688.

time afterwards, before an action is brought to enforce the contract (*g*). It has been held that an offer in writing specifying all the terms of a proposed agreement, and signed by the proposer, may be a sufficient memorandum to bind him under the statute, notwithstanding that the offer was accepted not in writing, but by conduct only (*h*).

Sale of goods worth 10*l.* or more.

The fourth section of the Sale of Goods Act, 1893, which has taken the place of the seventeenth section of the Statute of Frauds, and relates to contracts for the sale of goods worth 10*l.* or more, has been already noticed (*i*). Agreements for the sale of goods but not to be performed on either side within the year are also governed by the fourth section of the Statute of Frauds (*k*).

Lord Tenterden's Act.

Written acknowledgment required to take the case out of the Statute of Limitations.

The next statute which requires our notice is commonly called Lord Tenterden's Act (*l*). By this statute no acknowledgment or promise by words only can take any case of simple contract out of the operation of the Statute of Limitations (*m*), or deprive any party of the benefit thereof, unless such acknowledgement or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby (*n*). The effect of such a promise has already been referred to (*o*). The statute makes no mention of any signature by an agent; but by the Mercantile Law Amendment

(*g*) *Re Holland*, 1902, 2 Ch. 360.

(*h*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342; *ante*, p. 176.

(*i*) *Ante*, p. 80.

(*k*) *Pressed Miners' Co., Ld.* v. *Garner, Ld.*, 1910, 2 K. B. 776; 1911, 1 K. B. 425; see *Bracegirdle* v. *Heald*, 1 B. & A. 722, 727; *Donellan* v. *Read*, 1 B. & Ad. 899, 906.

(*l*) Stat. 9 Geo IV. c. 14.

(*m*) Stat. 21 Jac. I. c. 16, s. 3.

(*n*) See *Lechmere* v. *Fletcher*, 1 C. & M. 623; *Bird* v. *Gammon*, 3 Bing. N. C. 883; *Cheslyn* v. *Dilby*, 4 You. & Coll. 238. Nothing contained in stat. 9 Geo. IV. c. 14 (see s. 1), is to alter the effect of any payment of principal or interest to prevent a debt from being barred by the Statute of Limitations.

(*o*) *Ante*, p. 182.

Act, 1856, the signature of an agent was rendered sufficient (*p*). Lord Tenterden's Act further enacts (*q*), that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain *credit, money, or goods upon*, unless such representation or assurance be made in writing signed by the party to be charged therewith. There appears to be some error in the word "*upon*" in this enactment, which, as it stands, is superfluous (*r*). And it has been doubted whether a representation made to a purchaser by the trustee of some property that the property was encumbered to a less extent than was actually the case, was a representation concerning the *ability* of the vendor within the meaning of the statute (*s*). The better opinion seems to be that such a representation is within the statute, and ought consequently to be obtained in writing. There are a few other cases, besides those affected by the Statute of Frauds and Lord Tenterden's Act, in which contracts are by law required to be in writing, or in some other special form (*t*). Thus contracts of marine insurance are required to be embodied in a policy signed by the insurer, or they will not be admissible in evidence (*u*).

Representations of character, &c.

4. There must be nothing unlawful in the object of the agreement, or it cannot be enforced. For,

Legality of object of contract.

(*p*) Stat. 19 & 20 Vict. c. 97, s. 13.

(*q*) Stat. 9 Geo. IV. c. 14, s. 6.

(*r*) See 1 M. & W. 104, 123; *Swift* v. *Jewsbury*, L. R. 9 Q. B 301; *Hirst* v. *West Riding Union Banking Co., Ld.*, 1901, 2 K. B. 560.

(*s*) See *Lyde* v. *Barnard*, 1 M. & W. 101; *Swann* v. *Phillips*, 8 A. & E. 457; *Devaux* v *Steinkeller*, 6 Bing. N. C. 84.

(*t*) See Pollock on Contract, 145 *sq.*, 7th ed.

(*u*) Stat. 6 Edw. VII. c. 41, ss. 22, 24; see *post*, Part II. Ch. V.

as we have seen (*x*), a contract gives a right to acts or forbearances on the part of another or others; and if the acts or forbearances contemplated by an agreement be unlawful, the law will not enforce them, and the agreement is void. Agreements may, however, be void as unlawful, not only because they contemplate some illegal act, that is, some act forbidden by common law or statute, but also if their object be the commission of some act, discouraged though not absolutely forbidden by law, on the ground either of its immorality or of its being against public policy. And there are agreements which are simply made void, but not prohibited by statute; so that it is not an illegal act to enter into or to perform them, but they are merely invalid and cannot therefore be enforced at law (*y*). It is beyond the scope of this work to discuss fully the various grounds on which agreements may be void for illegality (*z*). A few examples must suffice.

Agreements contemplating illegal acts.

First, as to agreements contemplating illegal acts. Any agreement to commit a crime, an indictable offence or a civil wrong is generally void (*a*). So that an agreement involving the publication of a libel (*b*), or the commission of a fraud on a third party, is void (*c*). It is illegal to trade with the inhabitants of hostile states without the licence of the Crown; and contracts made in violation of this rule are void (*d*). Again, some contracts are expressly forbidden by statute;

(*x*) *Ante*, p. 173.

(*y*) See *Hyams* v. *Stuart King*, 1908, 2 K. B. 696, 707–711, 725—728.

(*z*) See Pollock on Contract, ch. vii. p. 273, 7th ed.

(*a*) *Ibid.* 276, 278, 7th ed.

(*b*) *Shackell* v. *Rosier*, 2 Bing. N. C. 634.

(*c*) *Mallalieu* v. *Hodgson*, 16 Q. B. 689; *Begbie* v. *Phosphate Sewage Co.*, L. R. 10 Q. B. 491, 499; *Scott* v. *Brown & Co.*, 1892, 2 Q. B. 724.

(*d*) *The Hoop*, 1 C. Rob. 196; *Potts* v. *Pell*, 8 T. R. 548; 5 R. R. 452; *Esposito* v *Bowden*, 7 E. & B. 763.

others are impliedly prohibited by the infliction of a penalty or otherwise (*e*). And in the latter case, contracts made in violation of the statute are void, as well as in the former (*f*). The following instances may be given :—Insurances upon any life or other event, in which the person taking the benefit of the insurance has no interest, are prohibited by statute (*g*). Every money-lender is required to be registered under the Money-lenders Act, 1900 (*h*), and to carry on his business of money-lending in and at his registered name and address only, and is prohibited from entering any agreement in the course of such business with respect to the advance and repayment of money, or from taking any security for money in the course of such business, otherwise than in his registered name. All agreements entered into and securities taken in contravention of these provisions are therefore void (*i*); though they may be validated under the Money-lenders Act, 1911, in favour of a *bonâ fide* assignee or holder for value, not being himself a money-lender, without notice of the defect or any person deriving title under him (*k*). Unqualified persons are prohibited by statute from practising as medical advisers; so that an agreement contemplating the

Contracts contravening the Money-lenders Act, 1900.

(*e*) See Pollock on Contract, Appendix (G.), p. 707, 7th ed.

(*f*) *Bensley* v. *Bignold*, 5 B. & A. 335; 24 R. R. 401; *Cope* v. *Rowlands*, 2 M. & W. 149; see *Whiteman* v. *Sadler*, 1910, A. C. 514, 525—527; Pollock on Contract, 293, 7th ed.

(*g*) Stat. 14 Geo. III. c. 48, which does not extend to insurance of ships, goods, or merchandises; see *post*, Part II. Ch. V.

(*h*) Stat. 63 & 64 Vict. c. 51, s. 2 (1); see sect. 6 for the definition of a money-lender.

(*i*) *Bonnard* v. *Dott*, 1906, 1 Ch. 740; *Chapman* v. *Michaelson*, 1909, 1 Ch. 238; *Whiteman* v. *Sadler*, 1910, A. C. 514; *Re Robinson*, 1911, 1 Ch. 230; *Re Campbell*, 1911, 2 K. B. 992; *Re Robinson's Settlement*, 1912, 1 Ch. 717.

(*k*) Stat. 1 & 2 Geo. V. c. 38, s. 1, also validating any payment or transfer of money or property made *bonâ fide* by any person on the faith of the validity of any such agreement or security without notice of the defect, but requiring the money-lender in this and in the above case to indemnify the borrower or any other person who is prejudiced by virtue of this enactment.

practice of the medical profession by an unqualified person is void (*l*).

Agreement unlawful for immorality.

The best instance of an agreement held to be unlawful on the ground of immorality is an agreement between a man and a woman contemplating future cohabitation. Such an agreement is altogether void (*m*). If, however, a promise be made in consideration of past cohabitation, the agreement is not void as unlawful (*n*). But as such a past consideration cannot support a promise, the agreement will not be binding unless made under seal (*o*).

Agreements unlawful as against public policy.

As to what agreements are unlawful as being against public policy, all that can be said here is that there are certain kinds of agreements which have been judicially held to be against the common weal (*p*). One instance is afforded by agreements tending to impede the course of justice; as agreements for stifling a criminal prosecution for some offence, which cannot also be the subject of an action for damages, or is an offence against the public (*q*), or agreements to indemnify a surety for a person admitted to bail or ordered to find bail for his good behaviour against loss by his default (*r*). Agree-

Maintenance.

(*l*) *Davies* v. *Makuna*, 29 Ch. D. 596.

(*m*) *Walker* v. *Perkins*, 1 W. Black. 517; 3 Burr. 1568; *Gray* v. *Mathias*, 5 Ves. 286.

(*n*) *Turner* v. *Vaughan*, 2 Wils. 339; *Hill* v. *Spencer*, Amb. 641, 836; *Gray* v. *Mathias*, 5 Ves. 286; 5 R. R. 48; *Hall* v. *Palmer* 3 Hare, 532; *Kyne* v. *Moore*, 1 S. & S. 61; 2 S. & S. 260; *Nye* v. *Moseley*, 6 B. & C. 133; 30 R. R. 266; *Re Vallance*, 26 Ch. D. 353.

(*o*) *Binnington* v. *Wallis*, 4 B. & A. 650; *Beaumont* v. *Reeve*, 8 Q. B. 483. See *ante*, pp. 177, 181.

(*p*) See Pollock on Contract, 312 *sq.*, 7th ed.

(*q*) *Collins* v. *Blantern*, 2 Wils. 341; 1 Smith, L. C.; *Keir* v. *Leeman*, 6 Q. B. 308; 9 Q. B. 371; *Williams* v. [illegible]*yley*, L. R. 1 H. L. 200; *Fisher* v. *Apollinaris Co.*, L. R. 10 Ch. [illegible]7; *Ex parte Wolverhampton and Staffordshire Banking Co.*, 14 Q. B. D. 32; *Windhill Local Board* v. *Vint*, 45 Ch. D. 351; *Jones* v. *Merionethshire, &c., Building Society*, 1892, 1 Ch. 173.

(*r*) *Wilson* v. *Strugnell*, 7 Q. B. D. 548; *Herman* v. *Jeuchner*, 15 Q. B. D. 561; *Consolidated Exploration Co.* v. *Musgrave* 1900, 1 Ch. 37.

ments void for similar reasons (*s*) are agreements involving maintenance (*t*), or champerty (*u*). Agreements by a father to forego his right to the custody of his children or his discretion as to their education, are generally void as against public policy (*x*). Again, some agreements are void as tending unduly to restrict individual freedom of action (*y*), as agreements in restraint of marriage (*z*) or of trade. The law, which determines what contracts are void as being in restraint of trade, is the result of two conflicting principles of public policy. On the one hand, it is for the advantage of the community that every person should be allowed the full exercise of his trade or profession; upon this ground it has been established, as a rule, that all contracts are void which impose an unreasonable restraint upon the exercise of a man's lawful calling. On the other hand, it is equally for the public welfare that every man should be free to make the best bargain he can either for his own labour or skill or for the result of his own capable conduct of his business in the shape of its goodwill. And for this reason it has been admitted that a contract may be well made for valuable consideration (*a*) imposing a *reasonable*

Champerty.

Contracts in restraint of trade.

(*s*) See *Hunter* v. *Daniel*, 4 Hare, 420, 431; *Sprye* v. *Porter*, 7 E. & B. 58; *Hutley* v. *Hutley*, L. R. 8 Q. B. 112 *British Cash, &c., Ld.* v. *Lamson Store, &c., Ld.*, 1908, 1 K. B. 1006; Pollock on Contract, 335, 7th ed. The fact that maintenance is an actionable offence furnishes another ground for holding such agreements void; see Bac. Abr. Maintenance; *Bradlaugh* v *Newdegate*, 11 Q. B. D. 1; *Alabaster* v. *Harness*, 1895, 1 Q. B. 339; *ante*, p. 190.

(*t*) *Ante*, p. 35.

(*u*) *Ante*, p. 169; *Rees* v. *Bernardy*, 1896, 2 Ch. 437.

(*x*) *Andrews* v. *Salt*, L. R. 8 Ch. 622, 636; see *Re Agar-Ellis*, 10 Ch. D. 49; 24 Ch. D. 317; *Re Nevin*, 1891, 2 Ch. 299. As to agreements in separation deeds giving the custody or control of the children to the mother, see now stat. 36 Vict. c. 12, s. 2; *Re Besant*, 11 Ch. D. 508.

(*y*) Pollock on Contract, 349, 7th ed.

(*z*) *Lowe* v. *Peers*, 4 Burr. 2225 (promise by Peers under seal not to marry any one but Mrs. Lowe, and if he did, to pa her 1,000*l.* within three mont after he should have married any one else, held void).

(*a*) Such a contract must be

restriction on a man's following his trade or business (*b*). Questions of the validity of a restraint on trade generally arise in cases where one person stipulates that another, to whom he is to impart instruction or give employment in his business, shall not afterwards enter into competition with him, or where the vendor of the goodwill of a business agrees not to compete with the purchaser; indeed it is only for the protection of some business, in which the person imposing the restraint is interested, that an agreement of this kind can well be made, as otherwise the restraint would be unreasonable and void (*c*). To give examples, a contract is not rendered void by having for its object the restraint of a person from trading in a particular place, or within a reasonable distance from any particular place (*d*), for he may carry on trade elsewhere; nor is a contract void which restrains a person from serving a particular class of customers (*e*) (for there are plenty of others to be found), or which binds a person to be the servant for life in his trade to another (*f*), for this is not in restraint of trade when it is to be carried on for his life. And agreements may lawfully be made restricting the manner in which a trade is to be worked (*g*). It was for a long time considered that

made for valuable consideration in order to be good, even though made by deed; see *ante*, pp. 177, 178.

(*b*) See Pollock on Contract, 353, 361 *sq.*, 7th ed.; *Mitchel* v. *Reynolds*, 1 Smith, L. C.; *Maxim Nordenfelt, &c., Co.* v. *Nordenfelt*, 1893, A. C. 535; *Underwood* v. *Barker*, 1899, 1 Ch. 300; *Ehrman* v. *Bartholomew*, 1898, 1 Ch. 61.

(*c*) *Townend* v. *Jarman*, 1900, 2 Ch. 698, 702; *Henry Leetham & Sons, Ld.* v. *Johnstone White*, 1907, 1 Ch. 322, 326.

(*d*) See *Avery* v. *Langford*, Kay, 663, 667; Pollock on Contract, 363, 7th ed., where the cases are collected. The distance is reckoned as measured on a map; *Mouflet* v. *Cole*, L. R. 8 Ex. 32.

(*e*) *Rannie* v. *Irvine*, 7 Man. & Gr. 969; *Baines* v. *Geary*, 35 Ch. D. 154; *Mills* v. *Dunham*, 1891, 1 Ch. 576; *Dubowski* v. *Goldstein*, 1896, 1 Q. B. 478.

(*f*) *Wallis* v. *Day*, 2 M. & W. 273.

(*g*) See *Maxim Nordenfelt, &c., Co.* v. *Nordenfelt*, 1893, 1 Ch. 630, 657, 658, 671, 672.

any contract restraining a man from carrying on his business anywhere, although for a limited time, was necessarily void as being in general restraint of trade (*h*). But it has now been established that, while a restraint unlimited in area is void as a rule, this rule admits of exceptions. And contracts restraining persons for a limited time from engaging in a particular business in any part of the world have been allowed to be enforced, where the restriction was considered to be reasonably necessary for the protection of the other party to the agreement, and not to be otherwise to the public detriment (*i*). The question, whether the restraint is reasonable, is a question of law, not of fact (*k*).

Contracts merely made void by statute.

Instances of contracts not forbidden, but merely made void by statute (*l*), are all contracts or agreements by way of gaming or wagering, which are made void by the Gaming Act, 1845 (*m*); and all contracts of marine insurance by way of gaming or wagering, including those where the assured has not and has no expectation of acquiring an insurable interest, all of which are made void by the Marine Insurance Act, 1906 (*n*).

(*h*) *S. C.*, 1893, 1 Ch. 652, 653.

(*i*) *S. C.*, 1894, A. C. 535. The rule avoiding contracts in restraint of trade has been in some respects relaxed in favour of trade unions by stat. 34 & 35 Vict. c. 31, amended by 39 & 40 Vict. c. 22; see 38 & 39 Vict. c. 86.

(*k*) *Haynes* v. *Doman*, 1899, 2 Ch. 13; *Dowden* v. *Pook*, 1904, 3 K. B. 45.

(*l*) *Ante*, p. 190.

(*m*) Stat. 8 & 9 Vict. c. 109, s. 18; *Re Grove*, 1899, 3 Q. B. 794; see *Fitch* v. *Jones*, 5 E. & B. 238; *Hyams* v. *Stuart King*, 1908, 2 K. B. 696, in which it was held that a promise to pay the amount of a lost bet may be enforceable, if supported by a new valuable consideration. The Gaming Act, 1892, stat. 55 Vict. c. 9, makes void all promises to pay to any person any sum of money paid by him in respect of any contract rendered void by the Act of 1845, or to pay any sum of money by way of commission, reward or otherwise in respect of any such contract, or of any services in connection therewith; see *Tatham* v. *Reece*, 1893, 3 Q. B. 44; *Carney* v. *Plimmer*, 1897, 1 Q. B. 634; *Burge* v. *Ashley*, 1900, 1 Q. B. 744; cf. *Re O'Shea*, 1911, 2 K. B. 981.

(*n*) Stat. 6 Edw. VII. c. 41, s. 4, replacing 19 Geo. II., c. 37, which *prohibited* all such insurances; *Gedge* v. *Royal Exchange*

Effect of illegality of the object of an agreement.

As a general rule, agreements whose direct object is unlawful are altogether void; and in this respect there is no difference between agreements made under seal and those made without deed (*o*). And even if the immediate object of an agreement be lawful, but the agreement is made to the knowledge of both parties for an unlawful purpose, it is void (*p*). If an agreement have more than one object, and some of the objects are lawful whilst the others are unlawful, the unlawful objects will not vitiate the others, provided the good part be separated from, and not dependent upon, that which is bad (*q*). But if the good part of an agreement be inseparable from the bad, as where any part of the consideration for any promise or promises is unlawful, the illegal part of the consideration will vitiate the good, and render the whole contract void (*r*). As a general rule, money paid or property delivered under an unlawful agreement cannot be recovered back (*s*).

Corporation, 1900, 2 Q. B. 214. The Act of 1906 omits all terms of prohibition, and merely uses expressions similar to those of the Gaming Act, 1845. See *post*, Part II., Ch. V.

(*o*) Pollock on Contract, 369, 7th ed.; see the cases cited in the notes to pp. 189—195, *ante*.

(*p*) *Cannan* v. *Bryce*, 3 B. & A. 179; 24 R. R. 342 (money lent for an unlawful purpose); *Pearce* v. *Brooks*, L. R. 1 Ex. 213 (brougham let to a prostitute to assist her in carrying on her vocation); *Upfill* v. *Wright*, 1911, 1 K. B. 506 (flat let to a kept woman). If in such cases the unlawful purpose be at first unknown to one of the parties, but be discovered by him before the contract is executed, the contract is voidable at his option; *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; see *Ayerst* v. *Jenkins*, L. R. 16 Eq. 275. And see Pollock on Contract, 369—372, 7th ed.; 1 Wms. V. & P. 854—857, 861, 2nd ed.

(*q*) *Mallan* v. *May*, 11 M. & W. 653; *Price* v. *Green*, 16 M. & W. 346; *Nicholls* v. *Stretton*, 10 Q. B. 346; *Underwood* v. *Barker*, 1899, 1 Ch. 300; *Bromley* v. *Smith*, 1909, 2 K. B. 235; Pollock on Contract, 367, 7th ed.

(*r*) *Featherstone* v. *Hutchinson*, Cro. Eliz. 199; *Bridge* v. *Cage*, Cro. Jac. 103; *Hopkins* v. *Prescott*, 4 C. B. 578; *Lound* v. *Grimwade*, 39 Ch. D. 605; *Russell* v. *Amalgamated Society of Carpenters*, 1912, A. C. 421; Pollock on Contract, 368, 7th ed.

(*s*) *Taylor* v. *Chester*, L. R. 4 Q. B. 309 (half of a 50*l*. bank-note deposited as a pledge for the payment of wine and suppers supplied to plaintiff in a brothel for the purposes of debauch); *Herman* v. *Jeuchner*, 15 Q. B. D. 561 (money deposited by one, ordered to find bail for his good

If, however, one who has paid money or delivered property under such an agreement repudiate his unlawful purpose before any part of it be accomplished, he may recover his property back, unless perhaps the object of the agreement were actually criminal or immoral (*t*). And if one has been induced to make an unlawful bargain by fraud, duress, or undue influence, he may recover back money paid or property delivered in pursuance thereof (*u*). Another exception to the rule is where it is sought to recover money paid under a contract void by some statute, passed for the protection of a class of persons, of which the plaintiff is one (*x*). Money paid to or property deposited with a stakeholder under an illegal contract may also be recovered back, if notice not to part with it be given before it is paid over or applied in pursuance of the agreement (*y*). The like rule, with similar exceptions, applies in the case of money paid or property delivered under an agreement, which is not unlawful, but merely void in law (*z*).

5. The consent expressed by the parties to an agreement must be unimpeachable by any of them

behaviour, with his surety as an indemnity; see *ante*, p. 192); *Kearley* v. *Thomson*, 24 Q. B. D. 742; *Scott* v. *Brown & Co.*, 1892, 2 Q. B. 724; *Harse* v. *Pearl, &c., Co.*, 1904, 1 K. B. 558; *Re Robinson's Settlement*, 1912, 1 Ch. 717; 1 Wms. V. & P. 860, 863, 2nd ed.

(*t*) *Tappenden* v. *Randall*, 2 B. & P. 467; 5 R. R. 662; *Palyart* v. *Leckie*, 6 M. & S. 290; 18 R. R. 381; *Taylor* v. *Bowers*, 1 Q. B. D. 291; *Hermann* v. *Charlesworth*, 1905, 2 K. B. 123.

(*u*) *Atkinson* v. *Denby*, 6 H. & N. 778; 7 H. & N. 934, where plaintiff recovered 50*l*. paid to defendant as the condition of his signing a composition deed between plaintiff and his creditors, defendant having refused to sign unless he received something more than the other creditors. And see *Harse* v. *Pearl, &c., Co.*, 1904, 2 K. B. 558, 563, 564; Pollock on Contract, 384—386, 7th ed.

(*x*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154, 165—168; *Bonnard* v. *Dott*, 1906, 1 Ch. 740; *Chapman* v. *Michaelson*, 1909, 1 Ch. 238; cf. *Lodge* v. *National Union Investment Co., Ld.*, 1907, 1 Ch. 300.

(*y*) *Barclay* v. *Pearson*, 1893, 2 Ch. 154, 168, 169.

(*z*) See 1 Wms. V. & P. 863, 864, 2nd ed.

on the ground of mistake, misrepresentation, fraud, duress, or undue influence. The examination of this branch of the law of contract would be out of place in a book treating of rights acquired by contract only as part of a man's property. It is fully discussed in Sir F. Pollock's valuable "Principles of Contract" (*a*), and in the editor's treatise on the "Law of Vendor and Purchaser" (*b*). All that can be said here is this:—Mistake may be such as to exclude any true consent between the parties, in which case there can be but a void agreement between them (*c*); or mistake may occur in the expression of a true consent, in which case it can generally be rectified (*d*). Contracts induced by misrepresentation, fraud, duress, or undue influence are not void, but are voidable at the option of the party misled, deceived, coerced, or unduly influenced (*e*).

Contracts only affect parties thereto.

As we have seen (*f*), a contract gives rise to rights against particular persons only. And the only persons against whom such rights can be enforced are parties to the contract, or their executors or administrators, or their principals in the case of contracts made by agents (*g*). Conversely, as a general rule, no one can sue upon a contract who is not a party to it, save as the executor, administrator,

(*a*) Ch. IX.–XII., 7th ed.

(*b*) Vol. I., pp. 747 *sq.*, 2nd ed.

(*c*) See *Foster* v. *Mackinnon*, L. R. 4 C. P. 704, where defendant indorsed a bill of exchange believing he was signing a guarantee; *Smith* v. *Hughes*, L. R. 6 Q. B. 597, where the question was whether plaintiff had sold certain oats to defendant as old oats: *Cundy* v. *Lindsay*, 3 App. Cas. 459, where the respondents delivered goods to Blenkarn believing they were selling them to Blenkiron & Co.; *Carlisle, &c., Banking Co.* v *Bragg*, 1911, 1 K. B. 489; 1 Wms. V. & P. 748 *sq.*, and *Addenda* to Vol. II., 2nd ed.

(*d*) See 1 Wms. V. & P. 780 *sq.*, 2nd ed.

(*e*) See 1 Wms. V. & P. 748, 749 805 *sq.*, 2nd ed.

(*f*) *Ante*, p. 173.

(*g*) See Pollock on Contract, 197 *sq.*, 7th ed.; 2 Wms. V. & P. 1081 *sq.*, 2nd ed.; *ante*, p. 31, n. (*r*).

assign, or principal of some party thereto (*h*). When a party to a contract is adjudged bankrupt, the benefit of the contract passes, as a rule, to his trustee in bankruptcy (*i*), who is, however, at liberty to disclaim any onerous or unprofitable contract made by the bankrupt within the time and upon the conditions specified in the Bankruptcy Act, 1883 (*k*). And as a rule, any liability to pay money or money's worth on breach of contract and any liability on contract to pay or capable of resulting in the payment of money or money's worth is provable in and will be discharged by the bankruptcy of the party liable (*l*). Bankruptcy.

The term *chose in action* is applied to the benefit of an obligation arising from contract, whether resulting in the payment of a certain sum of money or sounding in damages only, notwithstanding that no action can be maintained thereon before there has been a breach of the contract. The benefit of a contract is therefore assignable, as a rule, in the same manner as other choses in action (*m*). If, Assignment of contracts.

(*h*) See Pollock on Contract, 197 *sq.*, 7th ed.; 2 Wms. V. & P. 1081 *sq.*, 1083, 2nd ed.; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Bagot, &c., Co.* v. *Clipper, &c., Co.*, 1902, 1 Ch. 146, 155; *Earl* v. *Lubbock*, 1905, 1 K. B. 253; *ante*, p. 31, n. (*r*).

(*i*) See *Emden* v. *Carte*, 17 Ch. D. 169, 768; *Ex parte Benwell*, 14 Q. B. D. 301; *Re Shine*, 1892, 1 Q. B. D. 522; *Wilmot* v. *Alton*, 1897, 1 Q. B. 17; *Re Roberts*, 1900, 1 Q. B. 122; cf. *Bailey* v. *Thurston*, 1903, 1 K. B. 137; and see 1 Wms. V. & P. 546 *sq.*, 552 *sq.*, 2nd ed.

(*k*) Stat. 46 & 47 Vict. c. 52, s. 55.

(*l*) See sects. 37, 30 (2); stated in the chapter on Bankruptcy below; cf. *Hardy* v. *Fothergill*, 13 App. Cas. 351, and *Victor* v. *Victor*, 1912, 1 K. B. 247, with *Re Reis*, 1904, 2 K. B. 769; and see Wms. V. & P. I. 546, 547, II. 1023, 2nd ed.

(*m*) Litt. s. 512; Co. Litt. 144 b, n. (1), 292 b; 2 Black. Comm 397, 436; *Ex parte Ibbetson, Re Moore*, 8 Ch. D. 519; *Brice* v. *Bannister*, 3 Q. B. D. 569; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; *Re Davis & Co.*, 22 Q. B. D. 193; L. Q. R. xi. 230, 231; *Hughes* v. *Pump Hotel Co.*, 1902, 2 K. B. 190; *Torkington* v. *Magee*, *ib.* 427, reversed on the facts only, 1903, 1 K. B. 644; *Tolhurst* v. *Associated Portland Cement Manufacturers*, 1903, A. C. 414.

however, an obligation under a contract was intended to be for the exclusive use of some or one of the contracting parties personally, the benefit of it is not assignable (*n*). As we have seen (*o*), before the year 1875, choses in action were assignable in equity, but not, as a rule, at law, otherwise than by giving the assignee a power of attorney enabling him to sue thereon in the assignor's name; and they are now directly assignable in the manner and under the conditions specified in the Judicature Act of 1873. But things in action, of which the indirect assignment was void before this Act for maintenance or otherwise, cannot be directly assigned over by virtue of its provisions (*p*). And the opinion has been judicially expressed that the things in action assignable under this Act do not include the mere right to sue for damages for a past breach of contract (*q*). This opinion, however, must of course be confined to the right to sue for *unliquidated* (that is, unascertained) damages for breach of contract. It can have no application to the breach of a promise to pay money, which gives rise to a debt (*r*). And it appears that a right to sue for unliquidated damages for a past breach of contract resulting in damage to or depreciation in value of property may be assigned over in connection with a transfer of the property; as where a landlord grants to another his reversion on a lease for years and assigns to the grantee his right to sue the lessee for past breaches of the covenants in the lease (*s*).

(*n*) *Kemp* v. *Baerselman*, 1906, 2 K. B. 604; cf. *Phillips* v. *Alhambra Palace Co.*, 1901, 1 Q. B. 59; and see Pollock on Contract, 471, 7th ed.

(*o*) *Ante*, pp. 29, 35–40.

(*p*) *Ante*, p. 171 and n. (*g*).

(*q*) See *May* v. *Lane*, 64 L. J. Q. B. 236, 235; *Torkington* v. *Magee*, 1902, 2 K. B. 427, 433, 434, reversed on the facts, 1903, 1 K. B. 644; *Dawson* v. *Great Northern & City Ry.*, 1905, 1 K. B. 260, 270, 271.

(*r*) See *Fitzroy* v. *Cave*, 1905, 2 K. B. 364, 372–374; *ante*, pp. 31, 39, 161, 162.

(*s*) See *Williams* v. *Protheroe*, 5 Bing. 309, 3 Y. & J. 129; *Johnson* v. *St. Peter's Churchwardens*,

And even if it be good law that in other cases an action for unliquidated damages for a past breach of contract is not transferable, the fruits of such an action, that is to say, the moneys to be recovered as such damages, are without doubt lawfully assignable as property to be afterwards acquired by the assignor (*t*). It should be noted that where a contract is made to secure some future benefit, as the payment of money on a future day, for a consideration which is not completely executed, but consists wholly or partly in some continuing duty (*u*), an assignee of the benefit of the contract becomes entitled, subject to the performance by the assignor of the required duty. The assignee is therefore liable to lose the fruits of the assignment, not only if the required duty should remain undone, but also if the assignor become bankrupt and his trustee in bankruptcy adopt and carry out the contract (*x*). The *burden* of an obligation arising from a contract is not assignable (*y*), except by way of novation (*z*).

Bills and notes.

Let us now consider the most notorious exceptions to the old rule of law, viz., bills of exchange and promissory notes, which were simple contracts to pay money made in writing and were assignable, the former by the Law Merchant (*a*), the latter under a statute of Anne (*b*), by the mere transfer from hand to hand (after indorsement) of the piece of paper on which the written contract appeared. Bills and notes further differ from ordinary simple contracts

4 A. & E. 520, 527; Sug. V. & P. 357, 14th ed.; *Defries* v. *Milne*, 1913, 1 Ch. 98, 102, 108, 109.

(*t*) See *Glegg* v. *Bromley*, 1912, 3 K. B. 474; *ante*, p. 170 and n. (*b*).

(*u*) *Ante*, p. 181.

(*x*) *Wilmot* v. *Alton*, 1897, 1 Q. B. 17.

(*y*) *Tolhurst* v. *Associated Portland Cement Manufacturers*, 1902, 2 K. B. 660, 668, affirmed, 1903, A. C. 414.

(*z*) See *ante*, p. 32 and n. (*y*).

(*a*) *Gibson* v. *Minet*, 1 H. Bl. 569, 605, 606; 1 R. R. 754; *ante* pp. 33, 34.

(*b*) Stat. 3 & 4 Anne, c. 8, revised ed. (c. 9, Ruffhead's ed.), made perpetual by stat. 7 Anne, c. 25, s. 3.

in a very important particular, viz., that a consideration is presumed to have been given for them till the contrary is proved (*c*). The law relating to bills of exchange, cheques, and promissory notes, was codified by the Bills of Exchange Act, 1882 (*d*).

A bill of exchange.

By this Act (*e*), a bill of exchange is defined as an unconditional order in writing, addressed by one person to another, signed by the person giving it (*f*), requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer. The person making the order is called the drawer, the person on whom it is made the drawee, and the person to whom the money is payable the payee (*g*). The bill is sometimes made payable to the drawer himself, or to his order, or to him or bearer (*h*).

Acceptance.

If the person on whom the bill is drawn undertakes to pay it, he writes on it the word "accepted," with his signature, and is then called the acceptor. By the Bills of Exchange Act, 1882, the acceptance of a bill is defined as the signification by the drawee of his assent to the order of the drawer. And an acceptance is invalid unless it complies with the following conditions, namely:—(1) it must be written on the bill and be signed by the drawee; (2) it must not express that the drawee will perform his promise by other means than the payment of money. But the mere signature of the drawee without additional words is sufficient; and it is sufficient if the signature of the drawee be written

(*c*) See *Mills* v. *Barber*, 1 M. & W. 425; stat. 45 & 46 Vict. c. 61, ss. 30, 89.

(*d*) Stat. 45 & 46 Vict. c. 61.

(*e*) See sect. 3

(*f*) See sect. 1

(*g*) Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer; stat. 45 & 46 Vict. c. 61, s. 7 (3); *Clutton* v. *Attenborough*, 1897, A. C. 90; cf. *Vinden* v. *Hughes*, 1905, 1 K. B. 795; *North* & *South Wales Bank, Ld.* v. *Macbeth*, 1908, A. C. 137.

(*h*) See stat. 45 & 46 Vict. c. 61, s. 5.

by some other person by or under his authority (*i*). Where a bill is drawn in a set, the acceptance may be written on any part, and it must be written on one part only (*k*). If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course (*l*), he is liable on every such part as if it were a separate bill (*m*). A promissory note is defined by the same Act (*n*), as an unconditional promise in writing made by one person to another, signed by the maker (*o*), engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer. But an instrument in the form of a note payable to maker's order is not a note within the meaning of the Act unless and until it is indorsed by the maker; and a promissory note is inchoate and incomplete until delivery thereof to the payee or bearer (*p*).

A promissory note.

The making or negotiating in England of notes for less than 5*l*. payable to bearer on demand is prohibited by statute (*q*). And bills and notes payable to bearer on demand are prohibited from being issued by bankers, except by the banks and under the restrictions mentioned in the Bank Charter Act, 1844 (*r*).

Notes for less than 5*l*. payable to bearer on demand.

As both the property in and the right to sue upon a bill of exchange were transferable by the mere delivery of a bill payable to bearer, and by the delivery after indorsement of a bill payable to

Negotiation of bills and notes.

(*i*) Stat. 45 & 46 Vict. c. 61, ss. 17, 91, replacing 19 & 20 Vict. c. 97, s. 6; 41 Vict. c. 13, s. 1.
(*k*) Stat. 45 & 46 Vict. c. 61, s. 71.
(*l*) See sect. 29; and see below.
(*m*) See sect. 71.
(*n*) See sect. 83.
(*o*) See sect. 91.
(*p*) See sects. 83, 84.
(*q*) Stats. 7 Geo. IV. c. 6, ss. 3, 4; 9 Geo. IV. c. 65, s. 1; 26 & 27 Vict. c. 105, last continued by 1 & 2 Geo. V. c. 22
(*r*) Stat. 7 & 8 Vict. c. 32, ss. 10, 11.

Negotiable instrument.

order (*s*), a bill of exchange was said to be a *negotiable* instrument (*t*). By a statute of Anne, promissory notes were made negotiable in the same manner as inland bills of exchange (*u*). By the Bills of Exchange Act, 1882 (*x*), a bill or note is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder of the bill. The term "holder" in the Act means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof (*y*). And the holder of a bill or note may sue thereon in his own name (*z*). A bill or note payable to bearer is negotiated by delivery. A bill or note payable to order is negotiated by the indorsement of the holder, completed by delivery (*a*). An indorsement, in order to operate as a negotiation, must be written on the bill or note itself and signed by the indorser. The simple signature of the indorser on the bill or note, without additional words, is sufficient (*b*). And it is sufficient if his signature be written thereon by some other person by or under his authority (*c*). An indorsement may be made in blank or special (*d*). An indorsement in blank specifies no indorsee, and a bill or note so indorsed becomes payable to bearer. A special indorsement specifies the person to whom, or to whose order, the bill or note is to be payable (*e*). Thus, if a bill or note be made payable to A. B. or order, and A. B. write his name on the back, this

Holder.

Indorsement in blank.

Special indorsement.

(*s*) Eyre, C. B., *Gibson* v. *Minet*, 1 H. Bl. 569, 605, 606; see *ante*, pp. 24, 25, 33, 34, 42.

(*t*) See Blackburn, J., *Crouch* v. *Credit Foncier*, L. R. 8 Q. B. 374, 381, 382.

(*u*) Stat. 3 & 4 Anne, c. 8, revised ed. (c. 9, Ruffhead's ed.), made perpetual by stat. 7 Anne, c. 25, s. 3.

(*x*) Stat. 45 & 46 Vict. c. 61, ss. 31, 89; see *Herdman* v. *Wheeler*, 1902, 1 K. B. 361, 373 *sq.*

(*y*) Sect. 2.

(*z*) Sects. 38, 39.

(*a*) Sects. 31, 89.

(*b*) Sects. 32, 89.

(*c*) Sect. 91.

(*d*) Sects. 32 (6), 89.

(*e*) Sects. 34, 89.

operates as an indorsement in blank; and the bill or note becomes payable to bearer and negotiable by delivery only. But if A. B. write "Pay C. D. or order, A. B." on the bill or note, this is a special indorsement; and in order to be negotiated, the bill or note must be again indorsed by C. D. By the Bills of Exchange Act, 1882 (*f*), when a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person. By the same Act, a bill or note is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank (*g*).

Bill or note payable to bearer.

A cheque is defined by the Bills of Exchange Act, 1882, as a bill of exchange drawn on a banker payable on demand. And the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque, except as otherwise provided therein (*h*). The Act provides that, when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorse-

Cheque.

Banker's protection.

(*f*) Sect. 34, sub-s. 4; see sect. 8, sub-s. 3. Before this act was passed, if a bill were once indorsed in blank, it was always payable to the bearer by any of the parties thereto; but the special indorser was not liable to the bearer without the indorsement of the person to whom he had specially indorsed it; *Smith* v *Clark*, 1 Peake, 295; *Walter* v. *Macdonald*, 2 Ex. 527.

(*g*) Sects. 8 (3), 89.

(*h*) Sect. 73. A cheque is not invalid by reason of its being post-dated; sect. 13; *Royal Bank of Scotland* v. *Tottenham*, 1894, 2 Q. B. 715.

ment has been forged or made without authority (*i*). Payment in due course means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title thereto is defective (*k*). And where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment (*l*). Cheques may be crossed either generally by drawing two parallel lines across them, with or without the words & Co." or specially by writing the name of a particular banker across them (*m*), and may, in addition, be crossed with the words "not negotiable." The banker on whom a cheque is drawn must not pay it if crossed generally, otherwise than to a banker, or if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection, being a banker (*n*). When a person takes a crossed cheque which bears

Payment in due course.

Banker receiving payment for a customer of cheque, to which the customer's title is defective.

Crossed cheques.

(*i*) Stat. 45 & 46 Vict. c. 61, s. 60. Also by stat. 16 & 17 Vict. c. 59, s. 19, any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof. These enactments protect the banker on whom the bill is drawn, but not other persons, against a forged indorsement; see *Ogden* v. *Benas*, L. R. 9 C. P. 513; *Vinden* v. *Hughes*, 1905, 1 K. B. 795; *North & South Wales Bank Ld.* v. *Macbeth*, 1908, A. C. 137.

(*k*) Stat. 45 & 46 Vict. c. 61, s. 59.

(*l*) Sect. 82, which does not protect a banker who so receives payment of such a cheque otherwise than for a *customer*; see *Great Western Ry. Co.* v. *London & County Bank*, 1901, A. C. 414. By stat. 6 Edw. VII. c. 17, s. 1, a banker receives payment of a crossed cheque for a customer within the meaning of the above section, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof. This enactment alters the previous law on this point as laid down in *Capital and Counties Bank* v. *Gordon*, 1903, A. C. 240; cf. *Akrokerri Mines* v. *Economic Bank*, 1904, 2 K. B. 465.

(*m*) Stat. 45 & 46 Vict. c. 61, ss. 76, 77.

(*n*) See sect. 79, sub-s. 2.

on it the words "not negotiable," he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (*o*). Crossing a cheque "not negotiable" does not make it untransferable (*p*), but merely exempts it from the operation of the rule, whereby a valid title is acquired to negotiable securities taken in good faith and for value in the ordinary course of business (*q*).

Cheque crossed "not negotiable."

The effect of accepting a bill, or making a promissory note, is to render the acceptor or maker primarily liable to pay the same to the person entitled to require payment (*r*). The effect of drawing a bill is to make the drawer liable to payment, if the acceptor makes default, provided that the requisite proceedings on dishonour be duly taken (*s*). The effect of indorsing a bill or note is to make the indorser also liable to payment, if the acceptor of the bill or maker of the note should make default, provided that the requisite proceedings on dishonour be duly taken (*t*). The indorsement operates as against the indorser as a new drawing of the bill by him (*u*). An indorsement, however, may be made without recourse to the indorser, or "sans recours," as it is generally expressed, in which case the indorser avoids all personal liability (*x*). The Bills of Exchange Act, 1882, enacts that, subject to the provisions of the Act, a bill must be duly presented for payment; and that, if it be not so

Liability of acceptor; of drawer.

Liability of indorser.

Presentment for payment.

(*o*) Sect. 81; *Fisher* v. *Roberts*, 6 Times L. R. 354; *Great Western Ry. Co.* v. *London & County Bank*, 1901, A. C. 414.

(*p*) Sect. 8; see *National Bank* v. *Silke*, 1891, 1 Q. B. 435, as to expressing an intention that a bill or cheque shall not be transferable.

(*q*) *Ante*, pp. 24, 25.

(*r*) See stat. 45 & 46 Vict. c. 61, ss. 54, 57, 88; *Duncan, Fox & Co.* v. *North & South Wales Bank*, 6 App. Cas. 1, 13.

(*s*) Sects. 55, 57.

(*t*) Sects. 55, 57, 89.

(*u*) *Penny* v. *Innes*, 1 C. M. & R. 441.

(*x*) Byles on Bills, 181, 16th ed.; see stat. 45 & 46 Vict. c. 61, s. 16.

presented, the drawers and indorsers shall be discharged (*y*). And presentment for payment is necessary in order to render the indorser of a note liable (*z*). The drawer of a bill, or the indorser of a bill or note, will, however, be discharged from all liability, unless the person requiring payment should, within a reasonable time, give him notice that the bill or note has not been paid, or, as it is termed, has been dishonoured, and give him to understand, either expressly or by implication, that he looks to him for payment (*a*). And the Bills of Exchange Act, 1882, provides that, subject to the provisions of the Act, when a bill has been dishonoured by non-acceptance or a bill or note by non-payment, notice of dishonour must be given to the drawer and each indorser of a bill, or to each indorser of a note; and any drawer or indorser to whom such notice is not given is discharged (*b*). The rules regulating the validity of a notice of dishonour are codified by the Act (*c*); as are also the rules, which determine the cases, in which delay in giving notice of dishonour is excused, or notice of dishonour is dispensed with (*d*). In order to charge the drawer or indorser of a foreign bill of exchange, by the custom of merchants, the bill must be protested by a notary public (*e*). This protest is a declaration by him in due form that payment has been demanded and refused (*f*). And by the Bills of Exchange Act, 1882, where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested for non-acceptance; and where such a

Notice of dishonour.

Protest.

(*y*) Sect. 45.

(*z*) Sect. 87, sub-s. 2.

(*a*) *Hartley* v. *Case*, 4 B. & C. 339; Byles on Bills, 225 *sq.*, 16th ed; see stat. 45 & 46 Vict. c. 61, ss. 48–50.

(*b*) Sects. 48, 89; *Studdy* v. *Beesly*, W. N. 1889, p. 14; *Fruhauf* v. *Grosvenor*, 8 Times L. R. 744.

(*c*) Sect. 49.

(*d*) Sect. 50.

(*e*) *Gale* v. *Walsh*, 5 T. R. 239; 2 R. R. 580.

(*f*) See stat. 45 & 46 Vict. c. 61, s. 51, sub-s. 7.

bill which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment (*g*). By the same Act, where a dishonoured bill is required or authorized to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill (*h*). Protest is unnecessary in the case of an inland bill of exchange, and in the case of a promissory note, whether inland or foreign (*i*).

Bonâ fide holder may enforce payment.

In consequence of a consideration being presumed to have been given for every bill or note till the contrary is shown (*k*), it follows, that if a bill or note should have been drawn, accepted, or indorsed without any consideration, or for a consideration which is illegal, a *bonâ fide* holder for valuable consideration, or any indorsee from him, may nevertheless, enforce payment; for when he took the security he was entitled to rely on the legal presumption of a proper consideration having been given (*l*). It is stated by Sir William Blackstone (*m*), "that every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration." This, however, appears to be a mistake. The law does not give this effect to

Reason why a consideration is presumed

(*g*) Sect. 51, sub-s. 2.
(*h*) Sect. 94.
(*i*) Stat. 45 & 46 Vict. c. 61, ss. 51 (1), 89 (1, 4).
(*k*) *Ante*, p. 202.
(*l*) *Collins* v. *Martin*, 1 Bos. & Pull. 651; 4 R. R. 752; *Morris* v. *Lee*, Bayley on Bills, 509, 6th ed.; *Robinson* v. *Reynolds*, 2 Q. B. 196; *May* v. *Chapman*, 16 M. & W. 355; *Glassrock* v. *Balls*, 24 Q. B. D. 13; *Clutton* v. *Attenborough*, 1897, A. C. 90. But as between the parties to a bill or note, a valuable consideration is necessary or the instrument is not enforceable; see *Re Whitaker*, 42 Ch. D. 119, 124, 127; *ante*, p. 180.
(*m*) Black. Comm. 446.

bills of exchange and promissory notes in respect of the undertaking being evidenced by writing, but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities (*n*). On this ground the law allows these instruments to form an exception to the general rule that a consideration must be shown for every agreement, although evidenced by writing. By the Bills of Exchange Act, 1882, every party whose signature appears on a bill or note is *primâ facie* deemed to have become a party thereto for value. And every holder (*o*) of a bill or note is *primâ facie* deemed to be a holder in due course (*p*); but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (*q*). Valuable consideration for a bill or note may be constituted by any consideration sufficient to support a simple contract (*r*); or by an antecedent debt or liability (*s*). Such debt or liability is deemed valuable consideration whether the bill or note is payable on demand or at a future time (*t*). A holder in due course is a holder who has taken a bill or note, complete and regular on the face of it, under the following conditions; namely,—

Valuable consideration for a bill or note.

Holder in due course.

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact.

(*n*) 1 Fonbl. Eq. 343, 344.
(*o*) See *ante*, p. 204.
(*p*) Stat. 45 & 46 Vict. c. 61, ss. 30. 89.
(*q*) See *Tatham* v. *Huslar*, 23 Q. B. D. 317.
(*r*) *Ante*, p. 180.
(*s*) Cf. *ante*, p. 181, and see note (*o*), thereto.
(*t*) Stat. 45 & 46 Vict. c. 61, ss. 27 (sub-s. 1), 89.

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it (*u*).

Days of grace.

Three days, called days of grace, beyond the time fixed for payment, are allowed on every bill and note, except such as are payable on demand; and no action can be brought on the bill or note until the last day of grace has expired (*x*). By the Bills of Exchange Act, 1882, a bill or note is payable on demand, which is expressed to be payable on demand, or at sight, or on presentation, or in which no time for payment is expressed (*y*).

Bill or note payable on demand.

Securities for money won at play.

By the Gaming Act, 1835 (*z*), securities for money

(*u*) Sects. 29, 89.

(*x*) *Kennedy* v. *Thomas*, 1894, 2 Q. B. 759.

Stamps on bills and notes.

(*y*) Sects. 10, 89, replacing stat. 34 & 35 Vict. c. 74. The Rules of the Supreme Court, 1883 (Orders II. r. 6, III. r. 6, and XIV.) provide for summary procedure in actions on bills, notes, or cheques, superseding the procedure under stat. 18 & 19 Vict. c. 67. The stamps on bills and notes are now regulated by stat. 54 & 55 Vict. c. 39, First Schedule, tit. Bill of Exchange, and are, with some exceptions, as follows: —

	£	s.	d.
Bill of Exchange payable on demand, or at sight, or on presentation	0	0	1
Bill of Exchange of any other kind whatsoever (except a bank note) and promissory note of any kind whatsoever (except a bank note), drawn or expressed to be payable, or actually paid, or endorsed, or in any manner negotiated in the United Kingdom: where the amount or value of the money for which the bill or note is drawn or made does not exceed £5	0	0	1
Exceeds £5 and does not exceed £10	0	0	2
„ 10 „ 25	0	0	3
„ 25 „ 50	0	0	6
„ 50 „ 75	0	0	9
„ 75 „ 100	0	1	0
„ 100— for every £100, and also for any fractional part of £100, of such amount or value	0	1	0

And see sects. 32-39; *Oettinger* v. *Cohn*, 1908, 1 K. B. 582, deciding that a promissory note payable at sight requires an *ad valorem* stamp.

(*z*) 5 & 6 Will. IV. c. 41, amending 9 Anne, c. 14, which made ~~such securities~~ void.

won at any game or any game, or by betting on any game, or for money lent for gaming or betting at the time and place of such play, are to be taken to have been given for an illegal consideration. They are consequently void only as between the parties, but valid in the hands of any innocent holder, to whom they may have been transferred without notice of the illegality of the transaction in which they originated (*a*). Betting on horse racing is gaming within this Act (*b*). Bills, cheques or notes for money won on bets or wagers not coming within this Act are, as between the parties, merely void and stand on the same footing as those given without valuable consideration; but they are enforceable by a holder in due course (*c*).

Breach of contract.

The chief remedy for a breach of contract is an action at law, which is now commenced by a writ of summons indorsed with a statement of the claim made or the relief or remedy required (*d*). We have seen (*e*) that, under the equitable jurisdiction of the Court, a decree may be obtained for the specific performance of contracts of a certain class, chiefly those for the purchase or leasing of land. But the law's ultimate remedy in personal actions is the payment of money (*f*). An action for a given debt (*g*) will therefore be effectually satisfied by a judgment that the plaintiff do recover his debt; and this was the judgment accordingly given in

(*a*) *Woolf* v. *Hamilton*, 1898, 2 Q. B. 337; *Moulis* v. *Owen*, 1907, 1 K. B. 746; cf. *Saxby* v. *Fulton*, 1909, 2 K. B. 208; *Hawker* v. *Hallewell*, 3 Sm. & G. 194. See *ante*, p. 209.

(*b*) *Hyams* v. *Stuart King*, 1908, 2 K. B. 696, 701, 715.

(*c*) See *Fitch* v. *Jones*, 5 E. & B. 238; *ante*, pp. 195, and n. (*m*), 209, 210.

(*d*) Rules of the Supreme Court, 1883, Order II. rule 1; and see Appendix A. Part III. ss. 2, 4. As to the remedy for breach of contract by rescission of the contract, and as to the discharge of a contract, see 2 Wms. V. & P. 1050 *sq.*, 1008 *sq.*, 2nd. ed.

(*e*) *Ante*, pp. 159, 160.

(*f*) *Ante*, pp. 159—161.

(*g*) *Ante*, p. 162.

Action of debt.

the old action of debt, which lay, as we have seen, for the recovery of a specific sum due from the defendant to the plaintiff (*h*). And in an action to recover a debt (*i*) the judgment now is that the plaintiff recover the amount due to him, specifying it (*k*). But, except where a specific sum or thing is claimed as in debt or detinue (*l*), a personal action ex · only, in the law phrase, *sound in damages ;* and the amount of the damages to be recovered must, formerly, have been assessed by a jury according to the injury sustained (*m*). Under the present practice, however, in every action or proceeding in the King's Bench Division (*n*), in which it shall appear to the Court or a judge that the amount of damages sought to be recovered is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the Court or a judge may direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court (*o*).

Actions which sound in damages.

Damage ascertained by officer of the Court.

Liquidated damages.

It is competent, however, to the parties to a contract to agree between themselves, that, in the event of a breach by either party, a given sum shall be recovered from him by the other as liquidated (that is ascertained) damages ; and in this case the whole of the sum thus agreed on may, on a

(*h*) 2 Tidd's Practice, 931, 9th ed. ; Tidd's Practical Forms, 338. The action of debt appears to have been included among personal actions, because the defendant was not compelled to restore the very thing sued for, but was only bound to restore the quantity demanded of the things sued for. In other words, the action was brought not to recover certain specific coins, but a certain sum of money. See Glanvil, lib. x. c. 2 ; Bract. fo. 102 b ; Reg. 139 b ; *ante*, pp. 16, n. (*l*), 179.

(*i*) *Ante*, p. 162.

(*k*) See Rules of the Supreme Court, 1883, Appendix F. This practice was introduced by the Common Law Procedure Act, 1852, stat. 15 & 16 Vict. c. 76, s. 95.

(*l*) *Ante*, p. 16.

(*m*) Bac. Abr. tit. Damages (A. F.) ; Stephen on Pleading, p. 117.

(*n*) See *ante*, p. 160.

(*o*) Rules of the Supreme Court, 1883, Ord. XXXVI. r. 57, replacing stat. 15 & 16 Vict. c. 76, s. 94.

breach of the contract, be recovered from the defaulter (*p*). The sum so agreed on is not properly called a penalty; for, as we shall see hereafter when speaking of bonds, the law regards a penalty as a security only for the damage actually sustained. But the use of the word *penalty* will not prevent the whole sum from being recovered, if this be clearly the intention (*q*). For the question, whether a sum of money, agreed to be recoverable in the case of a breach of contract, is to be considered as a penalty or as liquidated damages, is a question of the intention of the parties, to be ascertained according to legal rules of construction from the terms of the whole contract (*r*). For the same reason it is held that the use of the words *liquidated damages* does not conclusively manifest the intention of the parties (*s*); and, under some circumstances, a sum of money stipulated to be recoverable "as liquidated damages" for breach of contract, will be treated as a penalty, properly so called. In the present state of the authorities it is hardly possible to state exhaustively what these circumstances are (*t*). It appears, however, to be established that if a specified sum be agreed to be recoverable as liquidated damages for a breach of a contract to do several acts, of which one is to pay a smaller sum of money, then the sum specified will be treated as a penalty; and, in the case of a breach

(*p*) *Reilly* v. *Jones*, 1 Bing. 302; 25 R. R. 640; *S. C.*, 8 Moore, 244; Sugd. V. & P. 223, 11th ed.; *Leighton* v. *Wales*, 2 M. & W. 545; *Price* v. *Green*, 16 M. & W. 346, 354; *Galsworthy* v. *Strutt*, 1 Ex 659; *Atkyns* v. *Kinnier*, 4 Ex. 776; *Wallis* v. *Smith*, 21 Ch. D. 243.

(*q*) *Sainter* v. *Ferguson*, 7 C. B. 716; *Sparrow* v *Paris*, 7 H. & N. 594.

(*r*) See the judgments in *Lea* v *Whitaker*, L. R. 8 C. P. 70; *Wallis* v. *Smith*, 21 Ch. D. 243; *Law* v. *Local Board of Redditch*, 1892, 1 Q. B. 127; *Pye* v. *British Automobile, &c., Ld.*, 1906, 1 K. B. 425; *Diestal* v. *Stevenson*, 1906, 2 K. B. 345; *Webster* v. *Bosanquet*, 1912, A. C 394.

(*s*) *Kemble* v. *Farren*, 6 Bing. 141; 31 R. R. 366.

(*t*) See *Wallis* v. *Smith*, 21 Ch. D. 243.

of any of the provisions of the contract, the aggrieved party will only be allowed to recover damages proportioned to the actual injury which the breach has occasioned (*u*). In the case of a contract to do several acts, which do not include the payment of money, it appears that, *primâ facie*, a stipulation that a specified sum shall be recoverable as liquidated damages for breach of contract will be construed literally; and the whole sum will be recoverable in the case of a breach (*x*). But if any of the provisions of the contract be of such a nature that the damage occasioned by a breach thereof must necessarily be very small, it is thought that the Court would be inclined to treat the sum specified as a penalty only (*y*). If one of the terms of a contract be that a sum of money shall be deposited by a party thereto, and a stipulation be made that the deposit shall be forfeited in the event of a breach of contract, or that the deposit shall be applied in

Deposit.

(*u*) *Astley* v. *Weldon*, 2 B. & P. 346; 5 R. R. 618; *Kemble* v. *Farren*, 6 Bing. 141; 31 R. R. 366; *Davies* v. *Penton*, 216, 223; *Horner* v. *Flintoff*, 9 M. & W. 678; *Reindel* v. *Schell*, 4 C. B. N. S. 97; *Betts* v. *Burch*, 4 H. & N. 506; *Magee* v. *Lavell*, L. R. 9 C. P. 107; *Re Newman, Ex parte Capper*, 4 Ch. D. 724; *Wallis* v. *Smith*, 21 Ch. D. 243, 254—277. The following explanation of this rule is given. According to English law, as a general rule, the damage for the breach of a contract to pay a sum of money on a certain day is the sum agreed to be so paid, with interest in the case of a debt bearing interest, but no more. Thus the damage for the breach of such a contract is said to be ascertained damage. The Courts have held, therefore, that in the case of a contract to do several acts, one of which is the payment of money, with a stipulation that a specified sum shall be recoverable for breach of contract, it shall be considered unreasonable to suppose that the parties could have intended that the whole sum should be payable in the case of a breach of the contract, for which the damage is ascertained at a smaller sum. And it has been further held, upon the construction of such contracts, that in the case of a breach of any of the provisions of the contract, other than the provision for the payment of money, the sum specified must also be treated as a security only for the damage actually sustained. See *Wallis* v. *Smith*, *ubi supra*; *Cook* v. *Fowler*, L. R. 7 H. L. 27; *Re Roberts*, 14 Ch. D. 49.

(*x*) *Atkyns* v. *Kinnier*, 4 Ex. 776; *Mercer* v. *Irving*, E. B. & E. 563; *Wallis* v. *Smith*, 21 Ch. D. 243.

(*y*) See *Wallis* v. *Smith*, 21 Ch. D. 243, 257, 258, 270, 271; *Willson* v. *Love*, 1896, 1 Q. B. 626.

satisfaction of a specified sum to be recoverable in that event, these circumstances are regarded by the Court as evidencing an intention that the amount of the deposit, or other amount specified, shall be recoverable as liquidated damages. In such cases the whole deposit or sum will generally be recoverable in the case of a breach of the contract, notwithstanding that one of the provisions of the contract be for the payment of money, or be of such a nature that the damage for a breach thereof must necessarily be very small (*z*).

Reference to arbitration.

Award of arbitrator.

The amount of money to be paid as compensation for the infliction of a wrong or for a breach of contract not giving rise to a debt may also be ascertained by the award of an arbitrator, upon a reference of the matter in dispute to arbitration (*a*). An award for the payment of money creates a debt from one party to the other (*b*). Written agreements to submit present or future differences to arbitration are now governed by the provisions of the Arbitration Act, 1889 (*c*). By this Act (*d*), an award made under such an agreement may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect.

The person to whom money had become due, whether from any injury received, or from any contract broken, or from a contract to pay money itself, formerly stood in a situation more or less advantageous with regard to his remedies for recovering the money, according to the nature of

(*z*) *Hinton* v. *Sparkes*, L. R. 3 C. P. 166; *Lea* v. *Whitaker*, L. R. 8 C. P. 70; *Wallis* v. *Smith*, 21 Ch. D. 243, 250—252, 258; *Pye* v. *British Automobile, &c. Ld.*, 1906, 1 K. B. 425.

(*a*) See 2 Wms. V. & P. 1044, 2nd ed.

(*b*) 2 Wms. Saund. 62 a, n. (5); *Ex parte Lingard*, 1 Atk. 241.

(*c*) Stat. 52 & 53 Vict. c. 49; see 2 Wms. V. & P. 1044, n. (*m*), 2nd ed.

(*d*) Sects. 12, 27; see *Re a Bankruptcy Notice*, 1907, 1 K. B. 478.

the *debt* which had thus become due to him. For by the common law all creditors were not allowed equal rights, but were preferred the one to the other, partly according to accidental circumstances, and partly according to the degree of diligence and precaution which each might have used. These old distinctions have, however, as we shall see, been greatly modified by modern legislation, though not altogether abolished. The subject of debt is of sufficient importance to form a separate chapter. Debts.

CHAPTER III.

OF DEBTS.

DEBTS, by the common law, are divided into different classes, which formerly conferred on the creditor different degrees of security for repayment. But these differences have been greatly modified, though not entirely removed by modern statutes, as we shall presently see. So long as a debtor's property is sufficient to discharge all his engagements in full, a creditor is not prejudiced by the fact that there are others who may be preferred before him (*a*). But the value of a privilege of priority of payment is at once apparent in the event of the application of an insolvent debtor's estate in part satisfaction of his liabilities. This may occur during his lifetime in the event of his bankruptcy (*b*), or on the distribution of his property after his death (*c*). In case of a debtor's bankruptcy, his creditors are prohibited from pursuing their legal remedies after a receiving order, which is the first order now made in bankruptcy proceedings, has been made against him (*d*); all the debtor's property vests in the creditors' trustee, who is empowered to sell it (*e*); the creditors must prove their debts in the bankruptcy, and take their share of the assets as distributed according to the law of bankruptcy (*f*); and all debts and liabilities (*g*) *provable* in the

Bankruptcy.

(*a*) *Ante*, pp. 104, 114.
(*b*) *Ante*, pp. 106, 112.
(*c*) *Ante*, pp. 2, 3.
(*d*) Stat. 46 & 47 Vict. c. 52, ss. 9, 10 (2); *Re Gnedalla*, 1905, 2 Ch. 331.
(*e*) *Ante*, p. 112; and see next chapter.
(*f*) See next chapter.
(*g*) See *ante*, p. 199.

bankruptcy are, with some exceptions, discharged (whether actually proved or not) either by the bankrupt's obtaining an order of discharge or by the creditors' acceptance and the approval by the Court of a composition or a scheme of arrangement (*h*). In bankruptcy, which is a method of discharge from debt depending entirely on statute and formerly available to traders only, the privileges attached to the various classes of debts at common law were not regarded; and, as a general rule, all creditors are and always have been placed on equal footing (*i*). Before the Bankruptcy Act, 1883, the Crown enjoyed the privilege of exacting full payment of any debt due to itself; for the Crown was not bound by the previous bankruptcy statutes (*k*): but by that Act the Crown is expressly placed on the same footing as other creditors (*l*). There are, however, certain preferential debts, which are to be paid in bankruptcy in priority to all others (*m*). If a man die insolvent, his estate may be administered either by his executor or administrator without any judicial proceedings, or else under the direction of the Court. An executor or administrator is bound to apply the personal estate of the deceased in payment, first, of the funeral expenses, next, of the testamentary or administration expenses, and

Administration of a dead man's estate out of Court.

(*h*) Stats. 46 & 47 Vict. c. 52, s. 30; 53 & 54 Vict. c. 71, s. 3 (12); *Hardy* v. *Fothergill*, 13 App. Cas. 351; *Flint* v. *Barnard*, 22 Q. B. D. 90; *Seaton* v. *Deerhurst*, 1895, 1 Q. B. 853; *Re Sewell*, 1909, 1 Ch. 806; *Victor* v. *Victor*, 1912, 1 K. B. 247.

(*i*) Stat. 46 & 47 Vict. c. 52, s. 40 (4), replacing 32 & 33 Vict. c. 71, s. 32; 24 & 25 Vict. c. 134, s. 156; 12 & 13 Vict. c. 106, ss. 166—169; 6 Geo. IV. c. 16, s. 48; 21 Jac. I. c. 19, s. 9; see 2 Black. Comm. 487.

(*k*) *Ex parte Postmaster-General, Re Bonham*, 10 Ch. D. 595; *New South Wales Taxation Commrs.* v. *Palmer*, 1907, A. C. 179, 184. The Crown is not bound by any statute, unless expressly mentioned therein, or unless there is a necessary implication to be drawn from the provisions of the Act, or from the legislation on the subject, that the Crown was intended to be bound; *Ex parte Postmaster-General, Re Bonham*, 10 Ch. D. 601; *Thomas* v. *Pritchard*, 1903, 1 K. B. 209, 212.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 150.

(*m*) Stat. 46 & 47 Vict. c. 52, s. 40, amended by 51 & 52 Vict. c. 62.

then of the deceased person's debts (*n*); and the debts are to be paid in due order according to the priorities prescribed by the common law, as modified in some particulars by statute (*o*). According to these priorities, the Crown has a paramount claim for debts due to it by record or specialty; then follow debts to which priority is given by particular statutes; next come debts of record due to a subject, and of these, judgment debts are to be preferred to recognizances; then follow judgments against the executor or administrator on the dead man's liabilities by contract for value; after which, debts incurred for value by special or simple contract—these are now payable on an equal footing, save as to certain claims postponed by statute; and last of all, debts incurred voluntarily by deed (*p*). If the executor or administrator pay a debt of lower degree in preference to one of a superior order, of which he has notice, he will be liable to pay the superior debt out of his own pocket in case of a deficiency of assets; for such an act is an admission that he has assets sufficient to satisfy the superior claim (*q*). But he has the privilege of preferring one creditor to another of *equal* degree (*r*), and of retaining a debt due to himself in preference to paying any other of equal degree (*s*). These priorities, however, apply only to legal assets. It appears that in the administration out of Court of equitable assets an executor ought to observe the same rules as would be applied in the administration

Executor's right to prefer a creditor, and of retainer.

Payment of debts out of equitable assets.

(*n*) *Ante*, p. 2.

(*o*) *Re Hargreaves*, 44 Ch. [illegible] 236, 242.

(*p*) See Table annexed [illegible] p. 244, *post*.

(*q*) 2 Black[illegible]; Exors. ii. 988, [illegible] 1975, 2049, 7th [illegible] *sq.*, 1436, 1583, [illegible] ed.; see *Re Flunner*, [illegible] 562; *Re Marvin*, [illegible] *Harmoll*, 1907, 2 [illegible] but an executor is [illegible] notice of judgment [illegible] 227, *post*.

(*r*) [illegible] *Cross*, 3 B. & C. [illegible] *Jeffe*, 7 Ch. D. 733; [illegible] 24 Q. B. D. 264. [illegible] Comm. 511; Wms. Exors. [illegible] 7th ed.; i. 785, [illegible] ed.

of such assets by the Court (*t*). These are that, subject only to the priority given by prerogative to the Crown (*u*) or by any particular statute to any creditor (*x*), all debts are payable thereout on an equal footing, and that the assets shall be *marshalled* by requiring any creditor, who has obtained payment out of the legal assets, to bring the amount so paid to him into hotchpot as a condition of his participating in the fund (*y*). And an executor has no right to retain his own debt, or (as it seems) to pay one creditor in preference to another out of any equitable assets (*z*).

Legal assets.

Legal assets are those which come to the executor's hands by virtue of his office, as to which the dead man's *creditor* has a remedy by suing the executor at law to recover the debt (*a*), and with which the executor will be charged in such an action as assets come to his hands. The dead man's general personal estate is an instance: but legal assets include all equitable interests (*b*) vesting in the executor *virtute officii* (*c*). Equitable assets are those as to which the *creditor's* sole original remedy was to sue in equity for the administration of the dead man's estate; such as lands devised on trust to pay or charged with debts or lands made liable to their deceased owner's debts solely by virtue of the Administration of Estates Act, 1833 (*d*).

Equitable assets.

(*t*) *Howe* v. *Dartmouth*, 7 Ves. 137, 150; *Holland* v. *Hughes*, 16 Ves. 111, 114.

(*u*) *Ante*, p. 219, n. (*k*); *post*, pp. 224, n. (*e*), 225.

(*x*) *Post*, pp. 240—242.

(*y*) *Deg* v. *Deg*, 2 P. W. 412, 416; *Haslewood* v. *Pope*, 3 P. W. 322, 323; *Wride* v. *Clarke*, Dick. 382; *Chapman* v. *Esgar*, 1 Sm. & Giff. 575; Williams on Real Assets, 4, 7, 117; Seton on Judgments, 1608, 7th ed.

(*z*) *Bain* v. *Sadler*, L. R. 12 Eq. 570; *Walters* v. *Walters*, 18 Ch. D. 182.

(*a*) *Ante*, p. 114.

(*b*) *Ante*, pp. 26—28.

(*c*) *Cook* v. *Gregson*, 3 Drew. 547, 549, 550; *A.-G.* v. *Brunning*, 8 H. L. C. 243, 258, 259; *Re Hadley*, 1909, 1 Ch. 20, 30, 31.

(*d*) Stat. 3 & 4 Will. IV. c. 104; see Williams, R. P. 281—284, 21st ed.; cases cited in n. (*z*) above; *Re Illidge*, 27 Ch. D. 478, 483, 484; Williams on Real Assets, 4—7, 14, 23—26; *ante*, p. 114.

It is a question whether the Land Transfer Act, 1897 (*e*), which provides for the vesting of a dead man's real estate in his personal representatives and for the payment of his debts thereout, has had the effect of converting such real estate into legal assets: but it has been decided that an executor has no right of retainer out of such real estate (*f*); and it appears that it was not the intention of this Act to give to any creditor any priority or preference, to which he would not before the Act have been entitled in case of payment of his debt out of the dead man's real assets (*g*).

Administration of deceased persons' estates by the Court.

The administration of the estates of deceased persons is an important branch of the jurisdiction of the Court of Chancery transferred in 1875 to the High Court of Justice (*h*), and it is assigned to the Chancery Division (*i*). After an order for administration under the direction of the Court has been obtained—and it may be granted on the application either of a creditor (*k*), or the executor or administrator (*l*), or a legatee (*m*)—creditors can be prevented from pursuing their remedies at law (*n*), and they must prove their debts in the administration proceedings, and await the satisfaction of their claims in the due course of the administration of the estate. And after such an order has been made on behalf of creditors generally, an executor or administrator may no longer prefer one creditor to another (*o*): but he may still exercise his right of retainer (*p*). Formerly an order for administra-

(*e*) Stat. 60 & 61 Vict. c. 65, ss. 1–5, amended by 1 & 2 Geo. V., c. 37, s. 12; see Williams, R. P. 219, 220, 283, 284, 21st ed.

(*f*) *Re Williams*, 1904, 1 Ch. 52.

(*g*) See *S. C.*

(*h*) *Ante*, p. 109.

(*i*) St. 36 & 37 Vict. c. 66, s. 34.

(*k*) *Ante*, p. 114.

(*l*) *Post*, Part III. Ch. iii. and iv.

(*m*) *Ante*, p. 36, and n. (*m*).

(*n*) *Post*, Part III. Ch. iii.

(*o*) Wms. Exors. ii. 1036, 7th ed.; i. 783, 10th ed.

(*p*) *Nunn* v. *Barlow*, 1 S. & S. 588; *Re Belham*, 1901, 2 Ch. 52.

tion did not affect the legal priorities of debts: but it is now established that, according to the true construction of an enactment of the Judicature Act, 1875 (*q*), in the administration by the Court of the insolvent estates of deceased persons the same rules are to be observed with respect to the priority of debts as are for the time being in force under the law of bankruptcy (*r*). It appears, however, that this enactment does not bind the Crown (*s*); and the Crown privilege of priority of payment seems to remain untouched, although the estate be administered by the Court (*t*). The rules applied by the Court in the administration of equitable assets have been already stated (*u*). In accordance with the same principles, any creditors, who have been paid before the administration order in priority or preference to others according to the rules of the administration of legal assets out of Court (*x*), will not be allowed to receive anything under the administration of the estate by the Court until the other creditors have received enough to place them on an equal footing with those so preferred (*y*). Under the Bankruptcy Act, 1883 (*z*), an order may be made by a Court exercising bankruptcy jurisdiction for the administration of the insolvent estate of a deceased debtor according to the law of bankruptcy; but such an order can only be obtained on the application of a creditor (*a*), or by order of a Court in which the estate is being administered. If such an order be made, the priority of debts is

Administration in bankruptcy of deceased debtor's insolvent estate.

(*q*) Stat. 38 & 39 Vict. c. 77, s. 10.

(*r*) *Re Whitaker*, 1901, 1 Ch. 9, overruling *Re Maggi*, 20 Ch. D. 545; and see *Re Whitaker*, 1904, 1 Ch. 290; *M'Causland* v. *O'Callaghan*, 1904, 1 I. R. 370.

(*s*) See *ante*, p. 219, n. (*k*).

(*t*) See *Re Oriental Bank Corporation*, 28 Ch. D. 643, 645, 649; *Re Churchill*, 39 Ch. D. 174; *Re Bentinck*, 1897, 1 Ch. 673.

(*u*) *Ante*, pp. 220, 221.

(*x*) *Ante*, pp. 219, 220.

(*y*) *Lowthian* v. *Hassel*, 4 Bro. C. C. 167; *Mitchelson* v. *Piper*, 8 Sim. 64.

(*z*) Stat. 46 & 47 Vict. c. 52, s. 125, amended by 53 & 54 Vict. c. 71, s. 21; see next chapter.

(*a*) *Re Kitson*, 1911, 2 K. B. 109.

entirely determined by the bankruptcy rules, and the Crown is placed on an equal footing with the other creditors (*b*). The winding-up of joint-stock companies is a process analogous to that of the bankruptcy of a natural person (*c*); and in such proceedings the order of payment of the debts is now governed by the bankruptcy rules (*d*), except that the Crown appears to retain its ancient privileges (*e*). Let us now examine the above-mentioned classes of debts more particularly.

Winding-up of companies.

Debts of record.

Courts of record.

The class of debt which conferred the highest privileges is that of debts of record. These are debts due by the evidence of a Court of record; that is, properly speaking, a Court of which the proceedings are enrolled or recorded, and the records are indisputable evidence of its proceedings (*f*). But every Court, by having power given to it to fine and imprison, is thereby made a Court of record (*g*). Such Courts are either supreme, superior, or inferior. The supreme Court is the High Court of Parliament (*h*). The principal superior Courts are now the two divisions of the Supreme Court of Judicature established by the Judicature Acts—namely, the High Court of Justice and the Court of Appeal (*i*)—and the

(*b*) Stat. 46 & 47 Vict. c. 52, ss. 40, 125, 150; see *Re Williams*, 30 Ch. D. 573, 577—582.

(*c*) See *post*, Part II. Ch. vi.

(*d*) Stat. 8 Edw. VII. c. 69, ss. 207, 209, replacing 38 & 39 Vict. c. 77, s. 10, as now construed, and 52 & 53 Vict. c. 60, s. 4; *post*, pp. 243, n. (*z*), 244; *ante*, p. 223, n. (*r*).

(*e*) See cases cited *ante*, p. 223, n. (*l*); *Re Henley & Co.*, 9 Ch. D. 469; *Re West London Commercial Bank*, 38 Ch. D. 364.

(*f*) Black. Comm. ii. 465, iii. 24; Williams, R. P. 285, and n. (*x*), 21st ed.

(*g*) Bac. Abr. Courts (D 2).

(*h*) Bac. Abr. Courts (D 1).

(*i*) Stat. 36 & 37 Vict. c. 66, ss. 3, 4, 16, 18; see *ante*, p. 160, and n. (*n*). The old Courts of common law derived out of the King's Court, namely—the Courts of King's Bench, Common Pleas and Exchequer, and the Court of Chancery—were all superior Courts of record: Bac. Abr. Courts (D, 1); Williams, R. P. 9 and n. (*e*), 162, 21st ed. The High Court of Admiralty was not originally a Court of record, but was made so by stat. 24 Vict. c. 10, s. 14. The Ecclesiastical Courts were not

House of Lords (*k*). The Courts of Chancery of the counties Palatine of Lancaster and Durham are superior Courts of record (*l*). And the Court of Criminal Appeal is a superior Court of record (*m*). The inferior Courts of record may be said, generally, to consist of the County Courts, and of certain local Courts (*n*).

Inferior Courts of record.

Debts of record do not, however, confer the same advantages on all creditors equally, for there is one creditor whose claims are paramount to all others, namely, the Crown. In order to enjoy this priority, the Crown debt is required to be a debt of record (*o*), or a debt by specialty, that is, secured by deed (*p*); though if the debt be by simple contract without such security, it has preference over the other simple contract creditors of the debtor (*q*). As mentioned above (*r*), the Crown might formerly enforce payment of the whole debt due to it, notwithstanding the debtor's bankruptcy: but under the Bankruptcy Act, 1883 (*s*), debts due to the Crown are payable on an equal footing with those

Crown debts.

Courts of record: but the Court of Probate and the Court of Divorce and Matrimonial Causes, to which the ecclesiastical jurisdiction in these matters was transferred in the year 1858, were Courts of record; stats. 20 & 21 Vict. c. 77, ss. 4, 23; 20 & 21 Vict. c. 85, s. 6. So was the London Court of Bankruptcy united by the Bankruptcy Act, 1883, with the Supreme Court of Judicature; stats. 32 & 33 Vict. c. 71, s. 65; 46 & 47 Vict. c. 52, s. 93.

(*k*) Bac. Abr. Courts (D 3). The appellate jurisdiction of the House of Lords is now governed by the Appellate Jurisdiction Acts, 1876 and 1887; stats. 39 & 40 Vict. c. 59; 50 & 51 Vict. c. 70.

(*l*) Bac. Abr. Courts (D 1); see Williams, R. P. 277, n. (*p*), 21st ed.

(*m*) Stat. 7 Edw. VII. c. 23, s. 3 (7).

(*n*) *Ante*, p. 109.

(*o*) Debts found to be due to the Crown by the prerogative process of an inquest of office are debts of record, as well as debts due to the Crown by judgment in any ordinary proceedings in a Court of record; 3 Black. Comm. 258; Wentworth Exors. 262, 263, 14th ed.; Manning's Exchequer Practice, 1, 2nd ed.; Chitty Prerogative, 265—271.

(*p*) Wms. Exors. ii. 991—993, 7th ed.; i. 756, 10th ed.

(*q*) *Re Bentinck*, 1897, 1 Ch. 673.

(*r*) *Ante*, p. 219.

(*s*) Stat. 46 & 47 Vict. c. 52, s. 150.

of other creditors in case of the debtor's bankruptcy or of the administration of his estate in bankruptcy after his death. The claims of the Crown, however, appear to remain paramount in the administration of the deceased debtor's estate out of Court, or in the Chancery Division (*t*), in the winding-up of joint stock companies (*u*), and in other cases (*x*). The lien of the Crown on the lands of its debtors by record or specialty, and also on the lands of accountants to the Crown, is mentioned in the author's Treatise on the Principles of the Law of Real Property (*y*). The privilege of the Crown to enforce payment of its debt by prerogative process against the body, lands and goods of its debtor is also referred to in the same work (*y*), and has been mentioned in the present volume (*z*).

Judgment debt.

Of all debts which one subject may owe to another, that which formerly conferred the most important remedy is a *judgment debt*, or a debt which is due by the *judgment* of a Court of record (*a*). As such a debt is due by the evidence of a Court of record, it is of course a debt of record. Every judgment debt carries interest at the rate of 4*l. per cent. per annum* from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*b*). In the administration of a

A judgment debt carries interest.

(*t*) *Ante*, pp. 219. 222.

(*u*) *Ante*, p. 224.

(*x*) *A.-G.* v. *Leonard*, 38 Ch. D. 622.

(*y*) Page 285, 21st ed.

(*z*) *Ante*, p. 105.

(*a*) By the common law, every judgment for the recovery of a sum of money is a judgment *debt*, whether given on account of a debt or damages arising by contract or of damages for a wrong; *ante*, pp. 171 n. (*i*), 213. And when judgment is given to recover a debt, the original liability is, as a rule, merged in the judgment; *Ex parte Fewings*, 25 Ch. D. 338; *Wegg Prosser* v. *Evans*, 1895, 1 Q. B. 108; *Re King and Beesley*, *ib.* 189; *Economic, &c., Society* v. *Usborne*, 1902, A. C. 147.

(*b*) Stat. 1 & 2 Vict. c. 110, s. 17; *Taylor* v. *Roe*, 1894, 1 Ch. 413. See Rules of the Supreme Court, 1883, Ord. XLII. r. 16, and Appendix H. No. 1.

deceased debtor's estate out of Court, his judgment debts are required to be paid in full by his executors or administrators out of his personal estate before any of his debts by special or simple contract (*c*). By a statute of the year 1860, in order to secure this preference, the judgment was required to be registered or re-registered within five years before the death of the testator or intestate, in the same manner as was required in order to affect lands in the hands of purchasers or mortgagees (*d*). But these enactments were repealed by the Land Charges Act, 1900 (*e*), as from the commencement of that Act (*f*); since when it appears that judgment debts are again entitled to their common law priority in administration out of Court, although they be not registered; and that the executor or administrator will be taken to have notice of them, whether he be actually aware of them or not (*g*). As between themselves, such judgment debts are payable rateably, and not in the order of their date (*h*). The decree of a Court of equity was equivalent to the judgment of a Court of law (*i*). And the privilege of priority of payment extends to the judgments of every Court of record, whether superior or inferior; but the judgment of a foreign Court is entitled to no precedence over a simple contract debt (*k*). In bankruptcy, however, and in the

Judgment debts entitled to preference in administration out of Court.

Registration of judgment debts no longer required.

No preference of judgment

(*c*) Wentworth's Executors, 265 *sq.*, 14th ed.; Wms. Exors. 996, 7th ed.; 762 10th ed.; *Berrington* v. *Evans*, 3 Y. & Col. 384; *ante*, p. 220.

(*d*) Stat. 23 & 24 Vict. c. 38, ss. 3, 4. See Williams, R. P. 271, 272, 21st ed. Under this Act an unregistered judgment debt had no priority over a simple contract debt; *Van Gheluwe* v. *Nerinckx*, 21 Ch. D. 189.

(*e*) Stat. 63 & 64 Vict. c. 26, s. 5.

(*f*) 1st July, 1901; s. 6 (2).

(*g*) See *Fuller* v. *Redmond*, 26 Beav. 600; *Evans* v. *Williams*, 2 Dr. & Sm. 324; and cf. *ante*, p. 220.

(*h*) Wentworth Exors. 269, 14th ed.; Wms. Exors. ii. 1004, 7th ed.; i. 766, 10th ed.; *Dolloud* v. *Johnson*, 2 Sm. & Giff. 301, 304.

(*i*) *Shafto* v. *Powe*, 3 Lev. 355.

(*k*) *Duplex* v. *De Proven*, 2 Vern. 540. See also *Smith* v. *Nicolls*, 5 Bing. N. C. 208. As to Scotch and Irish judgments, see *ante*, p. 109, n. (*b*).

debts in bankruptcy.

administration in bankruptcy of the insolvent estates of deceased debtors no priority is given to creditors who have obtained judgment against the debtor, but, after satisfaction of the preferential claims, all debts are paid rateably (*l*). And the same rule now obtains in the administration by the Court of the insolvent estates of deceased debtors, and in the winding-up of companies (*m*).

Remedies of judgment creditors.

The remedies of the creditor by judgment of any of the superior Courts, against the real estate of his debtor, are mentioned in the author's Treatise on the Principles of the Law of Real Property (*n*). The remedies against the choses in possession of the debtor have been referred to in a previous part of the present work (*o*). The remedies in respect of the choses in action of the debtor will be hereafter mentioned. In addition to these remedies, such a judgment creditor might formerly have imprisoned the person of his debtor by means of the writ of *capias ad satisfaciendum* (*p*); but should he have done so, he would have relinquished all right and title to the benefit of any charge or security which he might have obtained by virtue of his judgment (*q*). But the Debtors Act, 1869, which came into operation on the 1st of January, 1870, now provides that, with the exceptions therein mentioned, no person shall be arrested or imprisoned for making default

Imprisonment by writ of *capias ad satisfaciendum*.

The Debtors Act, 1869.

(*l*) *Ante*, pp. 219, 223.
(*m*) *Ante*, pp. 223, n. (*r*), 224.
(*n*) Pp. 268 *sq.*, 21st ed.
(*o*) *Ante*, pp. 103 *sq.*
(*p*) Bac. Abr. tit. Execution (C) 3.
(*q*) Bac. Abr. tit. Execution (D); stat. 1 & 2 Vict. c. 110, s. 16. If, however, the debt should not have exceeded 20*l.*, the debtor could not have been imprisoned without a previous summons and examination before a commissioner of bankruptcy or a judge of a county court, who would have ordered the commitment of the debtor only in case of fraud or other ill behaviour; and the imprisonment would not then have operated as any satisfaction of the debt. See stats. 7 & 8 Vict. c. 96, s. 57; 8 & 9 Vict. c. 127; 9 & 10 Vict. c. 95, ss. 99, 103.

in payment of a sum of money (*r*). Power is, however, reserved by section 5 of the Act, for any Court to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court (*s*). But this jurisdiction is only to be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same (*t*). In the case of any Court, other than the superior Courts

Section 5 of the Debtors Act, 1869.

Proof of means of payment.

(*r*) Stat. 32 & 33 Vict. c. 62, s. 4; *Buckley* v. *Crawford*, 1893, 1 Q. B. 105; *R.* v. *Birmingham County Court Judge*, 1902, 2 K. B. 283. The exceptions are: (1) Default in payment of a penalty, other than a penalty in respect of any contract. (2) Default in payment of any sum recoverable summarily before a justice or justices of the peace. (3) Default by a trustee or person acting in a fiduciary capacity, and ordered by a Court of Equity to pay any sum in his possession or under his control. (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order; see *Re Hope*, L. R. 7 Ch. 523; *Re Strong*, 32 Ch. D. 342. (5) Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorised to make an order. (6) Default in payment of sums in respect of the payment of which orders are in the Act authorised to be made. But no person is to be imprisoned in any of the excepted cases for a longer period than one year. Imprisonment is awarded in these cases as a punishment for an offence, and not as a remedy to obtain payment of the sum due; *Re Smith, Hands* v. *Andrews*, 1893, 2 Ch. 1; *Re Edgcome*, 1902, 2 K. B. 403; *Church's Trustee* v. *Hibbard*, 1902, 2 Ch. 784. By stat. 41 & 42 Vict. c. 54, in any case coming within the exceptions Nos. (3) & (4), the Court may inquire into the case and (subject to the provisoes contained in s. 4 of the Act of 1869) may grant or refuse, either absolutely or upon terms, any application for a writ of attachment, or other process or order for arrest or imprisonment, and any application to stay the operation of any such writ, process, or order, or for discharge from arrest or imprisonment thereunder; see *Marris* v. *Ingram*, 13 Ch. D. 338; *Holroyde* v. *Garnett*, 20 Ch. D. 532.

(*s*) Stat. 32 & 33 Vict. c. 62, s. 5; *Hermitage* v. *Kilpin*, L. R. 9 Ex. 205; *Evans* v. *Wills*, 1 C. P. D. 229.

(*t*) Stat. 32 & 33 Vict. c. 62, s. 5; see *Chard* v. *Jervis*, 9 Q. B. D. 178.

of law and equity (*u*), this jurisdiction is subject to certain other restrictions (*x*). The Act provides that no imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods or chattels, of the person imprisoned, in the same manner as if such imprisonment had not taken place (*y*). Imprisonment under this section is punitive, and is not an execution of the judgment (*z*). For the purposes of section 5 of the Act, any Court may direct any debt due from any person, in pursuance of any order or judgment of that or any other competent Court, to be paid by instalments (*a*). So long as an order for payment by instalments remains in force, the right to issue execution on the judgment is suspended (*b*). But execution may issue for any unpaid instalment (*c*). The jurisdiction and powers of the High Court, under section 5 of the Debtors Act, 1869, are now exercised by the judge to whom bankruptcy business is for the time being assigned (*d*). And by the Bankruptcy Act, 1883 (*e*), where under section 5 of the Debtors Act, 1869, application is made by a judgment creditor to a Court having bankruptcy jurisdiction, for the committal of a judgment debtor, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of

Order for payment by instalments.

Receiving order in lieu of committal.

(*u*) See *ante*, pp. 224, 225.

(*x*) Sect. 5; see stat. 46 & 47 Vict. c. 52, ss. 103 (4), 169.

(*y*) Sect. 5.

(*z*) *Stonor* v. *Fowle*, 13 App. Cas. 20; *Re Watson*, 1893, 1 Q. B. 21; *Haydon* v. *Haydon*, 1911, 2 K. B. 191.

(*a*) Stat. 32 & 33 Vict. c. 62, s. 5; *Dillon* v. *Cunningham*, L. R. 8 Ex. 23; *Re Ives, Ex parte Addington*, 16 Q. B. D. 665.

(*b*) *Montgomery* v. *De Bulnes*, 1898, 2 Q. B. 420.

(*c*) *Wadham Smith* v. *Edwards*, 1908, 2 K. B. 899.

(*d*) Bankruptcy Rules, 1886, Nos. 3, 355, made under stat. 46 & 47 Vict. c. 52, s. 103; *Genese* v. *Lancelles*, 13 Q. B. D. 901.

(*e*) Stat. 46 & 47 Vict. c. 52, s. 103, sub-s. 5; see Bankruptcy Rules, 1886, Nos. 355—361; *Ex parte Fryer*, 17 Q. B. D. 718; stat. 53 & 54 Vict. c. 71, s. 20; *Re a debtor*, 1905, 1 K. B. 374.

the judgment creditor, and on payment by him of the prescribed fee, make a receiving order against the debtor; and in such case the judgment debtor shall be deemed to have committed an act of bankruptcy at the time the order is made. A receiving order is the first order made in bankruptcy proceedings (*f*). Arrest on mesne process (*g*) is allowed by the Debtors Act, 1869, under certain circumstances, if the debtor is about to quit England (*h*). Provision is also made by the same Act for the punishment of fraudulent debtors by imprisonment for any time not exceeding two years with or without hard labour (*i*).

Judgment by consent.

Judgment may be given against the defendant in an action with his consent, as well as in consequence of a verdict or decision against him (*k*). And it is a

Judge's order.

(*f*) Stat. 46 & 47 Vict. c. 52, ss. 5, 9; *ante*, p. 218.

(*g*) *Ante*, p. 18, n. (*d*).

(*h*) Stat. 32 & 33 Vict. c. 62, s. 6; *Hume* v. *Druyff*, L. R. 8 Ex. 214; *Colverson* v. *Bloomfield*, 29 Ch. D. 341. See Rules of the Supreme Court, 1883, Order LXIX.

(*i*) Stat. 32 & 33 Vict. c. 62, s. 11 *sq.*; see 46 & 47 Vict. c. 52, s. 163; 53 & 54 Vict. c. 71, s. 26.

(*k*) This might take place, under the old common law procedure, by his voluntary default in omitting to plead any defence to the action, which was called *nihil dicit*, or by his failing to instruct his attorney, whose statement of that circumstance was called *non sum informatus*, or by a *cognovit actionem*, or more shortly *cognovit*, by which the defendant confessed the action, and suffered judgment to be at once entered up against him; 3 Black. Comm. 397; Stephen on Pleading, 120. Formerly also it was a very common practice for a debtor to give his creditor a *warrant of attorney* to enter up judgment against him, by way of security for the debt: but since the Acts of 1860 and 1864, whereby judgments ceased to operate as a charge on the debtor's lands, this method of securing a debt has become almost obsolete; see stats. 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112; Williams, R. P. 272—275, 21st ed. A warrant of attorney was an authority from the intended debtor to certain attorneys to appear for him in an action of debt at suit of the intended creditor, for the amount of the intended judgment, and thereupon to confess the action or suffer judgment to go by default, and to permit judgment to be forthwith entered up against the intended debtor for the amount, besides costs of suit. It was generally executed as a security for a smaller sum of money, usually one-half of the amount of the judgment debt, and was accordingly accompanied by a *defeazance*, declaring that it was given only as a security for the smaller sum and interest, and that no execution

common practice for the parties to an action to recover a debt, where no defence is made, to obtain by consent a judge's order, authorising the plaintiff to enter up judgment against the defendant, or to issue execution against him, either at once and unconditionally (*l*), or more frequently at a future time, conditionally on the non-payment of whatever amount may be agreed on (*m*). Judgments suffered by consent have the same effect as those recovered against the defendant's will (*n*). All such judge's orders as before mentioned are required to be filed in the Central Office of the Supreme Court (*o*) within twenty-one days after the making of the order, otherwise the order and any judgment signed or entered up thereon, and any execution issued on such judgment shall be void (*p*).

Recognizances and statutes.

In addition to judgment debts, other debts of

should issue on the judgment to be entered up in pursuance of the warrant, until default should have been made in payment of such sum and interest at the time agreed on; but that, in case of default, execution might be issued. The defeazance must have been written on the same paper or parchment as the warrant itself, otherwise the warrant was void; Reg. Gen., Hil. 1853, s. 27; stats. 3 Geo. IV. c. 39, s. 4; 32 & 33 Vict. c. 62, s. 26. Warrants of attorney to confess judgment for securing any sum or sums of money are, with some exceptions, liable to the same duty (one-eighth per cent. on the money secured) as mortgages for the like purposes; stat. 54 & 55 Vict. c. 39, First Schedule; Williams, R. P. 550, n. (*y*), 21st ed.

(*l*) A judgment obtained on a judge's order for immediate judgment and execution is the same thing as a judgment by *nihil dicit* or confession; *Bell* v. *Bidgood*, 8 C. B. 763; *Andrews* v. *Diggs*, 4 Ex. 827.

(*m*) See Archbold's Queen's Bench Practice, 1294, 1297, 14th ed.

(*n*) *Re South American, &c. Co.*, 1895, 1 Ch. 37.

(*o*) Formerly in the office of the Court of Queen's Bench; see stat. 42 & 43 Vict. c. 78, s. 5.

(*p*) Stat. 32 & 33 Vict. c. 62, s. 27; see *Gowan* v. *Wright*, 18 Q. B. D. 201; *Re Smith, Ex parte Brown*, 20 Q. B. D. 321. This Act (see ss. 24—28) extended to judge's orders the requirement of filing already imposed by stat. 3 Geo. IV. c. 39, ss. 1, 3, in the case of all warrants of attorney, with the defeazances thereto, and *cognovits*; see *Williams* v. *Burgess*, 12 A. & E. 635. A list of such warrants, *cognovits* and judge's orders, and also an index of the names of the givers, is directed to be kept open to public inspection and search; stats. 3 Geo. IV. c. 39, s. 5; 6 & 7 Vict. c. 66; 32 & 33 Vict. c. 62, s. 28.

record are *recognizances* when duly enrolled (*q*), and statutes merchant, statutes staple and recognizances in the nature of statutes staple. The three last are now quite obsolete. A recognizance is an obligation entered into before some Court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, or to pay a debt (*r*). It is payable out of the personal estate of the debtor, in the event of his decease and of the administration of his estate out of Court, next after judgment debts (*s*). But in bankruptcy and in the administration of the estate of a deceased debtor in bankruptcy or in the Chancery Division, both judgment debts and recognizances are placed on a level with ordinary debts (*t*).

Specialty debts.

Next in importance to debts of record are *specialty debts*, or debts secured by *special contract* contained in a *deed* (*u*). These are of two kinds,—debts by specialty in which the heirs of the debtors are bound, and debts by specialty in which the heirs are not bound. On the decease of the debtor, both these classes of specialty debts have always stood on a level so far as regards their payment out of the personal estate of the debtor. They formerly ranked next after debts of record, and took precedence of all debts by simple contract (*x*), with the exception of money owing for arrears of rent, to which the feudal principles of our law gave an importance equal to that of debts secured by deed (*y*). Debts by specialty in which the heirs were bound had, however, precedence over those in which the heirs were not bound, in case the real estate of

Arrears of rent.

Precedence of specialties binding the heir.

(*q*) *Glynne* v. *Thorpe*, 1 B. & Ald. 153.

(*r*) 2 Black. Comm. 341.

(*s*) 2 Wms. Exors. 1006, 7th ed.; 767, 10th ed. See *ante*, p. 222.

(*t*) See *ante*, pp. 222, 223.

(*u*) 2 Black. Comm. 465. See *ante*, p. 177.

(*x*) *Pinchon's case*, 9 Rep. 88 b.

(*y*) Wentworth's Executors, 284, 14th ed.; *Traugh* v. *French*, 2 Coll. 277.

the debtor should have been resorted to on his decease (*z*); unless he should have charged his real estates by his will with the payment of his debts, in which case all the creditors of every kind would have been paid out of the produce of such real estates, without any preference (*a*). But an Act passed in the year 1869 abolished the distinction as to priority of payment which formerly existed between the specialty and simple contract debts of deceased persons (*b*); providing that in the administration of the estates of persons dying after that year all creditors, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets (whether legal or equitable) of such deceased persons; without prejudice, nevertheless, to any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt. It has been held that since this Act an executor may prefer a simple contract debt to the prejudice of a creditor by deed (*c*). Here it may be observed that, in the administration of a deceased debtor's estate out of Court, creditors who have obtained judgment against the executor or administrator in respect of a liability incurred by the testator or intestate, are entitled to be paid in priority to other creditors of equal degree who have not so recovered judgment (*d*). Since the last-mentioned Act, it has been decided

Priority of specialty debts abolished.

Judgments against executors.

(*z*) See Williams, R. P. 280, 21st ed.; *Richardson* v. *Jenkins*, 1 Drew. 477, 483.

(*a*) Williams, R. P. 281–283, 21st ed.

(*b*) Stat. 32 & 33 Vict. c. 46. The public are indebted for this important Act to the late Mr. J. Hinde Palmer, Q.C.

(*c*) *Re Samson*, 1906, 2 Ch. 584, overruling *Re Hankey*, 1899, 1 Ch. 541, and apparently disapproving of *Wilson* v. *Coxwell*, 23 Ch. D. 764, and *Re Jones*, 31 Ch. D. 440, in which it was decided that, notwithstanding this Act, an executor cannot *retain* a simple contract debt to the prejudice of a creditor by deed; see *ante*, p. 220. But the C. A. declined in *Re Samson* to decide the point as to retainer; and the rule in *Wilson* v. *Coxwell* has subsequently been followed by Neville, J., in *Re Jennes*, 52 Sol. J. 376.

(*d*) *Sawyer* v. *Mercer*, 1 T. R. 690; *Jennings* v. *Rigby*, 33 Beav.

that a judgment against an executor on a simple contract debt of the testator's should be satisfied in preference to his debts incurred by special contract, but not so secured by judgment (*e*). As between themselves, judgments against an executor or administrator ought to be paid in priority according to the date of the judgment, not rateably (*f*). But if the deceased debtor's insolvent estate be administered by the Court, either in the Chancery Division or in bankruptcy, judgments against his executor or administrator will have no priority over and will be payable rateably with his other debts (*g*). Debts by special contract have not and never have had any priority over simple contract debts in the event of the debtor's bankruptcy (*h*).

For the sake of the advantage of priority which might have been gained on the decease of the debtor, his heirs were usually bound in every specialty debt. The deed creating the debt may be a deed of *covenant*, or a *bond*, or a contract under seal. The old form of a covenant ran thus: "And the said (*debtor*) doth hereby for himself and his *heirs*, executors and administrators, covenant with the said (*creditor*), his executors and administrators," to pay, &c. A bond was in the following form: "Know all men by these presents, that I (*debtor*), of (*such a place*), am held and firmly bound to (*creditor*), of (*such a place*), in the penal sum of 1,000*l.* of lawful money of Great Britain, to be paid to the said (*creditor*), or to his certain attorney, executors, administrators, or

Covenant.

Bond.

198; see Wentworth, Exors. 261 – 282, 14th ed.; Wms. Exors. ii. 999, 1021, 1029, 7th ed.; i. 763, 764, 780, 10th ed.: *Re Marvin*, 1905, 2 Ch. 490. Such judgments were not required to be registered in order to obtain priority; *Jennings* v. *Rigby*, *ubi sup.*; see *ante*, p. 227.

(*e*) *Re Williams*, L. R. 15 Eq. 270.

(*f*) *Dollond* v. *Johnson*, 2 Sm. & Giff. 301; cf. *ante*, p. 227, and n. (*h*).

(*g*) See *ante*, p. 223, and n. (*r*).

(*h*) 2 Black. Comm. 487; *ante*, p. 219.

assigns, for which payment to be well and truly made I bind myself, my *heirs*, executors and administrators, and every of them, firmly by these presents. Sealed with my seal. Dated this 1st day of January, 1848." In both of the above cases it will be observed that the executors and administrators were bound as well as the heirs. This, however, was not absolutely necessary; and the covenant or bond would formerly have been equally effectual if the heirs only had been named in it (*i*). By the Conveyancing Act, 1881 (*k*), a covenant, and a contract under seal, and a bond or obligation under seal made after the 31st of December, 1881, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as if heirs were expressed; unless a contrary intention be declared. So that there is now no necessity for the express mention either of the heirs or of the executors or administrators of the person to be bound by any covenant, bond, or contract or obligation under seal; and such instruments are constantly drawn without naming them (*l*).

Single bond.

A bond in the form above mentioned, without any addition to it, is called a single bond. Bonds, however, have usually a condition annexed to them, that, on the person bound (called the obligor) doing some specified act (as paying money when the bond is to secure the payment of money), the bond shall be void. The condition of an ordinary money-bond is as follows: "The condition of the above written bond or obligation is such, that if the above-bounden (*debtor*), his heirs, executors or administrators, shall

Bond with condition.

(*i*) Co. Litt. 209 *a*; *Barber* v. *Fox*, 2 Wms. Saund. 136. See *ante*, p. 31, n. (*r*); Williams' Conveyancing Statutes, 234, 498, note (*a*).

(*k*) Stat. 44 & 45 Vict. c. 41, s. 59; see Williams' Conveyancing Statutes, 234.

(*l*) See Williams' Conveyancing Statutes, 234, 235, 498, 499, 501, 502, 529.

pay unto the said (*creditor*), his executors, administrators or assigns, the full sum of 500*l*. (*usually half the amount named in the penalty*) of lawful money of Great Britain, with interest for the same after the rate of 5*l*. *per cent. per annum* upon the —— day of —— now next ensuing, without any deduction or abatement whatsoever, then the above-written bond or obligation shall be void, otherwise the same shall remain in full force." Bonds with conditions of this kind have been long in use. In former times, when the condition was forfeited, the whole penalty was recoverable (*m*). Equity subsequently interfered, and prevented the creditor from enforcing more than the amount of the damage which he had actually sustained. The Courts of law at length began to follow the example of the Courts of equity; and according to a course of proceeding, of which there are many examples in the history of our law, the legislature more tardily adopted the rules which had already been acted on in the Courts; and by a statute of the reign of Queen Anne it was provided that, in case of a bond with a condition to be void upon payment of a lesser sum at a day or place certain, the payment of the lesser sum with interest and costs shall be taken in full satisfaction of the bond, though such payment be not strictly in accordance with the condition (*n*). But if the arrears of interest should accumulate to such an amount as, together with the principal, to exceed the penalty of the bond, the creditor can claim no more than the penalty either at law (*o*) or in equity (*p*). If, however, there be special circumstances in the creditor's favour, as if he have a

Creditor can recover no more than the penalty.

Except in special circumstances.

(*m*) Litt. s. 340.

(*n*) Stat. 4 & 5 Anne, c. 16, ss. 12, 13. See 3 Bur. 1373; 2 Black. Comm. 341; *Smith* v. *Bond*, 10 Bing. 125; 38 R. R. 410; *S. C.*, 3 Moo. & Scott, 528; *James* v. *Thomas*, 5 B. & Ad. 40; 39 R. R. 378; *Re Dixon*, 1900, 2 Ch. 561.

(*o*) *Wild* v. *Clarkson*, 6 T. R. 303; 3 R. R. 178.

(*p*) *Clarke* v. *Seton*, 6 Ves. 411; *Hughes* v. *Wynne*, 1 My. & Keen, 20; *Hutton* v. *Harris*, 1892, A. C. 547, 555.

mortgage also for the principal and interest (*q*), or if the debtor has been delaying him by vexatious proceedings (*r*), equity will then aid him to the full extent of his demand (*s*).

Bonds for performance of agreements.

Bonds are frequently given, not only for securing the payment of money on a given day, but also with conditions to be void on the performance of many other acts agreed to be done, or on the payment of money by instalments. In such cases the law anciently was, that, on the breach of any part of the condition, the whole penalty became due; and judgment and execution might be had thereon, subject only to the control of a Court of equity on application to it for relief. But afterwards in such cases the obligee (or person to whom the bond was made) was required, in bringing his action, to state or *assign* the breaches which had been made by the obligor (*t*); and although judgment was still recovered for the whole penalty, execution of such judgment was allowed to issue only for the damages in respect of the breaches actually committed; and the judgment remained as a further security for the damages to be sustained by any future breach (*u*). So the law still remains, notwithstanding the changes in procedure made by the Judicature Acts (*x*). Although bonds and covenants have been deprived of all priority in administration over simple contract debts, they still continue in use. And the fact that

Assignment of breaches.

(*q*) *Clarke* v. *Lord Abingdon*, 17 Ves. 106; 11 R. R. 31.

(*r*) *Grant* v. *Grant*, 34 L. m. 430; 30 R. R. 170.

(*s*) 6 Ves. 416. Bonds for securing the payment or repayment of money, or the transfer or retransfer of stock, are liable to the same *ad valorem* duty as mortgages for the like purpose; stat. 54 & 55 Vict. c. 39, first schedule; Williams, R. P. 550, n. (*y*), 21st ed.

(*t*) See the judgment of Parke, B., in *Grey* v. *Friar*, 15 Q. B. 891, 910; *Wheelhouse* v. *Ladbrooke*, 3 H. & N. 291.

(*u*) Stat. 8 & 9 Will. III. c. 11, s. 8; *Hardy* v. *Bern*, 5 T. R. 636; *Willoughby* v. *Swinton*, 6 East, 550; 1 Wms. Saund. 57, n. (1); *Hurst* v. *Jennings*, 5 B. & C. 950; *S. C.*, 8 Dow. & Ry. 424.

(*x*) *Tuther* v. *Caralampi*, 21 Q. B. D. 414; see *ante*, pp. 21, 160, 161.

a bond or covenant may be enforced at any time within twenty years, whilst a simple contract debt cannot be enforced after six years, is a reason for their employment.

Simple contract debts.

The last and most numerous, though least important class of debts in the eye of the law is debts by simple contract (*y*), which are all debts not secured by the evidence of a Court of record, or by deed or specialty. On the decease of the debtor, these debts were formerly payable out of his personal estate, by his executor or administrator, subsequently to all debts of record or by specialty, except voluntary bonds, which were payable after all simple contract debts, but before any of the legacies (*z*). But now, as we have seen, all simple contract debts are payable *pari passu* with debts secured by specialty. Voluntary bonds and covenants under seal still continue in use, inasmuch as an agreement made by deed is binding without any consideration (*a*), and an action at law may consequently be brought upon a voluntary deed which would not otherwise lie upon a mere voluntary promise. In the administration of deceased persons' estates out of Court, voluntary bonds and covenants are still payable after other debts for valuable consideration, whether by specialty or simple contract (*b*). But in bankruptcy and in the administration of a deceased debtor's estate in bankruptcy or in the Chancery Division, voluntary bonds and covenants are payable *pari passu* with other debts (*c*). Debts secured by bills of exchange and promissory notes have no preference over the other simple

Voluntary bonds.

Voluntary bonds and covenants.

Bills and notes.

(*y*) *Ante*, p. 177.
(*z*) *Lomas* v. *Wright*, 2 My. & Keen. 769; *Watson* v. *Parker*, 6 Beav. 283
(*a*) *Ante*, pp. 177–178.
(*b*) See *ante*, p. 222.
(*c*) Stat. 46 & 47 Vict. c. 52, ss. 40, 125; *Ex parte Pollinger*, *Re Stewart*, 8 Ch. D. 621; *Re Whitaker*, 1901, 1 Ch. 9; *ante*, pp. 219, 223.

Money at a bank.

contract debts of the deceased (*d*). A particular kind of simple contract debt deserving special mention is what is commonly called money or cash at a banker's. Money paid into a bank to a customer's account is really lent to the banker to spend, so that the property in the particular coins paid in passes to the banker (*e*), who merely becomes bound to repay an equal amount (*f*). The relation of a banker to his customer is therefore that of a debtor to his creditor, with a super-added obligation on the former to honour his customer's cheques, so long as the balance to the holder's credit is sufficient to meet them (*g*).

Preferential debts by statute.

Besides the priorities attached to debts by the common law, a preference in payment is given to certain particular debts by statute. Thus, debts due to a parish from an overseer of the poor for money received by virtue of his office (*h*), and debts due to a registered friendly society from its officer for money of the society in his possession (*i*), are required to be paid by his executors or administrators in preference to all his other debts, except debts due to the Crown (*k*). And by the Regimental Debts Act, 1893 (*l*), certain preferential charges (chiefly for military debts) are given on the property of a person dying while subject to military law. Again, in bankruptcy, a paramount claim is given by statute to a registered friendly society for debts from its officer for money of the society in his possession (*m*);

(*d*) *Yeoman* v. *Bradshaw*, 3 Salk. 164.

(*e*) *Ante*, p. 74.

(*f*) *Ante*, p. 213, and n. (*h*). See *ante*, p. 206, n. (*l*), as to cheques paid in to a bank.

(*g*) *Parker* v. *Marchant*, 1 Ph. 356, 361; *Pott* v. *Clegg*, 16 M. & W. 321; *Foley* v. *Hill*, 2 H. L. C. 28, 36, 44, 45; *Re Derbyshire*, 1906, 1 Ch. 135.

(*h*) Stat. 17 Geo. II. c. 38, s. 3.

(*i*) Stat. 59 & 60 Viet. c. 25, s. 35, replacing several earlier statutes; see *Re Miller*, 1893, 1 Q. B. 327; *Re Eilbeck*, 1910, 1 K. B. 136.

(*k*) The Crown does not appear to be bound by these statutes; see *ante*, p. 219, n. (*k*).

(*l*) Stat. 56 Viet. c. 5, s. 2.

(*m*) See note (*i*) above.

and, subject to this, certain particular debts are required by the Bankruptcy Acts to be paid in full in preference to all others. These are, speaking generally, one year's rates and taxes, the wages or salary of any clerk or servant for services rendered during the last four months up to 50*l*., and the wages of any labourer or workman for services rendered during the last two months up to 25*l*. (*n*), and, as between themselves, they rank equally for payment. And under the Preferential Payments in Bankruptcy Act, 1888 (*o*), these same debts are required to be paid in full in preference to all others, not only in bankruptcy and in the administration in bankruptcy of the insolvent estates of deceased persons, but also in the administration of such insolvent estates in the Chancery Division (*p*), and in the winding-up of joint stock companies. It is an undecided question whether this Act gives any priority to the bankruptcy preferential debts in the administration of a dead man's estate out of Court; and if so, whether these debts should be first discharged in preference to the other claims above mentioned, to which priority is given by statute (*q*). But it is considered that these other claims have no preference in the administration of a dead man's insolvent estate in bankruptcy; for then the bankruptcy preferential claims alone are to be discharged in priority to other debts, which rank equally for payment (*r*). And subject to the paramount claim of the Crown, the same rule appears to obtain in

(*n*) Stat. 46 & 47 Vict. c. 52, ss. 40, 125, amended by 51 & 52 Vict. c. 62.

(*o*) Stat. 51 & 52 Vict. c. 62. The Crown does not appear to be bound by this statute, except as regards bankruptcy and administration in bankruptcy of deceased person's estates; *ante*, p. 219, and n. (*k*).

(*p*) *Re Heywood*, 1897, 2 Ch. 593.

(*q*) Consider the wording of stat. 51 & 52 Vict. c. 62, s. 1 (3), and *Re Heywood*, *ubi sup.*; and see *Re Hargreaves*, 44 Ch. D. 230, 242.

(*r*) See stat. 46 & 47 Vict. c. 52, ss. 40 (1, 2, 4), 125 (7), amended by 51 & 52 Vict. c. 62; *Re Williams*, 36 Ch. D. 573, 577—582

the administration of a dead man's insolvent estate in the Chancery Division (*s*). There has been added to the preferential debts in bankruptcy and the winding-up of companies all the amounts, not exceeding in any individual case 100*l*., due in respect of any compensation payable under the Workmen's Compensation Act, 1906 (*t*), the liability wherefor accrued before the date of the receiving order or of the commencement of the winding-up. But it does not appear that such claims enjoy the like priority in the administration of the estates of deceased employers, whether in or out of Court.

Summary of the law as to the order of payment of debts.

It will be seen, then, that according to the common law of England, there were five principal kinds of debts, namely, crown debts, judgment debts, specialty debts in which the heirs were bound, specialty debts in which the heirs were not bound, and simple contract debts. Each of these classes had a law of its own, and remedies of varying degrees of efficacy. The privileges attached to the various kinds of debts were to a certain extent modified by statute, judgments having been required to be duly registered in order to maintain their priority (*u*), and special and simple contract debts having been placed on an equality as regards payment (*x*). But the anomaly long remained that, whilst a man's debts were payable according to the established priorities in case he died insolvent, his general creditors were at once brought to an equality if he happened to be adjudged bankrupt. As already mentioned (*y*), at the present time, the bankruptcy rules as to the priority of debts are alone applicable in the adminis-

(*s*) *Ante*, pp. 219, 223.

(*t*) Stats. 6 Edw. VII. c. 58, s. 5 (3); see s. 5 (1, 5); 8 Edw. VII. c. 69, s. 209 (1) (d), which does not, however, apply where the company is being wound up voluntarily merely for the purpose of reconstruction or amalgamation with another company.

(*u*) *Ante*, p. 227.

(*x*) *Ante*, p. 234.

(*y*) *Ante*, pp. 223, 224.

tration of the insolvent estates of deceased persons in bankruptcy; and the same rules obtain, subject to the paramount claims of the Crown, in the administration of such estates in the Chancery Division, and in the winding-up of companies. But in establishing this result the law has taken a particularly crooked course (*z*). And in consequence

(*z*) It was enacted by section 10 of the Judicature Act, 1875 (stat. 38 & 39 Vict. c. 77), that in the administration by the Court of the insolvent estates of deceased persons, and in the winding-up of companies, 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. But for a long time the weight of authority was in favour of the view that the chief effect of this enactment was to do away with the old rule of administration established in *Mason* v. *Bogg*, 2 My. & Cr. 443, enabling a secured creditor to keep for himself the full benefit of his security and yet to prove a claim to be paid the whole amount of his debt out of the deceased debtor's general assets; see *Lee* v. *Nuttall*, 12 Ch. D. 61, 65, deciding that this enactment does not deprive the executor of his right of retainer; *Re Hopkins*, 18 Ch. D. 370. It was accordingly at first considered that the Act did not import into the administration by the Court of the insolvent estates of deceased persons the rule of bankruptcy that debts are payable *pari passu*; it was decided that judgments against the executor (*Smith* v. *Morgan*, 5 C. P. D. 337), and registered judgments against the deceased still enjoyed the same priority as before; *Re Maggi*, 20 Ch. D. 545; *Re M'Myn*, 33 Ch. D. 575 (*ante*, pp. 227, 234); and it was recognised, even by the Court of Appeal, after the Bankruptcy Act, 1883, that in the judicial administration of a deceased debtor's insolvent estate the order of payment of debts would be different according as the administration were ordered to be made in the Chancery Division or in bankruptcy; see *Re Williams* 36 Ch. D. 573; *Re Baker*, 44 Ch. D. 262; *ante*, pp. 222, 223. After this, the Court of Appeal decided that the enactment in question imports into administration in the Chancery Division a rule made by the Married Woman's Property Act, 1882, s. 3, whereby a wife's claim for any money or other estate lent or entrusted by her to her husband for the purposes of any trade or business carried on by him is postponed, in case of his bankruptcy, to the claims of all his other creditors for value; *Re Leng*, 1895, 1 Ch. 652; and in that case the Court criticised and appeared to repudiate the construction adopted in *Re Maggi*, without, however, overruling that decision. It was next decided that, by the combined operation of the 10th section of the Judicature Act, 1875, and of the Preferential Payments in Bankruptcy Act, 1888, the debts payable preferentially in bankruptcy were to have precedence in administration in the Chancery Division; *Re Heywood*, 1897, 2 Ch. 593; see *ante*, p. 241. And finally, in *Re Whitaker*, 1901, 1 Ch. 9, the Court of Appeal held that, by virtue of the enactment above quoted, in administration in the Chancery Division debts due by voluntary covenant are payable *pari passu* with debts incurred for value; and in that case *Smith* v. *Morgan* and *Re Maggi* were distinctly overruled; see *ante*, pp. 222, 223, 239. It has since

of the omission of the legislature to provide for the case of the administration of a dead man's insolvent estate out of Court, his executor or administrator is still bound strictly to observe the old priorities, on pain, if he disregard them, of rendering himself personally liable to satisfy the debts (*a*). The accompanying table shows the exact order of the payment of debts in bankruptcy, and in the administration of a deceased debtor's estate out of Court, in the Chancery Division, and in bankruptcy. In the winding-up of companies the claims of the Crown appear to remain paramount (*b*); subject to which the debts payable preferentially in bankruptcy are given precedence (*c*); and all other debts are payable *pari passu* (*d*). It is surely time that debts were made payable in the same order in every case of insolvency.

Winding-up of joint-stock companies.

Interest on debts.

The next subject which claims our attention is

been decided that, in administration in the Chancery Division, the payment of interest on debts is governed by the bankruptcy rules, and the interest due on a judgment debt is entitled to no priority; *Re Whitaker*, 1904, 1 Ch. 299; and (in Ireland) that judgments against an executor are payable *pari passu* with other debts; *M'Causland* v. *O'Callaghan*, 1904, 1 I. R. 376.

(*a*) *Ante*, p. 220 and nn. (*o*) and (*q*).

(*b*) *Ante*, p. 224.

(*c*) Stat. 8 Edw. VII. c. 69, s. 209, replacing 51 & 52 Vict. c. 60, s. 4. These debts also have priority over the claims of holders of debentures under any floating charge created by a company registered in England or Ireland; stat. 8 Edw. VII. c. 69, s. 209 (2) (b), replacing 60 Vict. c. 19; see *post*, Part II. ch. VI. at end.

(*d*) This rule was laid down under the Companies Act, 1862, now replaced by the Companies (Consolidation) Act, 1908; stats. 25 & 26 Vict. c. 89; 8 Edw. VII. c. 69; see *Black & Co.'s case*, L. R. 8 Ch. 254, 262; *Re Tron Colliery Co.*, 20 Ch. D. 442, 446; *Re Thurso New Gas Co.*, 42 Ch. D. 486, 491, 492; cf. *Re Wenborn & Co.*, 1905, 1 Ch. 413, 416. As to the restriction placed upon a landlord's right to distrain for rent, after the commencement of the winding-up of a company, which is his tenant, see *Re Traders' North Staffordshire Carrying Co.*, L. R. 19 Eq. 60; *Thomas* v. *Patent Lionite Co.*, 17 Ch. D. 250; *Re Lancashire Cotton Spinning Co.*, 35 Ch. D. 656 stat. 8 Edw. VII. c. 69, s. 209 (4), replacing 51 & 52 Vict. c. 62, s. 1, sub-s. 4. Secured creditors, upon the winding-up of a company, which is their debtor, are now governed by the same rules as prevail in bankruptcy; stat. 8 Edw. VII. c. 69, s. 207, replacing 38 & 39 Vict. c. 77, s. 10.

(A.) In bankru of deceased persons' estates by their insolvent estates ut of Court.

S... 40, 125, amenc y ; *ante*, pp. 219, 225.

oy particular statutes ; *ante*, pp. 220, 240. Note the

1. Debts due to a re ts payable preferentially in bankruptcy ; see No. 2, possession ; *ante*, p. 24

2. (a) All parochial deceased ; *ante*, pp. 220, 227.
of the receiving order q, p. 233.
within twelve months executor or administrator on special or simple contract
income tax assessed on
of the receiving order ether by special or simple contract, but subject to the
year's assessment. ract creditors ; *ante*, pp. 220, 225, 234, 240.

(b) All wages or sala person engaged or about to engage in any business on
rupt or the deceased d e a rate of interest varying with the profits, or shall
as the case may be, no ness, or in respect of the share of the profits contracted

(c) All wages of any iness in consideration of a share of the profits ; stat.
for piece work, in resp 29 Vict. c. 86, s. 5 ; *post*, Part III. Ch. II.
months before the date estate, lent or entrusted by her to her husband for the
where any labourer in d on by him ; *ante*, p. 243, n. (z).
his wages in a lump su *ante*, p. 239.
the whole of such sum, refer one creditor to another of equal degree, and may
proportionate to the ti deceased out of legal assets in preference to all other
case may be. 220, 235 ; *post*, Part III. Chs. III., IV. The above

(d) In the bankrupt to the rules applicable in the case of equitable assets, see
individual case £100, train for rent due to him from the deceased as far back
Compensation Act, 190 listress, if the tenancy were within the Agricultural
ante, p. 242. , s. 28), and six years from the time of the distress in

The debts specified u 42 ; see *Re Fryman's Estate*, 38 Ch. D. 468. But it
unless the property of within three months before the death of a tenant, who
they are to abate in e ether the preferential debts (No. 3, above) should be
forthwith, so far as th & 52 Vict. c. 62, s. 1 (4, 6) ; *Re Heywood*, *ante*, p. 222.

3. All other debts p

4. Nothing is recove
business on a contract of the insolvent estates of deceased
or shall receive a shar
contracted for by the sion.
profits, until the claim
tion in money or mon y.
28 & 29 Vict. c. 86, s. e bankruptcy rules, but subject to the executor's or

5. The claim of a w own debt in preference to others of equal degree (see
purpose of any trade Crown's priority over other simple contract creditors ;
other creditors for va
ante, p. 243, n. (z) ; p by the same rules as prevail in bankruptcy ; *ante*,

A landlord may on
1908, 2 K. B. 330), or ninistration by the Court of equitable assets, see *ante*,
for six months' rent d
tion, as the case may
months before the da
under (2), above, will
s. 42, amended by 51
executor or administr
for the administration

A secured creditor
debtor, or any part t
(1) rely on his secu
(2) realise his secur
(3) surrender his
(4) set a value on
46 & 47 Vict. c. 52,

Under the Stannar
the stannaries of Cor
or company working

[*To face p.* 244.

(A.) In bankruptcy and in the administration in bankruptcy of the insolvent estates of deceased persons (see stat. 46 & 47 Vict. c. 52, ss. 40, 125, amended by 51 & 52 Vict. c. 62).

1. Debts due to a registered friendly society from its officer for money of the society in his possession ; *ante*, p. 240.

2. (a) All parochial or other local rates due from the bankrupt or the deceased at the date of the receiving order or his death, as the case may be, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax assessed on the bankrupt or the deceased up to the 5th of April next before the date of the receiving order or his death, as the case may be, and not exceeding in the whole one year's assessment.

(b) All wages or salary of any clerk or servant in respect of services rendered to the bankrupt or the deceased during four months before the date of the receiving order or his death, as the case may be, not exceeding £50.

(c) All wages of any labourer or workman not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the bankrupt or the deceased during two months before the date of the receiving order or his death, as the case may be : provided that where any labourer in husbandry has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, he shall have priority in respect of the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order or the death, as the case may be.

(d) In the bankruptcy only (as it seems) of an employer, all amounts, not exceeding in any individual case £100, due in respect of any compensation payable under the Workmen's Compensation Act, 1906, the liability wherefor accrued before the date of the receiving order ; *ante*, p. 242.

The debts specified under (2) rank equally as between themselves, and are to be paid in full, unless the property of the bankrupt or the deceased is insufficient to meet them, in which case they are to abate in equal proportions between themselves. They are also to be discharged forthwith, so far as the property is sufficient to meet them.

3. All other debts proved *pari passu* : except that

4. Nothing is recoverable in respect of a loan to a person engaged or about to engage in any business on a contract that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits of the business, or in respect of the share of the profits contracted for by the seller of the goodwill of a business in consideration of a share of the profits, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied ; stat. 53 & 54 Vict. c. 39, s. 3, replacing 28 & 29 Vict. c. 86, s. 5 ; *post*, Part III. Ch. II.

5. The claim of a wife for any money or other estate lent or entrusted to her husband for the purpose of any trade or business carried on by him is postponed until the claims of all his other creditors for valuable consideration have been satisfied ; stat. 45 & 46 Vict. c. 75, s. 3 ; *ante*, p. 243, n. (z) ; *post*, Part III. Ch. V.

A landlord may only distrain after the commencement of a bankruptcy (see *Re Bumpus*, 1908, 2 K. B. 330), or an order for administration in bankruptcy of a deceased person's estate, for six months' rent due prior to the date of the order of adjudication, or order for administration, as the case may be : and if a landlord distrain on the goods of a bankrupt within three months before the date of the receiving order or order for administration, the debts specified under (2), above, will be a first charge on the goods so distrained on ; stat. 46 & 47 Vict. c. 52, s. 42, amended by 51 & 52 Vict. c. 62, s. 1, sub-ss. 4, 6, and 53 & 54 Vict. c. 71, s. 28. The executor or administrator does not lose the right of retainer of his own debt, if an order be made for the administration in bankruptcy of the deceased's estate : *Re Rhoades*, 1899, 2 Q. B. 347.

A secured creditor (*i.e.*, a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor) may either

(1) rely on his security, and not prove for any debt, or

(2) realise his security, and prove for any balance of his debt remaining unsatisfied, or

(3) surrender his security, and prove for his whole debt, or

(4) set a value on his security, and receive dividends on the balance of his debt. See stat. 46 & 47 Vict. c. 52, s. 168, and second schedule, rules 9—17 ; *Re M'Murdo*, 1902, 2 Ch. 684.

Under the Stannaries Act, 1887 (50 & 51 Vict. c. 43, ss. 4—10), miners employed in mines in the stannaries of Cornwall and Devon are given a first charge on certain assets of the persons or company working the mines for three months' wages for each person.

(B.) In the administration of deceased persons' estates by their executors or administrators out of Court.

1. Crown debts by record or specialty; *ante*, pp. 219, 225.

2. Debts to which priority is given by particular statutes; *ante*, pp. 220, 240. Note the doubt above mentioned as to the debts payable preferentially in bankruptcy; see No. 2, opposite; *ante*, p. 241.

3. Judgments obtained against the deceased; *ante*, pp. 220, 227.

4. Recognizances and statutes; *ante*, p. 233.

5. Judgments recovered against the executor or administrator on special or simple contract liabilities; *ante*, p. 234.

6. Other debts incurred for value, whether by special or simple contract, but subject to the Crown's priority over other simple contract creditors; *ante*, pp. 220, 225, 234, 240.

7. Debts in respect of any loan to a person engaged or about to engage in any business on a contract that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits of the business, or in respect of the share of the profits contracted for by a seller of the goodwill of a business in consideration of a share of the profits; stat. 53 & 54 Vict. c. 39, s. 3, replacing 28 & 29 Vict. c. 86, s. 5; *post*, Part III. Ch. II.

8. A wife's claim for money or other estate lent or entrusted by her to her husband for the purpose of any trade or business carried on by him; *ante*, p. 243, n. (*z*).

9. Voluntary bonds and covenants; *ante*, p. 239.

An executor or administrator may prefer one creditor to another of equal degree, and may retain a debt due to himself from the deceased out of legal assets in preference to all other debts of the same degree; *ante*, pp. 220, 235; *post*, Part III. Chs. III., IV. The above priorities apply only to legal assets. As to the rules applicable in the case of equitable assets, see *ante*, pp. 220—222. A landlord may distrain for rent due to him from the deceased as far back as one year from the making of the distress if the tenancy were within the Agricultural Holdings Act, 1908 (8 Edw. VII. c. 28, s. 28) and six years from the time of the distress in other cases; 3 & 4 Will. IV. c. 27, s. 42; see *Re Fryman's Estate*, 38 Ch. D. 468. But it appears that in case of a distress levied within three months before the death of a tenant, who dies insolvent, a question will arise, whether the preferential debts (No. 3, above) should be a first charge on the goods; see stat. 51 & 52 Vict. c. 62, s. 1 (4, 6); *Re Heywood*, *ante*, p. 222.

(C.) In the administration of the insolvent estates of deceased persons in the Chancery Division.

1. Crown debts by record or specialty.

2. The other debts according to the bankruptcy rules, but subject to the executor's or administrator's right of retainer of his own debt in preference to others of equal degree (see *Re Ambler*, 1905, 1 Ch. 697), and to the Crown's priority over other simple contract creditors; *ante*, pp. 222, 225, 226.

Secured creditors are now governed by the same rules as prevail in bankruptcy; *ante*, p. 243, n. (*z*).

As to the rules applicable in the administration by the Court of equitable assets, see *ante*, pp. 220—222, 223.

[*To face p.* 244.

that of interest upon debts. The absurd prejudice which anciently caused interest, under the name of usury, to be considered unlawful, retained some hold upon our law long after the taking of interest was rendered lawful by Act of Parliament (*e*). In ordinary cases a debtor was allowed to withhold payment of his debt, without being obliged to give to his creditor the poor recompense of interest on the money, unless making use of for his own benefit. For it was a general rule of law that interest was not payable on any debts, whether by specialty or simple contract, unless expressly agreed on, or a promise could be implied from the usage of trade or other circumstances, or unless the debt was secured by a bill of exchange or promissory note, which being mercantile securities, always carried interest (*f*). But in equity interest was more frequently allowed (*g*). And now, by an Act of 1833 (*h*), interest is recoverable on all debts *payable by virtue of any written instrument at a certain time*, from the time when such debts were payable, or if payable otherwise, then from the time when *demand of payment shall have been made in writing*, so as such demand give notice to the debtor that interest will be claimed from the date of such demand until the time of payment. But where these conditions are not fulfilled, the old rule still prevails (*i*).

(*e*) Stat. 37 Hen. VIII. c. 9. See Williams, R. P., 545. (*x*), 21st ed.

(*f*) *Higgins* v. *Sargent*, 2 B. & C. 348; 26 R. R. 379; *S.* C., 3 Dow. & R. 613; *Foster* v. *Weston* 6 Bing. 709; *Page* v. *Newman*, 9 B. & C. 378; 33 R. R. 204; *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry Co.*, 1893, A. C. 429.

(*g*) See *Lowndes* v. *Collins*, 17 Ves. 27; 2 Fonb. Eq. 429; C. P. Cooper, 426 *sq.*

(*h*) Stat. 3 & 4 Will. IV. c. 42, ss. 28, 29; *Hyde* v. *Price*, 8 Sim. 578; *Geake* v. *Ross*, 23 W. R. 658; *Duncombe* v. *Brighton Club Company*, L. R. 10 Q. B. 371.

(*i*) *Ward* v. *Eyre*, 15 Ch. D. 130; *Re Gosman*, 17 Ch. D. 771; *London, Chatham and Dover Ry. Co.* v. *South Eastern Ry. Co.*, 1893, A. C. 429; *Re Lloyd Edwards*, 61 L. J. N. S. Ch. 22; *Tautz* v. *Archdale*, 11 Times L. R. 152; cf. *Re Anglesey*, 1901, 2 Ch. 548.

Sureties.

The payment of a debt is sometimes secured by a *surety*, who makes himself liable, together with the principal debtor for the payment. If the surety should pay the debt, he will become the creditor of the principal debtor for the amount; but although the debt paid should have been secured to the original creditor by the bond under seal of the debtor and his surety, the surety having paid the debt, would formerly have become the simple contract creditor only of the principal debtor; unless he should have taken the precaution to procure from such debtor a counter-bond for his own indemnity (*k*). The surety, however, would have been entitled to the benefit of all collateral securities which the creditor, whom he had repaid, held for the debt (*l*); but he was not to be entitled to the original bond executed by the debtor, because that was at an end by the very fact of the payment (*m*). In the words of Lord Brougham (*n*), the Court admitted the surety's right, as against the principal debtor, to stand in the shoes of the creditor, but said there were no shoes for him to stand in. But by the Mercantile Law Amendment Act, 1856, every surety who pays a debt is now entitled to have assigned to him every judgment, specialty or other security which shall be held by the creditor in respect of such debt, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt; and such person shall be entitled to stand in the place of the creditor and to use all the remedies, and, if need be and upon a proper indemnity, the name of the creditor, in any action to obtain from the principal

Surety entitled to creditor's securities.

(*k*) *Copis* v. *Middleton*, Turn. & Russ. 224.

(*l*) *Forbes* v. *Jackson*, 19 Ch. D. 615.

(*m*) Turn. & Russ. 231; *Duncbiggen* v. *Bourne*, 2 You. & Coll. 412; *Jones* v. *Davids*, 1 Russ., 277; *Caulfield* v. *Maguire*, 2 Jones & Lat. 164, 168.

(*n*) *Hodgson* v. *Shaw*, 3 My. & Keen, 183, 194.

debtor indemnification for his loss; and the payment made by the surety shall not be pleadable in bar of any action or other proceeding by him (*o*). If there should have been more than one surety, any one surety, paying or having judgment entered up against him for the whole debt, is entitled, according to general principles of justice, to contribution from his co-sureties in equal shares, or if they should have been sureties for unequal amounts, then in proportion to the respective amounts to which they have made themselves liable (*p*). And the remedies given by the Act above mentioned are extended to co-sureties; provided that no co-surety shall be entitled to recover from any other co-surety, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable (*q*). If any surety obtain a security against his liability from the principal debtor, and call for contribution from his co-sureties, he must bring his security into hotch-pot for the benefit of all (*r*); so that a security obtained by one co-surety enures for the benefit of all the co-sureties until it be exhausted, or they be recoupe. all they have paid (*s*). If any surety has become insolvent, the others must contribute rateably to the payment of the whole debt (*t*). But if the surety has paid no more than

Co-sureties.

(*o*) Stat. 19 & 20 Vict. c. 97, s. 5; *Lockhart* v. *Reilly*, 1 De G. & J. 464; *Forbes* v. *Jackson*, 19 Ch. D. 615; *Re M'Myn*, 33 Ch. D. 575; *Re Lord Churchill*, 39 Ch. D. 174.

(*p*) *Dering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270, 272, 273; 1 R. R. 41; *Brown* v. *Lee*, 6 B. & C. 689; S. C., 9 D. & R. 701; *Holmershausen* v. *Gullick*, 1861, 2 Ch. 514; *Ellesmere Brewery Co.* v. *Cooper*, 1896, 1 Q. B. 75. But contribution will not be allowed if the parties are not in fact co-sureties for the same debt; *Craythorne* v. *Swinburne*, 14 Ves. 160; 9 R. R. 264; *Coope* v. *Twyman*, T. & R. 426; 24 R. R. 89; *Pendlebury* v. *Walker*, 4 Y. & C. 424; *Re Denton's Estate*, 1904, 2 Ch. 178.

(*q*) Stat. 19 & 20 Vict. c. 97, s. 5; *Re M'Myn*, 33 Ch. D. 575; *Re Parker*, 1891, 3 Ch. 400.

(*r*) *Steel* v. *Dixon*, 17 Ch. D. 825.

(*s*) *Re Arcedeckne*, 24 Ch. D. 709; *Berridge* v. *Berridge*, 44 Ch. D. 168.

(*t*) *Peter* v. *Rich*, 1 Cha. Rep. 34; *Hitchman* v. *Stewart*, 3 Drewry, 271.

his own proportion of the debt, he cannot obtain contribution from any of the others (*u*); although he may take proceedings against his co-sureties to be indemnified against any further payment he may be called upon to make (*x*). A surety, however, may be discharged from his liability by the conduct of the creditor. As surety he has made himself liable only for the payment of a particular debt at a given time, or under certain given circumstances. If therefore the creditor, by any subsequent arrangement with the principal debtor, preclude himself from demanding payment of his debt at the time or under the circumstances originally agreed on, the surety will be at once discharged from all liability (*y*); and any property which the surety may have mortgaged or pledged, as security for the debt, will be released from the charge so created (*z*). Thus, if the creditor bind himself to give further time for payment to the principal debtor (*a*), or compound with him, without expressly reserving his remedy against the surety (*b*), the surety will be discharged. But the acceptance by the creditor from the principal

Discharge of surety.

(*u*) *Ex parte Gifford*, 6 Ves. 807; 6 R. R. 53; *Davies* v. *Humphreys*, 6 M. & W. 153, 168, 169; *Ex parte Snowdon*, 17 Ch. D. 44; *Stirling* v. *Burdett*, 1911, 2 Ch. 418.

(*x*) *Hodenhausen* v. *Gullick*, 1893, 2 Ch. 514, 525–529.

(*y*) *Calvert* v. *London Dock Company*, 2 Keen, 638; *Heath* v. *Key*, 1 Y. & J. 434; *Nicholson* v. *Revill*, 4 A. & E. 675, 681; *Blake* v. *White*, 1 Y. & C. 420; *Bowser* v. *Cox*, 4 Beav. 379; 6 Beav. 110; and see *Squire* v. *Whalton*, 1 H. L. C. 333; *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; *Ward* v. *National Bank of New Zealand*, 8 App. Cas. 755.

(*z*) *Bolton* v. *Salmon*, 1891, 2 Ch. 48.

(*a*) *Samuel* v. *Howarth*, 3 Mer. 272; 17 R. R. 81; *Eyre* v. *Bartrop*, 3 Madd. 221; 18 R. R. 215; *Moss* v. *Hall*, 5 Ex. 46; *Davies* v. *Stainbank*, 6 De G., M. & G. 679; *Bailey* v. *Edwards*, 4 B. & S. 761; *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 142; 7 H. L. 348; *Bolton* v. *Buckenham*, 1891, 1 Q. B. 278.

(*b*) *Ex parte Gifford*, 6 Ves. 807; 6 R. R. 53; *Ex parte Carstairs*, Buck. 500; *Malthy* v. *Carstairs*, 7 B. & C. 735; *S. C.*, 1 Man. & Ry. 549; *Thompson* v. *Lack*, 3 C. B. 540; *Owen* v. *Homan*, 4 H. L. C. 997; *Close* v. *Close*, 1 De Gex., M. & G. 176; *Webb* v. *Hewitt*, 3 K. & J. 438; *Boaler* v. *Mayor*, 19 C. B. N. S. 76. See *Green* v. *Wynn*, L. R. 4 Ch. 204; *Batsom* v. *Gosling*, L. R. 7 C. P. 9.

debtor of a new and independent security for the debt will not discharge the surety (*c*). Neither will the surety be discharged by the mere neglect of the creditor to enforce payment of the debt from the principal debtor at the time of its becoming due (*d*); nor by the creditor's express agreement to give time to the principal debtor, if such agreement fail in any of the requisites of a binding contract (*e*). The bankruptcy of the principal debtor does not discharge the surety (*f*). The law is so jealous of the privileges of a surety that it is even held that if one lend money to two others, contracting with them as principal debtors, and afterwards receive notice that one debtor is in fact a surety for the other, the surety will be discharged if the creditor vary his contract with the principal debtor without reserving his remedy against the surety (*g*). It is, however, competent to any creditor contracting with a surety to stipulate that the surety shall not be discharged by the creditor's giving time to or compounding with or otherwise varying his contract with the principal debtor (*h*); and in practice stipulations of this kind are frequently inserted in contracts of suretyship (*i*). Where there is a debt actually accrued due and secured by a contract of suretyship, under which the surety admits his liability, he is entitled to sue in equity to compel the principal debtor to pay the debt, and so relieve him of his liability (*k*).

(*c*) *Bell* v. *Banks*, 3 Man. & Gr. 258.

(*d*) *Eyre* v. *Everett*, 2 Russ. 381; *Peel* v. *Tatlock*, 1 B. & P. 419.

(*e*) *Philpot* v. *Briant*, 1 Bing. 717; 29 R. R. 710; *Tucker* v. *Laing*, 2 Kay & John. 745.

(*f*) *Bowes* v. *Carr*, 7 Bing. 508; stat. 46 & 47 Vict. c. 52, s. 30, subs. 1; cf. *Re Moss*, 1905, 2 K. B. 307.

(*g*) *Oriental Financial Corporation* v. *Overend, Gurney & Co.*, L. R. 7 Ch. 142; 7 H. L. 348; *Rouse* v. *Bradford Bank*, 1894, A. C. 586.

(*h*) See *Perry* v. *National Provincial Bank of England*, 1910, 1 Ch. 161.

(*i*) See Kay & Elph. Prec. Conv. i. 16, 233; ii. 29, 9th ed.

(*k*) *Ascherson* v. *Tredegar, &c. Co., Ld.*, 1909, 2 Ch. 401; cf. *Re Mitchell*, 1913, 1 Ch. 201.

Alienation of debts.

The subject of the alienation of debts has been already considered, and we have seen that, according to the modern common law, debts were, as a rule, assignable only by a power of attorney enabling the assignee to sue in the original creditor's name; although in equity debts were directly assignable (*l*). The only debts directly assignable by subjects at common law were those due upon bills of exchange, of which the holders were enabled to sue in their own names by mercantile custom incorporated into English law (*m*). The same incident of negotiability was annexed to promissory notes by a statute of Anne (*n*); and certain particular choses in actions were made directly assignable by statute (*o*). But since the Judicature Acts came into operation on the 1st of November, 1875, all debts and other legal choses in action have been directly assignable at law by writing under the hand of the assignor (not purporting to be by way of charge only), accompanied by express notice in writing of the assignment to the debtor or other person liable (*p*). The previous necessity for notice to the debtor of the assignment of a debt has been already explained (*q*).

Charges on the book debts of a company.

Every mortgage or charge created after the 1st of July, 1908, on any book debts of a company registered in England or Ireland, must be registered with the Registrar of Companies within twenty-one days after its creation, or it will be void, so far as any security on the company's property is thereby conferred, against the liquidator and any creditor of the company (*r*).

Involuntary alienation of debts.

Debts, being considered as mere rights of action,

(*l*) *Ante*, pp. 34, 35.
(*m*) *Ante*, pp. 33, 202, 204.
(*n*) *Ante*, pp. 34, 202, 204.
(*o*) *Ante*, p. 38, and n. (*z*)
(*p*) *Ante*, pp. 38, 39
(*q*) *Ante*, p. 37.
(*r*) Stat. 8 Edw. VII. c. 69, s. 93, replacing 7 Edw. VII. c. 50, s. 10; see *Ladenburg* v. *Goudron, Ferraris & Co., Ltd.*, 1912, 3 K. B. 275.

could not formerly be taken in execution on a judgment obtained against the creditor. But when they are secured by some cheque, bill, note, bond, specialty or other security (*s*), the Judgments Act, 1838 (*t*), provides that under the writ of *fieri facias* (*u*) the sheriff may seize not only money and bank notes, but also the securities above mentioned, and may sue upon them in his own name upon the arrival of the time of payment; but the sheriff is not bound to sue, unless indemnified in the manner prescribed by the Act from the costs of the action. And now, under provisions of the Common Law Procedure Acts, 1854 and 1860 (*x*), since embodied in the Rules of the Supreme Court, 1883 (*y*), the Court has jurisdiction to order that all debts owing or accruing (*z*) to a judgment debtor may be attached to answer the judgment (*a*). Such an order may be made on the application of any person, who has obtained a judgment or order for the recovery or payment of money (*b*), or the assignee of such judgment or order (*c*), showing that any other person (*d*) is indebted to the judgment debtor and is within the jurisdiction. Such other person is called the garnishee; and he may be ordered to appear to

Attachment of debts.

Garnishee.

(*s*) *Harrison* v. *Paynter*, 6 M. & W. 387; *Wood* v. *Wood*, 4 Q. B. 397.

(*t*) Stat. 1 & 2 Vict. c. 110, s. 12.

(*u*) See *ante*, p. 107.

(*x*) Stats. 17 & 18 Vict. c. 125, ss. 60, 61; 23 & 24 Vict. c. 126, ss. 28–31. These enactments were repealed by stat. 46 & 47 Vict. c. 49, saving the jurisdiction thereby established, and reserving the power of making rules of Court as to the matters therein contained.

(*y*) Orders XLII. r. 32, XLV.

(*z*) See *Webb* v. *Stanton*, 11 Q. B. D. 518; *Edmunds* v. *Edmunds*, 1904, P. 382.

(*a*) The making of such an order is in the judicial discretion of the Court; *Martin* v. *Nadel*, 1906, 2 K. B. 26. As to garnishee proceedings in county courts, see *Hale* v. *Stennings*, 1911, 2 K. B. 418.

(*b*) Such a person may obtain an order that his judgment debtor may be orally examined as to whether any and what debts are owing to him; Order XLII. r. 32; see *Republic of Costa Rica* v. *Strousberg*, 16 Ch. D. 8.

(*c*) *Goodman* v. *Robinson*, 18 Q. B. D. 332.

(*d*) Including a firm, of which any member is resident within the jurisdiction; Order XLV. r. 10; W. N. 6 Oct. 1888.

Garnishee order *nisi*.

show cause why he should not pay to the judgment creditor the debt due from him, or enough to satisfy the judgment (*e*). An order so attaching a debt is called a garnishee order *nisi*. Service of such an order, or notice thereof to the garnishee in such manner as the Court or a Judge shall direct, binds the debts in his hands (*f*). If the garnishee does not forthwith pay into Court the amount of his debt, or of the judgment, and does not dispute the debt, or does not appear upon summons, then execution may be ordered to issue against the garnishee for the amount due from him or sufficient to satisfy the judgment and the costs of the garnishee proceedings (*g*). If the garnishee disputes his liability, any issue or question necessary for determining his liability may be ordered to be tried (*h*). If it is suggested by the garnishee that the debt sought to be attached belongs to or is subject to a lien or charge in favour of some third person (*i*) such person may be ordered to appear; and after hearing

(*e*) Order XLV. r. 1; *Vinall* v. *De Pass*, 1892, A. C. 90.

(*f*) Order XLV. r. 2; it binds the whole debt; *Rogers* v. *Hateley*, 1892, A. C. 118; subject, however, to the interest of any third party therein, whether by way of absolute assignment or of charge; *Re General Horticultural Co., Ex parte Whitehouse*, 32 Ch. D. 512; *Badeley* v. *Consolidated Bank*, 34 Ch. D. 536; *Davis* v. *Freethy*, 24 Q. B. D. 519; *Yates* v. *Terry*, 1902, 1 K. B. 527; *Edmunds* v. *Edmunds*, 1904, P. 362; *Stimott* v. *Bowden*, 1912, 2 Ch. 444; *Glegg* v. *Bromley*, 1912, 3 K. B. 474; but is not equivalent to an assignment of the debt to the garnishor: *Re Combined Weighing and Advertising Machine Co.*, 42 Ch. D. 99; *Norton* v. *Yates*, 1906, 1 K. B. 112; *Cairney* v. *Back*, 1906, 2 K. B. 746. The garnishor may, however, sue the garnishee on the garnishee order, if the amount garnished cannot be recovered by execution; *Potchett* v. *English and Colonial Syndicate*, 1899, 2 Q. B. 428. In case of the judgment debtor's bankruptcy, the garnishor will not be entitled to retain the benefit of the attachment as against the trustee in such bankruptcy, unless it be completed by receipt of the debt before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor; stat. 46 & 47 Vict. c. 52, s. 45; see next Chapter; cf. *Galbraith* v. *Grimshaw*, 1910, A. C. 508, as to a Scotch bankruptcy.

(*g*) Order XLV. r. 3; *Cowan* v. *Carlill*, 33 W. R. 583.

(*h*) XLV. r. 4.

(*i*) See note (*f*), above.

his allegations or in default of his appearance, execution may be ordered to issue against the garnishee, and the third person's claim may be barred, or such other order may be made as the Court or a Judge shall think fit (*k*). An order for execution to issue against the garnishee is termed a garnishee order absolute. Payment made by or execution levied upon the garnishee under any such proceeding, is a valid discharge to him, to the amount paid or levied, as against his original creditor (*l*). In special circumstances where a judgment creditor is hindered in proceeding by way of garnishment, the Court may appoint a receiver of debts due to the judgment debtor (*m*). And if a judgment debtor have any money in Court standing to his credit, the judgment creditor may obtain, under the equitable jurisdiction of the Court, an order charging the money with the amount of the judgment (*n*). But a judgment creditor cannot obtain equitable execution by means of the appointment of a receiver of his judgment debtor's future earnings, even though the latter may be in receipt of a regular salary payable to him under a contract (*o*). Garnishee order absolute.

When a man is adjudged bankrupt, his things in action vest, along with his other property, in the trustee in bankruptcy (*p*), who is empowered to sue Bankruptcy.

(*k*) Order XLV. rr. 5, 6.

(*l*) Order XLV. r. 7. But if the original creditor became bankrupt, before the date of the garnishee order *nisi*, payment to the garnishor under such an order is no discharge to the garnishee, as against such creditor's trustee in bankruptcy; *Re Webster*, 1907, 1 K. B. 623. It appears, however, that payment to the garnishor under a garnishee order *absolute*, either without notice of the original creditor's bankruptcy or under pressure to avoid the issue of execution, would be a good discharge to the garnishee as against the trustee in such bankruptcy; *Wood* v. *Dunn*, L. R. 2 Q. B. 73.

(*m*) *Goldschmidt* v. *Oberrheinische Metallwerke*, 1906, 1 K. B. 373.

(*n*) *Brereton* v. *Edwards*, 21 Q. B. D. 488.

(*o*) *Holmes* v. *Millage*, 1893, 1 Q. B. 551; see also *Harris* v. *Beauchamp*, 1894, 1 Q. B. 801; *Cadogan* v. *Lyric Theatre*, 1894, 3 Ch. 338.

(*p*) Stat. 46 & 47 Vict. c. 52 ss. 20, 21, 41, 54, 168; *ante*, p. 111. There is an exception

in his official name for any debts owing to the bankrupt (*q*). Things in action were originally as much subject to the "reputed ownership" clauses of the bankruptcy law (*r*) as tangible goods (*s*), and a debt due to a bankrupt and assigned over by him was considered to remain in his order and disposition as reputed owner, if the assignee had omitted to give notice of the assignment (*t*) to the debtor (*u*). But under the present Bankruptcy Act, as under that of 1869, things in action, other than debts due or growing due to the bankrupt in the course of his trade or business are excepted from the operation of the "reputed ownership" clause (*x*).

Discharge of debts.

We have now to consider the discharge of debts, which may take place by payment of the amount due (*y*), by accord and satisfaction, which is the creditor's acceptance of something else in discharge of the liability (*z*), by the assertion of a right of set-off, by release or under the law of bankruptcy.

Payment.

Payment, in order to discharge a debt, must be made by the debtor, or his representatives in law, or his or their authorized agents to the creditor, his representatives in law or assigns, or his or their

in the case of the rights of an employer under a contract with any insurers in respect of his liability under the Workmen's Compensation Act, 1906, which rights are transferred to and vest in the workman in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or (if a company) being wound up; stat. 6 Edw. VII. c. 58, s. 5 (1), (2); *King* v. *Phœnix Assurance Co.*, 1910, 2 K. B. 866.

(*q*) Sects. 56 (5), 83, replacing stats. 32 & 33 Vict. c. 71, s. 22; 12 & 13 Vict. c. 106, s. 141; 1 & 2 Will. IV. c. 56, s. 25; 6 Geo. IV. c. 16, s. 63; see also 2 Black. Comm. 485—487.

(*r*) *Ante*, p. 112.

(*s*) *Ryall* v. *Rowles*, 1 Ves. 348.

(*t*) *Ante*, p. 37.

(*u*) *Ex parte Monro*, Buck. 300.

(*x*) *Ante*, p. 112, and n. (*r*); see *Colonial Bank* v. *Whinney*, 30 Ch. D. 261; 11 App. Cas. 426.

(*y*) See *Kinglon* v. *Kinglon*, 11 M. & W. 233, 234; *Chambers* v. *Miller*, 13 C. B. N. S. 125, 131, 135; *Chissold* v. *Cratchley*, 1910, 2 K. B. 244, as to payment of a judgment debt; p. 256, n. (*i*), below.

(*z*) Bac. Abr. Accord and Satisfaction.

agent duly authorized to receive the money (*a*). Thus payment by a stranger to the creditor is no discharge of the debt until the debtor ratify the payment, as he well may (*b*); and payment to the creditor's solicitor, banker, or other agent is no discharge if the creditor has given no authority, express or implied, for payment to his agent (*c*). But where payment or even part payment of a debt is offered by a stranger on the condition that it shall be accepted in full discharge of the debt, and the creditor accepts this condition and receives the amount offered, he can no longer sue the debtor for the whole or for the balance of the debt (*d*). If the creditor request or authorize payment through the post, he takes the risks of that mode of transit (*e*), otherwise not (*f*). And if a debtor tender the amount due to his creditor, and the creditor refuse to accept it, the debt is not discharged (*g*): but if the creditor afterwards sue for the debt, the debtor will have judgment to recover his costs of the action, provided he has continued ready and willing to pay, and has paid the amount tendered into Court (*h*). Tender.

(*a*) Litt. ss. 334, 337, 340; Co. Litt. 206, 207, 209 *a*, 210.

(*b*) *Simpson* v. *Eggington*, 10 Ex. 845; *Lucas* v. *Wilkinson*, 1 H. & N. 420; *Walter* v. *James*, L. R. 6 Ex. 124; *Re Rowe*, 1904, 2 K. B. 483. Where a stranger pays off a mortgage debt it will be presumed that he intends to keep the charge alive for his own benefit; *Butler* v. *Rice*, 1910, 1 Ch. 277.

(*c*) *Wilkinson* v. *Candlish*, 5 Ex. 91; *Viney* v. *Chaplin*, 2 De G. & J. 468, 477, 481; *Bourdillon* v. *Roche*, 27 L. J. N. S. Ch. 681; *Catterall* v. *Hindle*, L. R. 2 C. P. 368; *Withington* v. *Tate*, L. R. 4 Ch. 288; *Ex parte Swinbanks*, 11 Ch. D. 525. A creditor's agent to receive payment must, as a rule, take payment in lawful money only. *Pape* v. *Westacott*, 1894, 1 Q. B. 272; see n. (*h*), below.

(*d*) *Hirachand Punamchand* v. *Temple*, 1911, 2 K. B. 330.

(*e*) *Warwicke* v. *Noakes*, Peake 67; 3 R. R. 651; *Norman* v. *Ricketts*, 3 Times L. R. 182; *Thairlwall* v. *Great Northern Ry. Co.*, 1910, 2 K. B. 509; see *Hawkins* v. *Rutt*, Peake, 186.

(*f*) *Pennington* v. *Crossley*, 77 L. T. N. S. 43.

(*g*) Co. Litt. 209.

(*h*) *Dixon* v. *Clark*, 5 C. B. 365; R. S. C. 1883, Order XXII. r. 3; *Kinnaird* v. *Trollope*, 42 Ch. D. 610, 615; and see *Edmondson* v. *Copland*, 1911, 1 Ch. 301, 310, 311. The debtor must tender in *lawful money* the whole amount due, or more, without asking for change; Co. Litt. 207; *Dixon* v. *Clark*, *ubi*

Accord and satisfaction.

With regard to accord and satisfaction, a debt is in general discharged by the creditor's acceptance, instead of payment, of anything in the way of valuable consideration that he may choose to take (*i*).

Payment of smaller sum no satisfaction of larger.

But there is a well-established exception that the payment of a smaller sum than the amount due is no satisfaction of the debt, unless there be some consideration for the relinquishment of the residue (*k*), such as the payment at an earlier time than the whole is due (*l*), or the concurrence of some (*m*) or all of the other creditors of the debtor in accepting a composition (*n*). If, however, the creditor accept a *negotiable security* (even a

sup.; *Betterbee* v. *Davis*, 3 Camp. 70; 13 R. R. 755; *Dean* v. *James*, 4 B. & Ad. 546; *Blumberg* v. *Life Interests, &c., Corporation*, 1897, 1 Ch. 171. Current gold coin is legal tender for any amount; Bank of England notes for all sums above 5*l*., except by the Bank itself, but not in Ireland; current silver coin for not more than 40*s*.; bronze for not more than 1*s*.; stats. 3 & 4 Will. IV. c. 98, s. 6; 8 & 9 Vict. c. 37, s. 6; 33 Vict. c. 10, ss. 4, 20. But a tender may well be made by cheque, or otherwise than in coin which is strictly legal tender, if the creditor waive the objection on that account; *Polglass* v. *Oliver*, 2 C. & J. 15; *Jones* v. *Arthur*, 8 Dow. P. C. 342. As to the effect of payment by cheque, see *Mears* v. *Western Canada, &c., Co.*, 1905, 2 Ch. 353. Costs of solicitors' letters demanding payment of the debt need not be paid or tendered before a writ be issued; *Kirton* v. *Braithwaite*, 1 M. & W. 310; *Holman* v. *Stephens*, 6 Jur. N. S. 124; *Caine* v. *Coulson*, 32 L. J. N. S. Ex. 97. But if a writ be issued, the creditor will be allowed the costs of *one* letter from his solicitor before action: Scott on Costs, 40, 4th ed.

(*i*) Litt. s. 344; Co. Litt. 212 b; *Pinnel's case*, 5 Rep. 117; cf. *ante*, p. 181, and n. (*q*). The rule of common law was that an obligation to pay a certain sum of money contracted by deed could not be effectually discharged without deed; but in equity such an obligation might be discharged by accord and satisfaction made for valuable consideration, though without deed; and since the Judicature Acts the rule of equity prevails in this respect; *Steeds* v. *Steeds*, 22 Q. B. D. 537. See *Nichol's case*, 5 Rep. 43; *Blake's case*, 6 Rep. 43; *Peyton's case*, 9 Rep. 77, 79; *Preston* v. *Christmas*, 2 Wils. 86; *Spence* v. *Healey*, 8 Ex. 668; Doctor and Student, Dial. 1. c. 12; *Webb* v. *Hewitt*, 3 K. & J. 438; stat. 4 & 5 Anne, c. 16, s. 12.

(*k*) *Pinnel's case*, 5 Rep. 117; *Fitch* v. *Sutton*, 5 East, 230; *Foakes* v. *Beer*, 9 App. Cas. 605; *Underwood* v. *Underwood*, 1894, P. 204.

(*l*) Co. Litt. 212 b.

(*m*) *Norman* v. *Thompson*, 4 Ex. 755; *Carey* v. *Barrett*, 4 C. P. D. 379.

(*n*) *Reay* v. *Richardson*, 2 C. M. & R. 422; *Pfleger* v. *Browne*, 28 Beav. 391.

cheque) (*o*) for a smaller sum than is due in satisfaction of the whole, the case falls within the general rule; for the creditor has chosen to take a valuable thing which is not *money* (*p*) instead of payment, and the debt is discharged (*q*). And the payment of a small sum may be a good satisfaction for an unliquidated demand for large pecuniary damages, on account of the uncertainty of such a claim (*r*).

Set-off.

Where two persons are each indebted to the other, the one debt may be set-off against an equal amount of the other in an action to recover either debt (*s*): but until the right of set-off is so asserted, a debt is not discharged by the mere fact that the creditor owes the debtor an equal sum (*t*). If, however, the parties have engaged in a transaction necessarily constituting an account current between them of receipts and payments, debts and credits, the balance only is recoverable (*u*). In case of a debtor's bankruptcy an account is to be taken where there have been mutual credits, mutual debts, or other mutual dealings between him and any of his creditors, the sums due on either side are to be set-off, and the balance of the account only is to be recoverable (*x*).

(*o*) *Ante*, pp. 203, 204.

(*p*) *Ante*, p. 255, n. (*h*).

(*q*) *Sibree* v. *Tripp*, 15 M. & W. 23; *Goddard* v. *O'Brien*, 9 Q. B. D. 37; *Bidder* v. *Bridges*, 37 Ch. D. 406. As to the effect of accepting a bill or note in payment of a debt, see *Re a Debtor*, 1908, 1 K. B. 344; *Marreco* v. *Richardson*, 1908, 2 K. B. 584; *Re J. Defries & Sons, Ld.*, 1909, 2 Ch. 433.

(*r*) *Wilkinson* v. *Byers*, 1 A. & E. 106.

(*s*) The right of set-off did not exist at common law, but was given by stats. 2 Geo. II. c. 22, s. 13; 8 Geo. II. c. 24, s. 5; Bac. Abr. Set-off (A. C.). Set-off was allowed in equity before these statutes; see *Freeman* v. *Lomas*, 9 Hare, 109. As to the present practice, see R. S. C. 1883, Order XIX. r. 3; *Pellas* v. *Neptune Marine Insurance Co.*, 5 C. P. D. 34; *Stooke* v. *Taylor*, 5 Q. B. D. 569, 575. A debt due from the creditor to a third person and assigned to the debtor may be set-off; *Bennett* v. *White*, 1910, 2 K. B. 643.

(*t*) *Pitts* v. *Carpenter*, 1 Wils. 19; *Brown* v. *Baskerville*, 2 Burr. 1229; *Re Hiram Maxim Lamp Co.*, 1903, 1 Ch. 70; *Re Leeds, &c., Theatres, Ld.*, 1904, 2 Ch. 45; see *Stooke* v. *Taylor*, 5 Q. B. D. 569, 575. It is otherwise in the Civil Law; Story, Eq. Jur. § 1440.

(*u*) *Green* v. *Farmer*, 4 Burr. 2214, 2220.

(*x*) Stat. 46 & 47 Vict. c. 52, s. 38, replacing 32 & 33 Vict.

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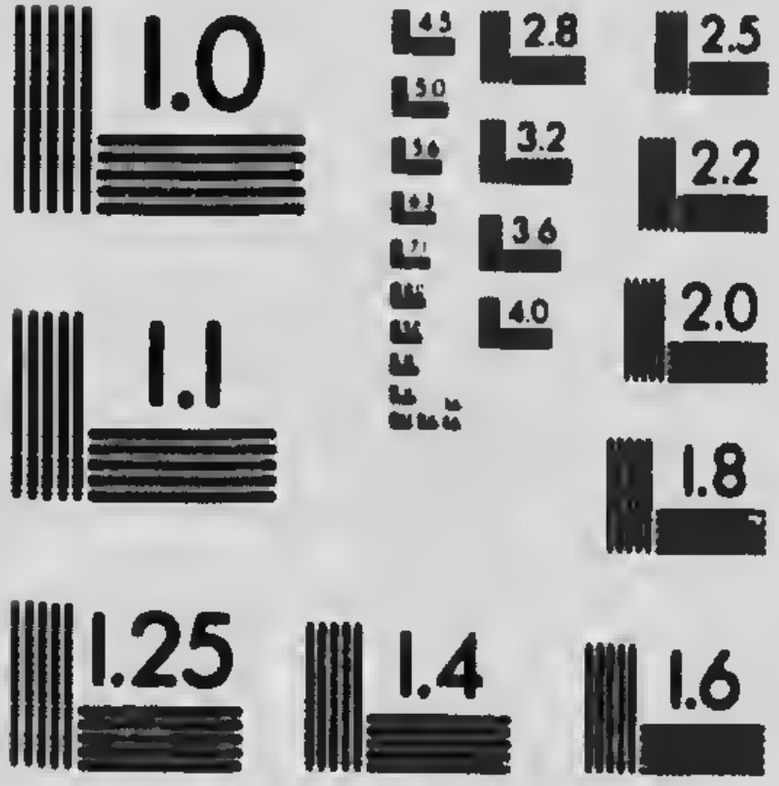

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This rule is held to be imported into the administration by the Court of the insolvent estates of deceased persons and the winding-up of companies by virtue of the 10th section of the Judicature Act of 1875 (*y*).

Release of debt.

A release given without valuable consideration of the whole or part of a debt is invalid unless made by deed (*z*): though by the law merchant the

c. 71, s. 39; 12 & 13 Vict. c. 106, s. 171; 6 Geo. IV. c. 16, s. 50; 46 Geo. III. c. 135, s. 3; 5 Geo. II. c. 30, s. 28; 4 Anne, c. 17, s. 11.

(*y*) Stat. 38 & 39 Vict. c. 77, now replaced as to companies by stat. 8 Edw. VII. c. 69, s. 207; *ante*, pp. 223, 224, 243, n. (*z*); *Mersey Steel, &c., Co.* v. *Naylor*, 9 App. Cas. 434.

(*z*) *Edwards* v. *Weekes*, Freem. C. B. 230, pl. 939; *Corporation of Scarborough* v. *Butler*, 3 Lev. 237; *May* v. *King*, 12 Mod. 537; *ante*, p. 256, n. (*k*). This is the rule in equity as well as at law; *Cross* v. *Sprigg*, 6 Hare, 552; *Edwards* v. *Walters*, 1896, 2 Ch. 157. There may be an implied release of a debt at law, as if the creditor appoint the debtor his executor, but such an appointment does not discharge the debt in equity, unless there be evidence of the testator's intention to forgive the debt; *post*, Part III. Ch. III. It has been held, however, that an informal release of a debt, followed by the appointment of the debtor as the creditor's executor, is sufficient to discharge the debt; *Strong* v. *Bird*, L. R. 18 Eq. 315; *Re Pink*, 1912, 2 Ch. 528. At common law the marriage of the creditor with the debtor released the debt, but this is no longer the case under the present law; 8 Rep. 136; *post*, Part III. Ch. V. It appears that a debt due by bond or covenant is released by cancellation of the deed, as by tearing off the seal with intent to release the debt; *Harrison* v. *Owen*, 1 Atk. 520. By cancellation a deed is made void, and no action can thereafter be maintained upon it; *Matherson's case*, 5 Rep. 22 b. 23 a. It appears that the cancellation of a mortgage deed effected without valuable consideration, but with intent to release the mortgage, may release the *debt*, if secured by covenant contained in the deed, but does not operate as a reconveyance to the mortgagor of any estate or interest, legal or equitable, in lands or goods assured to the mortgagee by the deed, or as a release of the mortgagee's *charge* on such lands or goods; *Harrison* v. *Owen*, *ubi sup.*; *Ward* v. *Lumley*, 5 H. & N. 87, 656; *Gummer* v. *Adams*, 13 L. J. N. S. Ex. 40; Williams, R. P. 154, n. (*o*), [illegible] 548, 21st ed. It has, however, been held that a mortgage [illegible] secured by deed is released, and with it the mortgagee's charge, by the gift and delivery of the deed by the mortgagee to the mortgagor with intent to forgive the debt; *Richards* v. *Symes*, Barn. Ch. 90. But although this decision seems to have been accepted as authoritative in *Byrn* v. *Godfrey*, 4 Ves. 5, 10; 4 R. R. 155; *Duffield* v. *Elwes*, 1 Bli. N. S. 497, 536–540; and *Cross* v. *Sprigg*, 6 Hare, 552, 556; it is opposed as regards the release of the *charge*, by *Re Hancock*, 57 L. J. N. S. Ch. 793, in which case the *debt* had been barred by the Statute of Limitations. Perhaps such a gift may be regarded as equivalent to cancellation, as the mortgagor then becomes absolutely entitled to the deed, and may destroy or cancel it, as he will; *Barton* v. *Gainer*, 3 H. & N. 387; *Rummens* v. *Hare*, 1 Ex. D. 169; *ante*, p. 140; see 44 Sol. J. 481.

liability on a bill or note may be discharged by an express renunciation by the holder (*a*). But by the Bills of Exchange Act, 1882 (*b*), such renunciation is required to be in writing, unless the bill or note be delivered up to the acceptor or maker. The discharge of debts under the bankruptcy law has been already mentioned (*c*), and will be considered in the next chapter. As we have seen (*d*), the recovery of a debt may be barred by lapse of time under the Statutes of Limitations, but a debt so barred may be revived by a promise or acknowledgment in writing signed by the party chargeable or his agent, or by a payment on account thereof, from which a promise to pay the remainder can be inferred (*e*).

Appropriation of payments.

When a less sum is paid to the creditor than the whole amount of his demands, it is competent to the debtor to make the payment in satisfaction of any demand he may please, and the creditor must appropriate the payment accordingly (*f*); but if the payment be made generally, without any express appropriation, the creditor may elect, either at the time of payment (*g*) or afterwards (*h*), to appropriate the money to whichever demand he may please. And if no election as to the appropriation of the payment should be made on either side, the law will, in ordinary cases of current accounts (*i*), presume that the first item on the debit side is discharged or

(*a*) *Foster* v. *Dawber*, 8 Ex. 839, 851.

(*b*) Stat. 45 & 46 Vict. c. 61, s. 62; *Edwards* v. *Walters*, 1896, 2 Ch. 157.

(*c*) *Ante*, p. 219.

(*d*) *Ante*, pp. 182, 188.

(*e*) *Post*, Part IV.

(*f*) *Shaw* v. *Picton*, 4 B. & C. 715; 28 R. R. 455; *Nash* v. *Hodgson*, 6 De Gex, M. & G. 171.

(*g*) *Devaynes* v. *Noble, Clayton's Case*, 1 Mer. 529, 585, 604 *sq.*; 15 R. R. 151.

(*h*) *Simpson* v. *Lapham*, 2 B. & C. 65; 28 R. R. 273; *Cory* v. *Owners of the Mecca*, 1897, A. C. 286; *Seymour* v. *Pickett*, 1905, 1 K. B. 715; see *Smith* v. *Betty*, 1903, 2 K. B. 317, 323.

(*i*) See *Re Sherry, London & County Bank* v. *Terry*, 25 Ch. D. 692, 702; *Cory* v. *Owners of the Mecca*, 1897, A. C. 286.

reduced by the first payment entered on the credit side, and so on in the order of time (*k*). When the debt carries interest, the payment is considered to be applied in the first place in discharge of the interest then due, and the surplus, if any, in discharge *pro tanto* of the principal. For no creditor would apply any payment to the discharge of part of the principal, which carries interest, instead of to the discharge of interest for which, when due, no further interest is payable (*l*).

Composition with creditors.

When a person becomes so embarrassed as to be unable to pay all his debts in full, he usually endeavours to enter into a composition with his creditors, prevailing on them to accept so much in the pound, and to allow a given time for payment. In this case a *letter of licence* is generally given by the creditors, by which they covenant not to take any proceedings for their debts in the meantime; and this licence is frequently embodied in a *deed of inspectorship*, by which certain inspectors are appointed to watch the winding-up of the debtor's affairs on behalf of the creditors. In some cases an assignment of the debtor's estate and effects is made to trustees for sale and conversion into money to be divided rateably amongst the creditors. As, however, this is the process adopted by the law in cases of bankruptcy, where it is carried on under judicial sanction, the law always considered that such an assignment of the whole of the estate of a person in trade was an act of bankruptcy, and as such voidable, if there were any creditor or creditors who had not concurred in it of sufficient amount to sue out a petition for

Letter of licence.

Deed of inspectorship.

Assignment to trustees for creditors voidable as an act of bankruptcy.

(*k*) 1 Meriv. 608; *Williams* v. *Rawlinson*, 10 J. B. Moore, 362; *Merryman* v. *Ward*, 1 J. & H. 371; *Knoppard* v. *Webster*, 19 Ch. D. 139; *Derby* v. *Lloyds Bank, Ld.*, 1912, A. C. 756. As to trust moneys, see *In re Hallett's estate*, 13 Ch. D. 696; *Re Stenning*, 1895, 2 Ch. 432; *Mutton* v. *Peat*, 1900, 2 Ch. 79.

(*l*) *Bower* v. *Marris*, 1 Cr. & Ph. 351, 355.

adjudication of bankruptcy (*m*). And by the Bankruptcy Act, 1883 (*n*), the following act, amongst others, is expressly made an act of bankruptcy on the part of the debtor, viz., if in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

Registration of deeds of arrangement.

By the Deeds of Arrangement Act, 1887 (*o*), any of the following instruments made in respect of the affairs of a debtor for the benefit of his creditors *generally* (otherwise than in pursuance of the bankruptcy law for the time being in force) shall be void, unless registered in the central office of the Supreme Court (*p*) within seven days after the first execution thereof by the debtor or any creditor (*q*),

(*m*) *Tappenden v. Burgess*, 4 East, 230; *Dutton* v. *Morrison*, 17 Ves. 193, 199; 11 P. R. 56; *Powell* v. *Lloyd*, 2 Y. & J. 372; 31 R. R. 598; *Ex parte Philpot*, 10 Jur. 717; *Ex parte Alsop*, 1 De G., F. & J. 289; see stats. 6 Geo. IV. c. 16, s. 4; 12 & 13 Vict. c. 106, s. 68. See *post*, the chapter on Bankruptcy. When all debtors, whether traders or not, had been made subject to the bankruptcy laws by the Bankruptcy Act, 1861, it appears that such an assignment of the whole of the estate of any debtor was an act of bankruptcy; see stat. 24 & 25 Vict. c. 134, s. 70; *Ex parte Stray*, L. R. 2 Ch. 374, 378; Mellish, L. J., *Re Wood*, L. R. 7 Ch. 302, 306.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 4; *Re Stephenson*, *Ex parte Official Receiver*, 20 Q. B. D. 540; *Davis* v. *Petrie*, 1905, 2 K. B. 528. The Bankruptcy Act, 1869, contained a similar provision; stat. 32 & 33 Vict. c. 71, s. 6, par. (1).

(*o*) Stat. 50 & 51 Vict. c. 57, amended as to Ireland by 53 & 54 Vict. c. 24; see rules thereunder, W. N., 7th July, 1888; *Muskelyne* v. *Cooke*, 1903, 1 K. B. 671. It has been held that this Act does not apply to arrangements made by limited companies; *Re Rileys, Ld.*, 1903, 2 Ch. 590; or to deeds of assignment made by a foreign debtor in the country of his domicil and valid by the law of that country; *Dalaney* v. *Merry*, 1903, 1 K. B. 536.

(*p*) In Ireland the place of registration is the Bills of Sale Office of the King's Bench Division; stat. 50 & 51 Vict. c. 57, s. 8.

(*q*) Others may execute the deed after registration; *Re Batten, Ex parte Milne*, 22 Q. B. D. 685. Instruments executed out of England or Ireland may be posted within one week after execution, and registered within seven days after arrival in the ordinary course of post; see stat. 50 & 51 Vict. c. 57, s. 5. The register is open to public inspection and search; s. 12. When the place of business or residence of the debtor, who is a party to such an instrument, is outside the London bankruptcy district, a copy of the instrument is transmitted by the registrar to

and unless stamped in accordance with the Act; that is to say, an assignment of property, or deed of or agreement for a composition, deed of inspectorship, letter of licence, and any agreement or instrument entered into for the purpose of carrying on, winding up, or disposing of a debtor's business with a view to the payment of his debts. And every trustee under any such instrument is now required to transmit, in January in each year, an account of his receipts and payments as such trustee to the Board of Trade (*r*). It has been held that a deed of arrangement for the benefit of certain named creditors only, without any option for the remaining creditors to assent thereto, is not for the benefit of creditors generally within the meaning of this Act, and does not therefore require to be registered (*s*).

Statutory provisions to make arrangements binding on all creditors.

Provision was made by several bankruptcy statutes of Queen Victoria's reign for rendering arrangements for composition or liquidation, made between a debtor and a majority of his creditors in number and value, binding on all his creditors, without the necessity of their taking proceedings in bankruptcy against him (*t*). But under the present Bankruptcy Act, no composition or scheme of arrangement with creditors can be initiated until proceedings have been taken in bankruptcy by the presentation of a *bankruptcy petition*, the making of a *receiving order* by the Court, and the holding of a *first meeting of creditors* in consequence thereof (*u*).

Bankruptcy Act, 1883.

the registrar of the county court of the district in which such place of business or residence is situate, and is filed by the latter in a local register, also open to public search; s. 13.

(*r*) Stat. 53 & 54 Vict. c. 71, s. 25 (2 b); see rules thereunder, W. N. 13th Dec. 1890.

(*s*) *Re Saumarez*, 1907, 2 K. B. 170.

(*t*) See Stats. 7 & 8 Vict. c. 70; 12 & 13 Vict. c. 106, s. 224; 24 & 25 Vict. c. 134, s. 192; 32 & 33 Vict. c. 71, ss. 125, 126.

(*u*) See Stats. 46 & 47 Vict. c. 52, ss. 5, 15, 18, amended by 53 & 54 Vict. c. 71, s. 3.

It is thought therefore that the provisions of the Act relating to the acceptance by creditors of a composition, or their assent to a scheme of arrangement, will be more properly dealt with in the chapter on Bankruptcy.

Agreement to accept composition.

Under the present law, then, an agreement between a man and any two or more of his creditors, that they shall accept the payment of a composition in satisfaction of the debts due to them (*x*), is binding, if made without any fraud on the part of the debtor, upon those creditors who enter into it (*y*); provided that where the agreement is made for the benefit of his creditors *generally* and is in writing, it must be duly registered and stamped under the Deeds of Arrangement Act, 1887 (*z*). But no agreement for the acceptance of a composition, or otherwise for the liquidation of a debtor's affairs, can now be made to bind any creditor, who does not assent thereto, except in proceedings under the Bankruptcy Act, 1883 (*a*). Thus, if a debtor make any such arrangement with the majority of his creditors, and commit any act of bankruptcy in carrying out the terms of the arrangement, a creditor, who has not assented thereto, may take proceedings to have the debtor's estate administered in bankruptcy (*b*). But a

(*x*) See *ante*, pp. 181, 256. The agreement by each individual to give up part of his claim is a sufficient consideration to support such an agreement; Parke, B., 4 Ex. 700; Jessel, M.R., 19 Ch. D. 400; *West Yorkshire Darracq Agency, Ld.* v. *Coleridge*, 1911, 2 K. B. 326.

(*y*) *Norman* v. *Thompson*, 4 Ex. 755; *Carey* v. *Barrett*, 4 C. P. D. 379; see *Ex parte Milner*, 15 Q. B. D. 605.

(*z*) See *ante*, pp. 261, 262. An agreement for a composition, even if made for the benefit of creditors generally, is not required by law to be put into writing; Blackburn, L. A., *Société Générale de Paris* v. *Green*, 8 App. Cas. 606, 614, 615. And the Act above mentioned applies only to the *instruments* (which means written documents; see Stroud's Judicial Dictionary, ii. 986, 2nd ed.) therein specified.

(*a*) Stat. 46 & 47 Vict. c. 52.

(*b*) *Ex parte Dixon*, 13 Q. B. D. 118; *Ex parte Oram*, 15 Q. B. D.

creditor who has acquiesced in and taken some benefit under an arrangement for composition, will not be permitted to commence proceedings in bankruptcy against the debtor, founded upon an act of bankruptcy committed in carrying out the arrangement (*c*). The acts of bankruptcy are enumerated in the next chapter (*d*).

The payment of a composition is sometimes guaranteed by some friends of the debtor as his sureties (*e*), and when payment is made, a release of all demands is given by the creditors. If, however, a man's creditors should agree to accept a composition to be paid within some specified time, and the composition should not be punctually paid, the creditors will no longer be restrained from proceeding to enforce the full payment of their debts (*f*). Such creditors as hold security for their debts should openly stipulate that their securities are not to be affected (*g*); and such a stipulation will be sufficient to preserve them (*h*). But any secret agreement between the debtor and a creditor, by which he is to have any advantage over the others, in order to induce him to agree to the composition, is evidently a fraud on the other creditors, and as such is abso-

399. Such proceedings must be taken within three months after the act of bankruptcy, or the arrangement cannot be set aside on that account; stat. 46 & 47 Vict. c. 52, s. 6; and see next chapter.

(*c*) *Ex parte Alsop*, 1 De G., F. & J. 289; *Ex parte Stray*, L. R. 2 Ch. 374; *Re Brindley*, 1906, 1 K. B. 377; cf. *Re Mills*, *ib.* 389; *Re Jones Bros.*, 1912, 3 K. B. 234.

(*d*) *Post*, pp. 268–271.

(*e*) See *Ex parte Hudson*, *Re Walton*, 22 Ch. D. 773.

(*f*) *Crowley* v. *Hillary*, 2 M. & S. 120; Mellish, L. J., *Re Hatton*, L. R. 7 Ch. 723, 726.

(*g*) As to the position of a creditor, who has retained a security for part of his debt and received his share of the composition for the balance, see *Société Générale de Paris* v. *Green*, 8 App. Cas. 606; *Baines* v. *Wright*, 16 Q. B. D. 330.

(*h*) *Nicholls* v. *Norris*, 3 B. & Ad. 41; *Ex parte Glendinning*, Buck, 517; *Lee* v. *Lockhart*, 3 Mylne & Craig, 302; *Cullingworth* v. *Lloyd*, 2 Beav. 385, and the cases collected, p. 395; *Bush* v. *Shipman*, 14 Sim. 239.

lutely void (*i*), and prevents the creditor who is party to it from suing for his share in the composition (*k*).

(*i*) *Leicester* v. *Rose*, 4 East, 372; *Knight* v. *Hunt*, 5 Bing. 432; 30 R. R. 692; *Pendlebury* v. *Walker*, 4 You. & Coll. 424; *Alsager* v. *Spalding*, 4 N. C. 407; *Higgins* v. *Pitt*, 4 Ex. 312; *Pfleger* v. *Browne*, 28 Beav. 391; *Mare* v. *Warner*, 3 Giff. 100; *Mare* v. *Earle*, 3 Giff. 108. See also *Ex parte Barrow*, *Re Andrews*, 18 Ch. D. 464, 471; *Ex parte Milner*, 15 Q. B. D 605.

(*k*) *Howden* v. *Haigh*, 11 A. & E. 1033; *Ex parte Oliver*, 4 De G. & Sm. 354. See *Atkinson* v. *Denby*, 7 H. & N. 934.

CHAPTER IV.

OF BANKRUPTCY.

Discharge from debt by bankruptcy.

As we have seen (*a*), a debt may be discharged under the law of bankruptcy. When a debtor is made bankrupt, he gives up all his property to his creditors, to be divided rateably amongst them; and, if his behaviour has been free from serious blame, he obtains a discharge from past liabilities. Bankruptcy was formerly considered as a crime, and in the earliest Bankruptcy Acts the bankrupt was called "the offender" (*b*). But in modern times bankruptcy has been looked upon as the proper remedy for traders in embarrassed circumstances; and persons not engaged in trade have been enabled to avail themselves of this resource.

The law of bankruptcy was created by statute (*c*). It is now contained in the Bankruptcy Act, 1883 (*d*), amended principally by Acts of 1888 (*e*) and 1890 (*f*), and in the Bankruptcy Rules, 1886 (*g*) and 1890 (*h*), made under powers given by the Act of 1883 (*i*).

(*a*) *Ante*, pp. 218, 254, 259.

(*b*) 2 Black. Comm. 471.

(*c*) It was introduced by stat. 34 & 35 Hen. VIII. c. 4, but was almost entirely altered by stat. 13 Eliz. c. 7, and was again re-cast by stats. 1 Jac. I. c. 15 and 21 Jac. I. c. 19. These statutes were amended by many others, passed at various times; but they continued to form the foundation of the law of bankruptcy, until they were repealed, together all the Acts amending them, by stats. 5 Geo. IV. c. 98 and 6 Geo. IV. c. 16. The bankruptcy law was entirely reconstituted by Bankruptcy Acts of the years 1825, 1849, 1869 and 1883; stats. 6 Geo. IV. c. 16; 12 & 13 Vict. c. 106; 32 & 33 Vict. c. 71; 46 & 47 Vict. c. 52.

(*d*) Stat. 46 & 47 Vict. c. 52.

(*e*) Stat. 51 & 52 Vict. c. 62.

(*f*) Stat. 53 & 54 Vict. c. 71.

(*g*) W. N. 30th Oct., 1886, supplement.

(*h*) W. N. 13th Dec., 1890.

(*i*) Stat. 46 & 47 Vict. c. 52, s. 127.

Persons subject to bankruptcy laws.

As a general rule, all debtors are now liable to be made bankrupt (*k*). An alien is within the bankrupt law with respect to any act of bankruptcy committed by him within the jurisdiction of the English Courts, or intended to operate according to English law, but not otherwise (*l*). A married woman carrying on trade for her separate use by the custom of London (*m*), or whilst her husband was undergoing sentence of transportation, has always been liable to be made bankrupt (*n*). And by the Married Women's Property Act, 1882, every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole* (*o*). But a married woman is not otherwise subject to the bankrupt law, even though she have separate estate (*p*). It appears that an infant under the age of twenty-one years cannot be a bankrupt, because by the law of England he cannot be made liable on contracts entered into by him in

Alien.

Married woman.

Infant.

(*k*) This has been the law ever since the Bankruptcy Act, 1861. Before that Act, traders only were subject to the bankruptcy laws. And under the present law no person, not being a trader within the meaning of that Act, is to be adjudged bankrupt in respect of a debt contracted before the passing of that Act. Previously to that Act, however, non-traders might, upon surrendering all their property for the benefit of their creditors, obtain their discharge from custody for debt and protection from future process against their persons or property, or if they had become indebted without any fraud or gross and culpable negligence) as complete a discharge from their debts as if they had become bankrupt, under the Insolvent Debtors Acts, all repealed by the Bankruptcy Act, 1861. See stats. 1 & 2 Vict. c. 110, replacing 7 Geo. IV. c. 57, continued and amended by 11 Geo. IV. and 1 Will. IV. c. 38; 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96, 10 & 11 Vict. c. 102; 24 & 25 Vict. c. 134, ss. 19–27, 69; 32 & 33 Vict. c. 71, ss. 6, 118; 46 & 47 Vict. c. 52, ss. 4, 126.

(*l*) *Cooke* v. *Charles A. Vogeler Co.*, 1901, A. C. 102, 112.

(*m*) *Ex parte Carrington*, 1 Atk. 206.

(*n*) *Ex parte Franks*, 7 Bing. 762; 1 M. & Scott, 1.

(*o*) Stat. 45 & 46 Vict. c. [illegible] s. 1, subs. 5, preserved by 46 & 47 Vict. c. 52, s. 152; see *Re Lyons*, 1893, 2 Q. B. 113; *Re Holsby*, 10 Times L. R. 87; *Re Wheeler's Settlement*, 1899, 2 Ch. 717; *Re Worsley*, 1901, 1 K. B. 309; *Re Simon*, 1900, 1 K. B. 201.

(*p*) *Ex parte Jones*, *In re Grissell*, 12 Ch. D. 484; *Re a Debtor*, 1898, 2 Q. B. 576.

Lunatic.

Persons having privilege of Parliament.

the course of trade or otherwise, except for neecessaries (*q*). It is a question whether a lunatic can be made bankrupt (*r*). If a person having privilege of Parliament commits an act of bankruptcy, he may be dealt with under the Bankruptcy Act, 1883, in like manner as if he had not such privilege (*s*).

Acts of bankruptcy.

A person becomes bankrupt by committing an *act of bankruptcy* (*t*). By the Bankruptcy Act, 1883 (*u*), a debtor commits an act of bankruptcy in each of the following cases :—

(a.) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally (*x*) :

(b.) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof (*y*) :

(*q*) *Belton* v. *Hodges*, 9 Bing 365, 370 ; stat. 37 & 38 Vict. c. 62, *ante*, p. 173 ; *R.* v. *Wilson*, 5 Q. B. D. 28 ; *Ex parte Jones*, *Re Jones*, 18 Ch. D. 109 ; *Lovell* v. *Beauchamp*, 1894, A. C. 607, 611.

(*r*) See *Re Farnham*, 1895, 2 Ch. 799.

(*s*) Stat. 46 & 47 Vict. c. 52, s. 24. The same law prevailed under the Acts of 1869, 1861, 1849, and 1825 ; stats. 32 & 33 Vict. c. 71, s. 120 ; 24 & 25 Vict. c. 134, s. 69 ; 12 & 13 Vict. c. 106, s. 66 ; 6 Geo. IV. c. 16, s. 9. Traders having privilege of parliament were first expressly declared to be subject to the bankrupt laws by stat. 4 Geo. III. c. 33. But, independently of the express provisions of the various bankruptcy statutes, a person, who enjoys privilege of parliament, is not thereby exempted from liability to be adjudged bankrupt ; *Ex parte Moyuot*, 1 Atk. 196, 201 ; *Duke of Newcastle* v. *Morris*, L. R. 4 H. L. 661.

(*t*) Wright, J., *Re Reis*, 1904, 1 K. B. 451, 455 (not affected by his being overruled on the main point ; *S. C.*, 1904, 2 K. B. 769 ; 1905, A. C. 442) ; *Ponsford* v. *Union Bank of London*, 1906, 2 Ch. 440 ; *Re Bumpus*, 1908, 2 K. B. 330 ; *Re Hart*, 1912, 3 K. B. 6, 16.

(*u*) Stat. 46 & 47 Vict. c. 52, s. 4.

(*x*) See *Re Spackman*, 24 Q. B. D. 728 ; *Re Hughes*, 1893, 1 Q. B. 595 ; cf. *Re Phillips*, 1900, 2 Q. B. 329. This was first *expressly* made an act of bankruptcy by stat. 32 & 33 Vict. c. 71, s. 6. Before the Act of 1869, a conveyance of all a man's property to trustees for the benefit of his creditors generally was held to be an act of bankruptcy, as being a fraudulent conveyance ; see *ante*, pp. 260, 261, and cases cited in note (*m*) thereto.

(*y*) This was made an act of bankruptcy, as to traders, by stats. 1 Jac. I. c. 15, s. 2 ; 6

(c.) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt (*z*) :

(d.) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England (*a*), or departs from his dwelling-house, or otherwise absents himself (*b*), or begins to keep house (*c*) :

(e.) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding (*d*) in the High Court, and the goods have been either sold (*e*), or held by the sheriff for twenty-one days (*f*) :

Geo. IV. c. 16, s. 3 ; 12 & 13 Vict. c. 106, s. 67 ; as to non-traders, by stat. 24 & 25 Vict. c. 134, s. 70 ; as to all debtors, by stat. 32 & 33 Vict. c. 71, s. 6.

(*z*) This was first made an act of bankruptcy by the Act of 1883. Before that Act, an act which might be avoided as a fraudulent preference, was not an act of bankruptcy unless it were void as a fraudulent conveyance ; *Ex parte Stubbins, Re Wilkinson*, 17 Ch. D. 58, 68.

(*a*) This was made an act of bankruptcy, as to traders, by stats. 13 Eliz. c. 7, s. 1 ; 1 Jac. 1. c. 15, s. 2 ; 6 Geo. IV. c. 16, s. 3 ; 12 & 13 Vict. c. 106, s. 67 ; as to non-traders, by stat. 24 & 25 Vict. c. 134, s. 70 ; as to all debtors, by stat. 32 & 33 Vict. c. 71, s. 6. See *Ex parte Brandon, Re Trench*, 25 Ch. D. 500.

(*b*) Before the Act of 1883, this was an act of bankruptcy in the case of *traders* only. See stats. 13 Eliz. c. 7, s. 1 ; 1 Jac. 1. c. 15, s. 2 ; 6 Geo. IV. c. 16. s. 3 ; 12 & 13 Vict. c. 106, s. 67 ; 32 & 33 Vict. c. 71, s. 6 ; *Ex parte M'George, Re Stevens*, 20 Ch. D. 697.

(*c*) Before the Act of 1869, this was an act of bankruptcy in the case of *traders* only ; by that Act in the case of all debtors (see enactments cited in preceding note).

(*d*) See *Ex parte Caucasian Trading Corporation*, 1896, 1 Q. B. 368.

(*e*) See *Re Follows*, 1895, 2 Q. B. 521, as to interpleader.

(*f*) Stat. 53 & 54 Vict. c. 71, s. 1 ; see *Burns' Trustee* v. *Brown* 1895, 1 Q. B. 324 ; *Re North*, 1895, 2 Q. B. 264 ; *Mason* v. *Bolton's Library, Ld.*, 1913, 1 K. B. 83. This was first made an act of bankruptcy in the case of all debtors by the Act of 1883. Under the Acts of 1869 and 1861 the seizure and sale of

(f.) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself (*g*) :

(g.) If a creditor (*h*) has obtained a final judgment (*i*) against him for any amount, and execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act (*k*), requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it to the satisfaction of the creditor or the Court, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice, or satisfy the Court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt, and

the goods of a *trader* on an execution for 50*l.* or upwards was an act of bankruptcy; stats. 32 & 33 Vict. c. 71, s. 6; 24 & 25 Vict. c. 134, s. 73.

(*g*) These were acts of bankruptcy under the Acts of 1869 and 1861, in the case of all debtors, and under the Act of 1849 in the case of traders; stats. 32 & 33 Vict. c. 71, s. 6, *Ex parte Duignan, Re Russell*, L. R. 6 Ch. 605; 24 & 25 Vict. c. 134, ss. 72, 86; 12 & 13 Vict. c. 106, ss. 70, 76, 93. Filing a declaration of insolvency was first made an act of bankruptcy by stat. 6 Geo. IV. c. 16, s. 6. A trader was first enabled to present a bankruptcy petition against himself by stat. 7 & 8 Vict. c. 96, s. 41.

(*h*) Including any person who is for the time being entitled to enforce a final judgment; stat. 53 & 54 Vict. c. 71, s. 1.

(*i*) See *Ex parte Chinery*, 12 Q. B. D. 342; *Ex parte Schmitz, Re Cohen*, ib. 509; *Ex parte Moon, Re Faithfull*, 13 Q. B. D. 627; *Re Binstead*, 1893, 1 Q. B. 199; *Re a Debtor*, 1912, 3 K. B. 212.

(*k*) See Stat. 46 & 47 Vict. c. 52, s. 1, sub s. 2; Bankruptcy Rules, 1886, Nos. 136–142; *Re Low*, 1891, 1 Q. B. 147; *Re Child*, 1892, 2 Q. B. 77; *Re Howes*, ib. 628; *Re a Judgment Debtor*, 1908, 2 K. B. 174; *Re a Debtor*, ib. 683.

which he could not set up in the action in which the judgment was obtained (*l*).

(h.) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts (*m*).

Fraudulent conveyance, what is.

We have seen (*n*) that it has been an act of bankr. tcy for a person within the bankrupt laws to make any *fraudulent conveyance* of his property, ever since the bankruptcy statute, 1 Jac. I. c. 15, was passed. The question of fraud sometimes resolves itself into the question of the debtor's intention in making the conveyance, and sometimes is concluded from the nature of the conveyance itself (*o*). A *bonâ fide* intent to carry on his business, and to procure advances for that purpose, will sustain a mortgage of the whole or nearly all of the debtor's property (*p*); and this is the case even if such advances are procured at the expense of first

(*l*) See *Re Powell*, 1891, 2 Q. B. 321; *Re Fraser*, 1892, 2 Q. B. 633; *Re H. B.*, 1904, 1 K. B. 94. In the like acts of bankruptcy under the Acts of 1809 and 1861, a difference was made between traders and non-traders: see stats. 32 & 33 Vict. c. 71, s. 6; 24 & 25 Vict. c. 134, ss. 76–85. Failure to satisfy a debt, after summons duly issued, was first made an act of bankruptcy in the case of traders *having privilege of Parliament* (who could not be arrested for debt) by stat. 4 Geo. III. c. 33 (so also under 6 Geo. IV. c. 16, ss. 10, 11); in the case of *all* traders, by 1 & 2 Vict. c. 110 (which abolished arrest on mesne process in civil actions), s. 8; 12 & 13 Vict. c. 106, s. 72.

(*m*) This was first made an act of bankruptcy by the Act of 1883. See *Ex parte Nickoll*, 13 Q. B. D. 409; *Ex parte Chaster*, ib. 471; *Crook* v. *Morley*, 1891, A. C. 316; *Re Daintrey*, 1893, 2 Q. B. 116; *Re Simonson*, 1894, 1 Q. B. 433; *Re Scott*, 1896, 1 Q. B. 619; cf. *Clough* v. *Samuel*, 1905, A. C. 442. Certain acts of bankruptcy defined by former bankruptcy statutes were omitted from the present Act as obsolete; these are principally outlawry, abolished in civil proceedings in the year 1879, and certain acts, such as lying in prison for debt, or escape from such imprisonment, which could not be committed after the abolition of imprisonment for debt at the beginning of 1870. See *ante* pp. 102, n. (*f*), 228; 2 Black. Comm. 477–479; 2 Steph. Comm. 157 *sq.*, 6th ed.

(*n*) *Ante*, p. 208, n. (*y*).

(*o*) See *Re Hirth*, 1899, 1 Q. B. 612.

(*p*) *Bittlestone* v. *Cook*, 6 E. & B. 296; *Ex parte Hauxwell*, *Re Hemingway*, 23 Ch. D. 626, 638.

securing to the proposed lender a pre-existing debt (*q*). But a mortgage of all or nearly all the debtor's property for simply securing a pre-existing debt, is evidently a fraud on the other creditors, and as such is void as a fraudulent conveyance (*r*). Not so, however, where a substantial portion of the debtor's property is excepted from the security, and the conveyance is made under pressure (*s*).

Proceedings in bankruptcy.

When a debtor has committed an act of bankruptcy, proceedings in bankruptcy must be duly instituted against him, in order that he may be adjudged bankrupt. The first step in these proceedings is a *petition* addressed to the High Court of Justice, or to a County Court having bankruptcy jurisdiction, either by a creditor, or by the debtor himself (*t*). And subject to the conditions specified in the Bankruptcy Act, 1883, if a debtor commits an act of bankruptcy, the Court may, on a *bankruptcy petition* being presented, either by a creditor or by the debtor, make an order, in the Act called a *receiving order*, for the protection of the estate (*u*).

Bankruptcy petition.

Receiving order.

(*q*) *Pennell* v. *Reynolds*, 11 C. B. N. S. 709; *Ex parte Winder*, *Re Winstanley*, 1 Ch. D. 290; affirmed on appeal, *Ex parte Sheen*, *Re Winstanley*, 1 Ch. D. 560; *Ex parte Ellis*, *In re Ellis*, 2 Ch. D. 797; *Ex parte Games*, *In re Bamford*, 12 Ch. D. 314; *Ex parte Wilkinson*, *Re Berry*, 22 Ch. D. 788; *Ex parte Johnson*, *Re Chapman*, 26 Ch. D. 338.

(*r*) *Smith* v. *Cannon*, 2 E. & B. 35; *Ex parte Foxley*, *In re Morse*, L. R. 3 Ch. 515; *Ex parte Trevor*, *In re Burghardt*, 1 Ch. D. 297; *Ex parte Cooper*, *Re Baum*, 10 Ch. D. 313; *Ex parte Payne*, *Re Cross*, 11 Ch. D. 539; *Ex parte Dunn*, *Re Parker*, 17 Ch. D. 29; *Ex parte Chaplin*, *Re Sinclair*, 26 Ch. D. 319.

(*s*) *Smith* v. *Timms*, 1 H. & C. 319.

(*t*) Stat. 46 & 47 Vict. c. 52, ss. 5–8, 92, 100; see *Re Painter*, 1895, 1 Q. B. 85; *Re Hancock*, 1904, 1 K. B. 585; cf. *Re Betts*, 1901, 2 K. B. 39. A petition has always been the first step in bankruptcy proceedings; but it was originally addressed to the Lord Chancellor, and afterwards to the Court of Bankruptcy. Formerly it could only be presented by a creditor; but ever since an Act of 1844 a man has been enabled to present a bankruptcy petition against himself. See 2 Black. Comm. 480; stats. 7 & 8 Vict. c. 96, s. 11.

(*u*) Stat. 46 & 47 Vict. c. 52, s. 5.

Conditions on which creditor may petition.

A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

(a.) The debt owing by the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors amounts to fifty pounds, and

(b.) The debt is a liquidated sum, payable either immediately or at some certain future time, and

(c.) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition, and

(d.) The debtor is domiciled in England (*x*), or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England (*y*).

Secured creditor.

If the petitioning creditor is a secured creditor, he must, in his petition, either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt, or give an estimate of the value of his security. In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor (*z*). A creditor's petition shall be verified by affidavit, and served in the prescribed manner (*a*). At the hearing the Court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more

Proceedings and order on creditor's petition.

(*x*) Not in Scotland or Ireland; *Ex parte Cunningham*, 13 Q. B. D. 418; see *Ex parte Barne*, 16 Q. B. D. 522.

(*y*) *Re Hecquard*, 24 Q. B. D. 71; see *ante*, p. 267, and n. (*l*).

(*z*) Stat. 46 & 47 Vict. c. 52, s. 6. See *Re Vautin*, 1899, 2 Q. B. 549; *Re Button*, 1905, 1 K. B. 602.

(*a*) Sect. 7, sub-s. 1; see rules (1886) 143—156.

than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition (*b*). A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order (*c*). Neither a creditor's nor a debtor's petition shall, after presentment, be withdrawn without the leave of the Court (*d*). If the debtor against or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by the Act (*e*) for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any County Court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court. In any other case the petition shall be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition. But these provisions shall not invalidate a proceeding by reason of its being taken in a wrong Court (*f*).

Debtor's petition and order thereon.

Petition, where to be presented.

Effect of receiving order.

On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as

(*b*) Sect. 7, sub-s. 2; see rules (1886) 137–149; *Re Gentry*, 1916, 1 K. B. 825.

(*c*) Sect. 8; see rules (1886) 143–147, 157.

(*d*) Sects. 7 (sub-s. 7), 8.

(*e*) See s. 96.

(*f*) Sect. 95; see rule (1886) 145; *Re French*, 24 Q. B. D. 63.

directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose. But this enactment shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this enactment had not been passed (*g*). Official receivers of debtors' estates are appointed by and act under the general authority and directions of the Board of Trade, but are also officers of the Courts to which they are respectively attached (*h*). The official receiver is empowered, on the application of any creditor, to appoint a special manager of the debtor's estate to act until a trustee is appointed (*i*). The Court has power at any time after the presentation of a bankruptcy petition, and before a receiving order is made, to appoint the official receiver to be interim receiver of the debtor's property (*k*). And, at any time after the presentation of such a petition, the Court may stay any action, execution, or other legal process against the property or person of the debtor (*l*). Notice of every receiving order is required to be duly gazetted and advertised (*m*).

Secured creditor.

Official receivers.

Special manager.

Interim receiver.

Staying action or process against debtor.

Advertisement of a receiving order.

As soon as may be after the making of a receiving

First meeting of creditors.

(*g*) Sect. 9; see *Re Ryley*, 15 Q. B. D. 329; *Re Manning*, 30 Ch. D. 480; *Rhodes* v. *Dawson*, 16 Q. B. D. 548; *Re Guedalla*, 1905, 2 Ch. 331.

(*h*) Stat. 46 & 47 Vict. c. 52, s. 66; see Order of 1st January, 1884, W. N. 5th January, 1884, appointing official receivers for the bankruptcy districts of the High Court and the County Courts.

(*i*) Stat. 46 & 47 Vict. c. 52, s. 12; *Re A. B. & Co.* (No. 2), 1900, 2 Q. B. 429.

(*k*) Sect. 10, sub-s. 1; *Re A. B. & Co.* (No. 2), 1900, 2 Q. B. 429.

(*l*) Sect. 10 sub-s. 2; see rule (1886) 184.

(*m*) Sect 13; see rule (1886) 182.

order, a *first meeting of creditors* is held in accordance with the Act (*n*). And a debtor against whom a receiving order is made is required to make out a *statement of his affairs* in the prescribed form (*o*); and also has to undergo a *public examination* in Court with regard to his affairs (*p*). And if the creditors at the first meeting, or any adjournment thereof, by ordinary resolution resolve that the debtor be adjudged bankrupt, or pass no resolution, or if the creditors do not meet, or if a composition or scheme is not accepted or approved in pursuance of the Act within fourteen days after the conclusion of the examination of the debtor, or such further time as the Court may allow, the Court shall adjudge the debtor bankrupt (*q*). On the application of the debtor himself the Court may adjudge him bankrupt at the time of making a receiving order, or at any time thereafter (*r*). And when a receiving order has been made, and a quorum of creditors do not attend at the time and place appointed for the first meeting, or one adjournment thereof, or where the official receiver satisfies the Court that the debtor has absconded, or that the debtor does not intend to propose a composition or scheme, or in any of the other cases mentioned in the Act, the Court may, either on the application of a creditor, or of the official receiver, forthwith adjudge the debtor bankrupt (*s*). Notice of every order adjudging a debtor bankrupt must be duly gazetted and advertised (*t*).

Debtor's statement of affairs.

Public examination of debtor.

Adjudication of bankruptcy.

Advertisement.

Composition or scheme of arrangement.

A debtor against whom a receiving order has been

(*n*) Sect. 15, and first schedule; 53 & 54 Vict. c. 71, s. 18; rules (1886) 249–257; rules (1890) 58–60.

(*o*) Stat. 46 & 47 Vict. c. 52, s. 16; rules (1886), 217, 218.

(*p*) Sect. 17; stat. 53 & 54 Vict. c. 71, s. 2; rules (1886) 6, 184–189.

(*q*) Stat. 46 & 47 Vict. c. 52, s. 20. See *Re Thurlow*, 1895, 1 Q. B. 724.

(*r*) Rule (1886) 190.

(*s*) Rule (1886) 191.

(*t*) Stat. 46 & 47 Vict. c. 52, s. 20, sub-s. 2; rule (1886) 193.

made is not necessarily adjudged bankrupt, for he may make a proposal for a composition in satisfaction of his debts, or a scheme of arrangement of his affairs (*u*). And if his proposal be accepted by a majority in number and three-fourths in value of his creditors who have proved their debts, at a meeting held for the purpose, and be approved by the Court (*x*), it will be binding on all his creditors (*y*), and will release him from all his liabilities to them which would be provable in bankruptcy (*z*). But it will not release the debtor from any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as a co-respondent in a matrimonial cause, except to such an extent, and under such conditions as the Court expressly orders in respect of such liability (*a*). If a trustee be appointed to carry out such a composition or scheme of arrangement, the debtor's property to be administered by him (*b*) will vest in him in the same manner as a bankrupt's property vests in the trustee under the bankruptcy; and he will, generally speaking, have the same powers and duties with respect to such property as a trustee in bankruptcy has with respect to the bankrupt's property (*c*). When a composition or scheme is approved of, the official receiver shall, on payment of all expenses incident to the proceedings, forthwith put the debtor or the trustee under the composition or scheme, or any other person to whom the debtor's property is to be assigned under

(*u*) Any such composition or scheme must provide for payment in priority to other debts of all debt directed to be so paid in the distribution of the property of a bankrupt: see *ante*, pp. 241, 244, and Table.

(*x*) See *Re Pilling*, 1903, 2 K. B. 59; *Re Flew*, 1905, 1 K. B. 278.

(*y*) *Ante*, p. 262.

(*z*) *Ante*, pp. 218, 219, and n. (*h*).

(*a*) Stat. 53 & 54 Vict. c. 71, s. 3, replacing 46 & 47 Vict. c. 52, s. 18; see *Ex parte Reed and Bowen*, 17 Q. B. D. 244.

(*b*) See *Re Croom*, 1891, 1 Ch. 695.

(*c*) Stat. 53 & 54 Vict. c. 71, s. 3, sub-ss. 16, 17

the composition or scheme, as the case may be, into possession of the debtor's property; and the Court shall discharge the receiving order (*d*). Where default is made in any payment under an approved composition or scheme either by the debtor or the trustee (if any), no action lies to enforce such payment, but the remedy of any person aggrieved is by application to the Court (*e*), which is empowered to enforce the provisions of the composition or scheme (*f*). If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the same cannot proceed without injustice or undue delay to the creditors or the debtor, or that the approval of the Court was obtained by fraud (*g*), the Court may, on application by the official receiver, the trustee or any creditor, adjudge the debtor bankrupt (*h*), and annul the composition or scheme without prejudice to anything duly done thereunder (*i*).

Power to accept composition or scheme after bankruptcy adjudication.

A debtor's affairs may also be liquidated under the Act of 1883 by means of a composition or scheme of arrangement proposed by him, accepted by a majority in number and three-fourths in value of his creditors, who have proved their debts, and approved by the Court, *after* an adjudication of bankruptcy; in which case the same proceedings are taken and the same consequences ensue as in the case of a composition or scheme accepted before adjudication. If the Court approves the composition or scheme it may make an order annulling the bankruptcy, and vesting the property of the bankrupt in him or in such other person as the Court

(*d*) Rule (1890) 30, replacing rule (1886) 208.

(*e*) Rule (1890) 33, replacing rule (1886) 211.

(*f*) Stat. 53 & 54 Vict. c. 71, s. 3, sub-s. 14.

(*g*) See *Ex parte Moon*, 19 Q. B. D. 669.

(*h*) See *Re McHenry*, 21 Q. B. D. 580.

(*i*) Stat. 53 & 54 Vict. c 71 s. 3, sub-s. 15.

may appoint, on such terms, and subject to such conditions, if any, as the Court may declare (*k*). But the Court may adjudge the debtor bankrupt, and annul the composition or scheme, as in the case of a composition or scheme approved before adjudication (*l*).

Vesting of bankrupt's property.

When a debtor is adjudged bankrupt (*m*), his property becomes divisible among his creditors, and vests (without any conveyance), first, in the official receiver, as trustee in the bankruptcy (*n*), and then in the trustee appointed by the creditors, on his appointment (*o*). The estate of the bankrupt is then administered by the trustee, under the control of a committee of inspection of not more than five nor less than three persons chosen from among the creditors (*p*), subject to any directions that may be given by resolution of the creditors at any general

Committee of inspection.

(*k*) See *Re Pearce*, 1909, 2 Ch. 492.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 23, amended by 53 & 54 Vict. c. 71, s. 6.

(*m*) *Ante*, p. 276

(*n*) *Turquand* v. *Board of Trade*, 11 App. Cas. 286.

(*o*) Stat. 46 & 47 Vict. c. 52, ss. 20, 21, 54. Stats. 34 & 35 Hen. VIII. c. 4, s. 1, and 13 Eliz. c. 7, s. 2, gave power to the commissioners, who used then to be appointed to direct each particular bankruptcy, to sell or otherwise to deal with all the bankrupt's property for the benefit of his creditors. Stat. 5 Geo. II. c. 30, ss. 26, 30, provided that the commissioners should assign the bankrupt's estates and effects to assignees chosen by the creditors. From that time until the year 1831, the estate of a bankrupt was always expressly conveyed by the commissioners to the assignees; see *Heslop* v. *Baker*, 5 Ex. 740, 747 *sq.* An Act of 1831, which established a Court of Bankruptcy in London and appointed fixed commissioners, and the Bankruptcy Acts of 1849 and 1861, provided that the estate of a bankrupt should vest in the assignees without any conveyance. Under these Acts there were official assignees, who were officers of the Bankruptcy Court, as well as creditor's assignees; and under the Acts of 1831 and 1849 one of the former acted jointly with the latter after their appointment. But the Act of 1861 left the management of the estate to the creditor's assignees alone. See stats. 1 & 2 Will. IV. c. 56, ss. 22, 25, 26; 12 & 13 Vict. c. 106, ss. 38–45, 102, 139, 141, 142; 24 & 25 Vict. c. 134, ss. 108, 116–129. The Act of 1869 abolished the official assignees, and substituted for the creditor's assignees a trustee to be appointed at a general meeting of creditors; stat. 32 & 33 Vict. c. 71, ss. 14, 17.

(*p*) Stat. 46 & 47 Vict. c. 52, ss. 22, 56, 57, 89; stat. 53 & 54 Vict. c. 71, s. 5.

meeting (*q*). And the administration of the estates of bankrupts is placed under the supervision of the Board of Trade (*r*). Stringent provisions are made to secure the discovery of all the debtor's property (*s*).

Description of bankrupt's property divisible amongst creditors.

The property of the bankrupt divisible amongst his creditors, and in the Act referred to as the property of the bankrupt (*t*), shall not comprise the following particulars:

(1) Property held by the bankrupt on trust for any other person (*u*):

(2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value, inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole:

But it shall comprise the following particulars:

(i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and

(ii.) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice (*x*); and

(*q*) Stat. 46 & 47 Vict. c. 52, s. 89.

(*r*) Sects. 74—81, 91.

(*s*) Sects. 24—27; stat. 53 & 54 Vict. c. 71, s. 7.

(*t*) By stat. 46 & 47 Vict. c. 52, s. 168, in this Act "property" includes money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined.

(*u*) See *Jennings* v. *Mather*, 1901, 1 K. B. 108; *St. Thomas's Hospital* v. *Richardson*, 1910, 1 K. B. 271 (as to where the trustee has a lien on the trust property).

(*x*) See *Nichols* v. *Nixey*, 29 Ch. D. 1005.

(iii.) All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section (*y*).

Disclaimer of onerous property.

Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerou or to the payment of any sum of money, the t tee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership relation thereto, may, subject to the conditions and within the time specified in the Act, disclaim the property (*z*). Such a disclaimer operates to determine, as from the date of disclaimer, the rights, interests and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and also discharges the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him; but, except so far as is necessary to attain these results, does not affect the rights or liabilities of any other person (*a*). A trustee is not, as a rule, entitled

Disclaimer of lease.

(*y*) Sect. 44; see *ante*, pp. 112–114.

(*z*) Stat. 46 & 47 Vict. c. 52, s. 55, sub-s. 1, amended by 53 & 54 Vict. c. 71, s. 13; see *Re Cohen*, 1905, 2 K. B. 704.

(*a*) Stat. 46 & 47 Vict. c. 52, s. 55, sub-s. 2; see *Re Bastable*, 1901, 2 K. B. 518.

to disclaim a lease without the leave of the Court; and the Court may impose such terms as the Court thinks just, as a condition of granting such leave (*b*).

Rescission of contract made with bankrupt.

The Court may, on the application of any person entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to the Court may seem equitable, and any damages payable under the order to the applicant may be proved as a debt in the bankruptcy (*c*). Any person injured by the operation of a disclaimer may prove for his injury as a debt in the bankruptcy (*d*).

Possession of property by trustee.

The trustee shall, as soon as may be, take possession of the deeds, books, and documents of the bankrupt, and all other parts of his property capable of manual delivery (*e*). For the purpose of acquiring or retaining possession of the property of the bankrupt, the trustee is in the same position as if he were a receiver of the property appointed by the High Court (*f*). And any treasurer, or other officer, and any banker, attorney or agent of the bankrupt is required to pay or deliver to the trustee all money and securities of the bankrupt which he is not entitled to retain as against the bankrupt or trustee (*g*).

Trustee may transfer bankrupt's stock, shares in ships, and shares—

Where any part of the property of the bankrupt consists of stock, shares in ships, shares, or any other property transferable in the books of any company, office, or person (*h*), the trustee may exercise the right to transfer the property to the same extent as the bankrupt might have exercised it if he had not become bankrupt (*i*).

And deal with his copyholds

And the

(*b*) Sect. 55, sub-s. 3; see rule (1890) 69, replacing rule (1886) 320.
(*c*) Sect. 55, sub-s. 5.
(*d*) Sect. 55, sub-s. 7.
(*e*) Stat. 46 & 47 Vict. c. 52, s. 50, sub-s. 1.
(*f*) Sect. 50, sub-s. 2.
(*g*) Sect. 50, sub-s. 6.
(*h*) *Ante*, pp. 40—44, 119.
(*i*) Sect. 50, sub-s. 3.

trustee is empowered to deal with the bankrupt's copyholds without being admitted thereto (*k*). without being admitted.

Where a bankrupt is a beneficed clergyman, the trustee may apply for and obtain a sequestration of the profits of the benefice (*l*). Where a bankrupt is an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, the trustee shall receive for distribution amongst the creditors so much of the bankrupt's pay or salary as the Court, on the application of the trustee, with the consent of the chief officer of the department under which the pay or salary is enjoyed, may direct (*m*). And where a bankrupt is in the receipt of a salary or income other than as aforesaid, or is entitled to any half pay, or pension (*n*), or to any compensation granted by the Treasury, the Court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary, income, half pay, pension, or compensation, or of any part thereof, to the trustee to be applied by him in such manner as the Court may direct (*o*). Sequestration of ecclesiastical benefice. Appropriation of portion of pay or salary to creditors.

The trustee, in the administration of the bankrupt's property, is to have regard to any directions given by resolution of the creditors at any general meeting, or by the committee of inspection (*p*); Powers of trustee to deal with property.

(*k*) Sect. 50, sub-s. 4; see Williams, R. P. 475, 21st ed.

(*l*) Such sequestration is, however, subject to the right of the bishop of the diocese to appoint to the bankrupt the like stipend as he might have appointed to a curate in case the bankrupt had been non-resident, and to payment of such stipend to the bankrupt, and also to payment of any duly licensed curate's salary (not exceeding 50*l*.) for four months before the date of the receiving order; sect. 52. See *Re Lawrence*, 1896, P. 244.

(*m*) Sect. 53, sub-s. 1

(*n*) *Re Saunders*, 1895, 2 Q. B. 117, 424; *Re Ward*, 1897, 1 Q. B. 266.

(*o*) Sect. 53, sub-s. 1; see *Re Shine*, 1892, 1 Q. B. 522; *Re Rogers*, 1894, 1 Q. B. 425; also *Ex parte Huggins*, 21 Ch. D. 85; *Ex part Benwell*, 14 Q. B. D. 301; decided on stat. 32 & 33 Vict. c. 71, s. 90.

(*p*) *Ante*, p. 279.

and any directions so given by the creditors are to override any directions given by the committee, in case of conflict (*q*). Subject to these and the other provisions of the Act, the trustee is to use his own discretion in the management of the estate (*r*); and he is empowered (*s*) to sell the bankrupt's property (*t*), give receipts for any money received by him, prove and draw dividends in respect of any debt due to the bankrupt, exercise any powers, the capacity to exercise which is vested in him under the Act (*u*), and deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it (*x*). The trustee is also empowered (*y*), with the permission of the committee of inspection to be obtained in each particular case, to carry on the bankrupt's business, bring or defend any action or other legal proceeding relating to the bankrupt's property, employ a solicitor or other agent to do any business sanctioned by the committee, accept a sum of money payable at a future time as the consideration for a sale of any of the bankrupt's property, mortgage or pledge any part of the bankrupt's property to raise money to pay the debts, refer to arbitration or compromise any claim between the bankrupt and any person who may have incurred any liability to him (*z*), make any compromise or arrangement in respect of any debts provable or claim against any person arising out of the property of the bankrupt, and divide amongst the creditors any property which cannot be readily or advantageously sold. And the trustee may, with the permission of the committee

Powers exerciseable by trustee with permission of committee of inspection.

Power to allow bankrupt to manage property.

(*q*) Stat. 46 & 47 Vict. c. 52, s. 89, subs. 1.
(*r*) Sect. 89, subs. 4.
(*s*) Sect. 56.
(*t*) See *ante*, p. 280, n. (*t*).
(*u*) *Ante*, p. 280.
(*x*) See Williams, R. P. 289, 21st ed.
(*y*) Sect. 57.
(*z*) See *Re Pilling*, 1895, 2 K. B. 664.

of inspection, appoint the bankrupt himself to superintend the management of the property, or any part thereof, or to carry on his trade for the benefit of his creditors; and may, with the same permission, make such allowance as he may think just to the bankrupt out of the property for the support of himself and his family, or for his services, if engaged in winding-up the estate: but any such allowance may be reduced by the Court (*a*). The trustee may apply to the Court for directions in any particular matter (*b*); and so may the bankrupt, or any of the creditors, or any other person, if aggrieved by any act or decision of the trustee (*c*).

Allowance to bankrupt.

Application to the Court.

A trustee in bankruptcy is not permitted to retain in his own hands any money which he may receive as the proceeds of the realisation of the estate of the bankrupt; but is required to pay the same to the Bankruptcy Estates Account at the Bank of England, or into a local bank, if authorised by the Board of Trade, on the application of the committee of inspection, to make his payments into and out of a local bank (*d*). And no trustee in a bankruptcy or under any composition or scheme of arrangement shall pay any sums received by him as trustee into his private banking account (*e*). Every trustee in bankruptcy is required to keep proper books of account (*f*), to be submitted with all requisite vouchers to the committee of inspection, when required, and not less than once every three months (*g*). The trustee's accounts are required to be audited by the committee of inspection once at least every three months (*h*); and by the Board of

Money received by trustee in bankruptcy.

Trustee not to pay into private account.

Trustee's books of account.

Audit by committee of inspection, and Board of Trade.

(*a*) Sect. 64.
(*b*) Sect. 89, sub-s. 3; rule (1886) 313.
(*c*) Sect. 90.
(*d*) Stat. 46 & 47 Vict. c. 52, s. 74; rules (1886), 340, 341.
(*e*) Sect. 75.
(*f*) Sect. 80; rules (1886) 285, 286.
(*g*) Rule (1886) 287.
(*h*) Rule (1886) 288.

Annual statement of proceedings.

Trade every six months (*i*). And once every year the trustee is required to transmit to the Board of Trade a statement in prescribed form showing the proceedings in the bankruptcy up to the date of the statement (*k*). And the Board of Trade are required to cause the statements so transmitted to be examined, and to call the trustee to account for any misfeasance, neglect or omission which may appear on the said statements or in his accounts or otherwise; and the Board may require the trustee to make good any loss which the estate of the bankrupt may have sustained by the misfeasance, neglect, or omission (*l*). The trustee or official receiver is also required to furnish a statement of accounts at any time, at the instance of one-sixth of the creditors (*m*).

Appointment of joint trustees.

Removal of trustee.

Trustee's remuneration.

The creditors are empowered to appoint more persons than one to the office of trustee (*n*), and to remove a trustee appointed by them (*o*). The Board of Trade are also empowered to remove a trustee for misconduct, failure to perform his duties, and in certain cases of unfitness (*p*). On the appointment of a new trustee the bankrupt's property vests in him at once, without any conveyance (*q*). The trustee's remuneration (if any) is to be fixed by the creditors, and to be in the nature of a commission or percentage, partly on the amount realised by him, and partly on the amount distributed in dividend (*r*).

Distribution of bankrupt's property.

The money which is derived from the realisation

(*i*) Sect. 78; rules (1886) 289–291.

(*k*) Sect. 81, sub-s. 1.

(*l*) Sect. 81, sub-s. 2.

(*m*) Stat. 53 & 54 Vict. c. 71, s. 17. A sum sufficient to pay the costs of such accounts must first be deposited.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 44.

(*o*) Sect. 86, sub-s. 2.

(*p*) Sect. 86, sub-s. 2, amended by 53 & 54 Vict. c. 71, s. 19 (sec s. 4).

(*q*) Stat. 46 & 47 Vict. c. 52, s. 54, sub-s. 3.

(*r*) Sect. 72, amended by 53 & 54 Vict. c. 71, s. 15; see *Re Christie*, 1900, 1 Q. B. 5.

of the property of a bankrupt is applied, first, in payment of the costs of the administration of the estate, and is then distributed amongst the creditors who have proved their debts (*s*). Dividends are to be declared and distributed with all convenient speed; in the absence of sufficient reason to the contrary, the first within four months after the conclusion of the first meeting of creditors, and subsequent dividends at intervals of not more than six months (*t*). And a final dividend is to be declared when the trustee has realised all the bankrupt's property, or so much thereof as can, in the joint opinion of the trustee and the committee of inspection, be realised without needlessly protracting the trusteeship (*u*). No action for a dividend lies against the trustee, but if the trustee refuses to pay any dividend the Court may, if it thinks fit, order him to pay it, and also to pay out of his own money interest thereon for the time that it is withheld, and the costs of the application (*x*). The bankrupt is entitled to any surplus remaining after payment in full of his creditors, with interest at 4*l.* per cent. per annum from the date of the receiving order, and of the expenses of the bankruptcy proceedings (*y*).

Dividends.

Final dividend.

No action for dividend.

Right of bankrupt to surplus.

The provisions of the present bankruptcy law as to the priority of debts have been already stated (*z*); and, as we have seen, subject to the provisions of the Friendly Societies Act, 1896, giving to a registered friendly society a paramount claim for money due

Priority of debts.

(*s*) See *Re Frost*, 1899, 2 Q. B. 50, as to the assignees of creditors, who have assigned their debts.

(*t*) Stat. 46 & 47 Vict. c. 52, s. 58.

(*u*) Sect. 62.

(*x*) Sect. 62. Stats. 32 & 33 Vict. c. 71, s. 45; 12 & 13 Vict. c. 106, s. 190; 6 Geo. IV. c. 16, s. 344; and 49 Geo. III. c. 121, s. 12, were similar in effect.

(*y*) Stat. 46 & 47 Vict. c. 52, ss. 65, 40, subs. 5. Stats. 32 & 33 Vict. c. 71, s. 45; 12 & 13 Vict. c. 106, s. 197; 6 Geo. IV. c. 16, s. 132; and 13 Eliz. c. 7, s. 4 were similar in effect.

(*z*) See *ante*, pp. 219, 241, and the Table opposite p. 244.

to it from its officer on account of funds of the society in his possession, precedence is given to one year's rates and taxes, four months' clerks' or servants' wages up to 50*l.*, two months' labourers' or workmen's wages up to 25*l.*, and employers' liabilities, not exceeding 100*l.* in each case, under the Workmen's Compensation Act, 1906. With these exceptions and subject to the postponement of certain claims, dividends are paid on all debts proved in the bankruptcy *pari passu* (*a*), and Crown debts are no longer preferred to the others (*b*). Any surplus remaining after payment of all the debts is to be applied in payment of interest at the rate of 4*l.* per cent. per annum from the date of the receiving order on all debts proved (*c*). If a landlord distrain upon the goods of his bankrupt tenant, after the commencement of the bankruptcy, the distress will only be available for six months' rent accrued due prior to the date of the order of adjudication (*d*): but he may prove under the bankruptcy for the surplus due for which the distress may not have been available (*e*). And if a landlord distrain on any goods of a bankrupt within three months before the date of the receiving order, the debts, to which the present bankruptcy statutes give priority, are to be a first charge on the goods so distrained on, or the proceeds of sale thereof (*f*). A landlord is not prevented from distraining upon a trustee in bankruptcy, who has not disclaimed the lease to the

Rent.

(*a*) See *ante*, pp. 210, 211, and the Table opposite p. 244.

(*b*) *Ante*, pp. 219, 225, 226.

(*c*) Stat. 46 & 47 Vict. c. 52, s. 40, sub-s. 5.

(*d*) One year's rent so due under stat. 46 & 47 Vict. c. 52, s. 42; 32 & 33 Vict. c. 71, s. 34; 12 & 13 Vict. c. 106, s. 129; and 6 Geo. IV. c. 16, s. 71. Before the last-mentioned statute a landlord might distrain for the full arrears of his rent, notwithstanding an act of bankruptcy; *Ex parte Plummer*, 1 Atk. 103; 2 Black. Comm. 487.

(*e*) Stat. 46 & 47 Vict. c. 52, s. 42 (see s. 13), amended by 53 & 54 Vict. c. 71, s. 28. See *Re Howell*, 1895, 1 Q. B. 841.

(*f*) Stat. 51 & 52 Vict. c. 62, s. 1, sub-ss. 1, 4.

bankrupt (*g*), for rent accruing due after the date of adjudication (*h*). If any money has been paid as a fee by or on behalf of any apprentice or articled clerk to the bankrupt, the trustee is empowered to pay a reasonable sum out of the bankrupt's property, to or for the use of the apprentice or clerk, upon the discharge of the indenture of apprenticeship or articles by the bankruptcy (*i*).

Preferential claim in case of apprenticeship.

Elaborate provisions were made by former bankruptcy statutes for the proof of as many demands as possible. Under the present Act, as under the Act of 1869 (*k*), demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust, are not provable in bankruptcy; nor is any debt or liability contracted after the creditor has had notice of an act of bankruptcy available against the debtor (*l*). But with these exceptions, all debts and liabilities (*m*),

Demands provable in bankruptcy.

(*g*) *Ante*, p. 281.

(*h*) *Ex parte Hale. Re Binns*, 1 Ch. D. 285.

(*i*) Stat. 46 & 47 Vict. c. 52, s. 41, replacing 32 & 33 Vict. c. 71, s. 33; 12 & 13 Vict. c. 106, s. 170; and 6 Geo. IV. c. 16, s. 49.

(*k*) Stat. 32 & 33 Vict. c. 71, s. 34.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 37, sub-ss. 1, 2.

(*m*) By sect. 37, sub-s. 8, "Liability" shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of an express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor; and generally it shall include any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion. See *Ex parte Waters*, 24 W. R. 554; *Re Sneezum*, 3 Ch. D. 463; *Ex parte Bates*, 13 Ch. D. 977; *Emma Silver Mining Co.* v. *Grant*, 17 Ch. D. 122; *Macfarlane's claim*, ib. 337; *Re Bridges*, ib. 342; *Ex parte Leslie*, 20 Ch. D. 131; *Watson* v. *Holliday*, ib. 780, aff. 34 W. R. 536; *Robinson* v. *Ommanney*, 23 Ch. D. 285; *Hardy* v. *Fothergill*, 13 App. Cas. 351; *Barnett* v. *King*, 1894, 1 Ch. 4; *Victor* v. *Victor*, 1912, 1 K. B. 247; cf. *Re Rees*, 1900, 2 K. B. 709.

present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy (*n*). An estimate is to be made by the trustee of the value of any provable liability, which does not bear a certain value; against which estimate any person aggrieved may appeal to the Court (*o*). As we have seen, where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order has been made, and any other person proving or claiming to prove a debt under such receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this provision to claim the benefit of any set-off against the property of a debtor in any case where he had at the time of giving credit to the debtor notice of an act of bankruptcy committed by the debtor and available against him (*p*). A debt is proved by delivering or sending through the post in a prepaid letter to the official receiver, or, if a trustee has been appointed, to the trustee, an affidavit in the prescribed form, verifying the debt (*q*). The courses open to a secured creditor with respect to proof of his claim

Mutual credit and set-off.

Proof of debts.

Secured creditor.

(*n*) Sect. 37, sub-s. 3.

(*o*) Sect. 37, sub-ss. 4–7.

(*p*) Sect. 38; *ante*, p. 257; see *Re Gillespie*, 14 Q. B. D. 963; *Palmer* v. *Day*, 1895, 2 Q. B. 618; *Re Mid-Kent Fruit Factory*, 1896, 1 Ch. 567; *Re Daintrey*, 1900, 1 Q. B. 546; *Re a Debtor*, 1909, 1 K. B. 430; *Re Taylor*, 1910, 1 K. B. 562.

(*q*) Stat. 46 & 47 Vict. c. 52, schedule 2, rule 2; and see rules (1886) 219–231.

have already been pointed out (*r*). Where a debt proved includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall, for the purposes of dividend, be calculated at a rate not exceeding five per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest, to which he may be entitled, after all the debts proved have been paid in full (*s*). On any debt or sum certain, payable at a certain time or otherwise, whereon interest is not reserved or agreed for, and which is overdue at the date of the receiving order and provable in bankruptcy, the creditor may prove for interest at a rate not exceeding four per cent. per annum to the date of the order from the time when the debt or sum was payable, if the debt or sum is payable by virtue of a written instrument at a certain time, and if payable otherwise, then from the time when a demand in writing has been made giving the debtor notice that interest will be claimed from the date of the demand until the time of payment (*t*). A creditor may prove for a debt not payable when the debtor committed an act of bankruptcy as if it were payable presently, and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five pounds per cent. per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted (*u*).

Interest on debts.

Debt payable at a future time.

(*r*) See the Table opposite p. 244, *ante*. If a secured creditor set a value on his security, the trustee may redeem it at the assessed value, or, if dissatisfied with the assessed value, the trustee may require the property comprised in the security to be offered for sale. See schedule 2, rule 12; *ante*, p. 273, n. (*z*).

(*s*) Stat. 53 & 54 Vict. c. 71, s. 23. See *Re Fox and Jacobs*, 1894, 1 Q. B. 438.

(*t*) Stat. 46 & 47 Vict. c. 52, schedule 2, rule 20. See *ante*, p. 245.

(*u*) Schedule 2, rule 21. Stats. 12 & 13 Vict. c. 106, s. 172; 6 Geo. IV. c. 16, s. 51; 49 Geo. III. c. 121, s. 9, were to the like effect. This provision was first introduced by stat. 7 Geo. I. c. 31, as to debts secured by bills, bonds not [illegible], or other persons' securities

As the bankruptcy of a person consists in his committing an act of bankruptcy, and not in his being adjudged bankrupt (*x*), his assignees (*y*), when appointed, became entitled to all the real and personal estate of which he was possessed at the hour when he committed the act (*z*): though the legal estate in the bankrupt's lands remained vested in him until conveyed to the assignees by their appointment (*a*). The title of the assignees, it was said, related back to the act of bankruptcy. The consequences of this rule were formerly very serious, as many *bonâ fide* transactions were overturned in consequence of an act of bankruptcy having been committed by one of the parties without the knowledge of the other. But after several partial remedies (*b*), provisions were made by the Act of 1849, of which the effect was to substitute the filing of the petition for adjudication for the *act* of bankruptcy, so far as respects all persons dealing and acting *bonâ fide* and without notice of the act of bankruptcy (*c*). Under the present bankruptcy law, the bankruptcy of a debtor is deemed to have relation back to and to commence at the time of the act of bankruptcy (if only one), on which a receiving order is made against him, or the first of several acts of bankruptcy proved to have been committed by him within three months next before the presentation of the bankruptcy petition (*d*).

The title of the assignees related back to the act of bankruptcy.

Relation of trustee's title.

(*x*) See *ante*, p. 268, n. (*t*).

(*y*) See *ante*, p. 279, n. (*o*).

(*z*) *Thomas* v. *Desanges*, 2 B. & Ald. 586; *Rouch* v. *Great Western Railway Company*, 1 Q. B. 51.

(*a*) *Doe* d. *Esdaile* v. *Mitchell*, 2 Man. & Selw. 446. See *ante*, p. 279, n. (*o*).

(*b*) Stat. 46 Geo. III. c. 135, s. 1; 49 Geo. III. c. 121, s. 2; 56 Geo. III. c. 137, s. 3; 6 Geo. IV. c. 16, ss. 81, 82, 84; 2 & 3 Vict. c. 11, s. 12; 2 & 3 Vict. c. 29.

(*c*) Stat. 12 & 13 Vict. c. 106, s. 133. The Act of 1869 contained similar provisions; stat. 32 & 33 Vict. c. 71, ss. 11, 94, 95.

(*d*) Stat. 46 & 47 Vict. c. 52, s. 43, amended by 53 & 54 Vict. c. 73, s. 20; see *Re Pollitt*, 1893, 1 Q. B. 455; *Davis* v. *Petrie*, 1905, 2 K. B. 528, affirmed 1906, W. N. 177; *Pousford* v. *Union of London Bank*, 1906, 2 Ch. 440; *Re Bumpus*, 1908, 2 K. B. 330; *McCarthy* v. *Capital and Counties Bank*, 1911, 2 K. B. 1088; *Re Ashwell*, 1932, 1 K. B. 390; *Re a Debtor*, 1912, 2 K. B. 533.

But subject to the provisions of the present Acts with respect to executions or attachments of debts, and the avoidance of certain settlements and preferences, bankruptcy does not invalidate any payment by the bankrupt to any of his creditors, any payment or delivery to the bankrupt, any conveyance by the bankrupt for valuable consideration, or any contract or dealing by or with the bankrupt for valuable consideration; provided that the same take place before the date of the receiving order, and the other party have no notice, at the time, of any available act of bankruptcy previously committed by the bankrupt (*e*). Creditors are not entitled to retain the benefit of any execution against the goods or lands of their debtor, or of any attachment of debts due to him, as against his trustee in bankruptcy, unless the execution or attachment be *completed* (*f*) before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor (*g*). Where any goods of a debtor have been taken in execution, and before the sale thereof, or completion of the execution by the receipt or recovery of the full amount of the levy, notice of a receiving order against the debtor is served on the sheriff, the sheriff is bound, on request, to deliver the goods to the official receiver or trustee

(*e*) Stat. 46 & 47 Vict. c. 52, s. 49. And see *Re Sinclair*, 15 Q. B. D. 616; *Re Pollitt*, 1893, 1 Q. B. 175; *Re Simonson*, 1894, 1 Q. B. 433; *Re O'Shea's Settlement*, 1895, 1 Ch. 325; *Shears* v. *Goddard*, 1896, 1 Q. B. 406; *Wild* v. *Southwood* 1897, 1 Q. B. 317; *Re Dunkley & Son*, 1905, 2 K. B. 683; *Re Teale*, 1912, 2 K. B. 367.

(*f*) An execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt (see *Butler* v. *Wearing*, 17 Q. B. D. 182; *Figg* v. *Moore*, 1894, 2 Q. B. 690; *Burns' Trustee* v. *Brown*, 1895, 1 Q. B. 324; *ante*, p. 253, n. (*l*)); and an execution against land is completed by seizure (see *Re Hobson*, 33 Ch. D. 493); or, in case of an equitable interest, by the appointment of a receiver; stat. 46 & 47 Vict. c. 52, s. 45, sub-s. 2.

(*g*) Sect. 45, sub-s. 1; *Re Ford*, 1900, 1 Q. B. 264.

under the order, retaining only a charge on the goods for the costs of the execution (*h*). Where goods are sold, or money is paid, to avoid sale in execution of a judgment for more than 20*l*. (*i*), the sheriff is bound to retain the balance of the proceeds of sale, after deducting the costs of the execution, for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff is bound to pay the balance to the official receiver or trustee, as the case may be, who will be entitled to retain the same as against the execution creditor (*k*). Any settlement (*l*) of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void (*m*) against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was

Avoidance of voluntary settlements.

(*h*) Stat. 53 & 54 Vict. c. 71, s. 11, sub-s. 1; *Re Harrison*, 1893, 2 Q. B. 111; *Bower* v. *Hett*, 1895, 2 Q. B. 337.

(*i*) See *Willey* v. *Hucks*, 1909, 1 K. B. 760.

(*k*) Stat. 53 & 54 Vict. c. 71, s. 11, sub-s. 2, replacing 46 & 47 Vict. c. 52, s. 46, sub-s. 2, and 32 & 33 Vict. c. 71, s. 87; see *Re Cripps, Rose & Co.*, 21 Q. B. D. 472.

(*l*) Including any conveyance or transfer of property; stat. 46 & 47 Vict. c. 52, s. 47, sub-s. 3; see *Re Player*, 15 Q. B. D. 682; *Re Vansittart*, 1893, 1 Q. B. 181; *Re Tankard*, 1899, 2 Q. B. 57; *Re Plummer*, 1900, 2 Q. B. 790; *Lister* v. *Hooson*, 1908, 1 K. B. 174.

(*m*) See *Re Farnham*, 1895, 2 Ch. 799, and note (*o*), below.

at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof (*n*). But the title of a *bonâ fide* purchaser for value from a beneficiary under any settlement so liable to be avoided will not be displaced by the subsequent bankruptcy of the settlor, even though the purchaser had notice that the settlement was voluntary (*o*), and even where the purchase was made after the act of bankruptcy (*p*). Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy (*q*). And every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable

Avoidance of preferences in certain cases.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 47, sub-s. 1; *Ex parte Mercer*, 17 Q. B. D. 290; *Ex parte Todd*, 19 Q. B. D. 186. See *Ex parte Hurtable, Re Conibeer*, 2 Ch. D. 54; *Ex parte Hillman Re Pumfrey*, 10 Ch. D. 622; *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588; *Hance* v. *Harding*, 20 Q. B. D. 732, decided on stat. 32 & 33 Vict. c. 71, s. 91, in similar terms but applying only to traders; *Mackintosh* v. *Pogose*, 1895, 1 Ch. 505; *Re Parry*, 1904, 1 K. B. 129; *Re Pope*, 1908, 2 K. B. 189; *Shrager* v. *March*, 1908, A. C. 402.

(*o*) *Re Vansittart*, 1893, 2 Q. B. 377; *Re Brall*, ib. 381; *Re Carter and Kenderdine's Contract*, 1897, 2 Ch. 776.

(*p*) *Re Hart*, 1912, 3 K. B. 6.

(*q*) Stat. 46 & 47 Vict. c. 52, s. 47, sub-s. 2. See *Ex parte Bishop, Re Tönnies*, L. R. 8 Ch. 718; *Ex parte Bolland, Re Clint*, L. R. 17 Eq. 115; *Re Andrews' Trusts*, 7 Ch. D. 635, decided on stat. 32 & 33 Vict. c. 71, s. 91, in similar terms but applying only to traders; *Re Reis*, 1904, 1 K. B. 451, reversed, 1904, 2 K. B. 769; 1905, A. C. 442; *Re Magnus*, 1910, 2 K. B. 1049.

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 a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy: but this shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt (*r*).

Discharge of bankrupt.

A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge (*s*), which the Court, after considering a report of the official receiver as to the bankrupt's conduct and affairs, may grant, either absolutely or subject to any conditions with respect to any future earnings or income of the bankrupt, or to his after-acquired property, and either immediately or suspending the operation of the order for a specified time, or may refuse. But the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under the Debtors Act, 1869 (*t*), or the Bankruptcy Act, 1883 (*u*), or

(*r*) Stat. 46 & 47 Vict. c. 52, s. 48, substantially in the same words as 32 & 33 Vict. c. 71, s. 92; see *Ex parte Craven*, L. R. 10 Eq. 648; *Ex parte Tempest*, L. R. 6 Ch. 70; *Butcher* v. *Stead*, L. R. 7 H. L. 839; *Ex parte Hall, Re Cooper*, 19 Ch. D. 580; *Ex parte Griffith, Re Wilcoxon*, 23 Ch. D. 69, decided upon that enactment.

(*s*) If a bankrupt had duly surrendered and conformed to the bankrupt law, he was formerly entitled to a certificate of conformity, by which he was discharged from all debts and claims provable in bankruptcy. The certificate was superseded by an order of discharge under the Acts of 1861 and 1869. See stats. 5 Geo. II. c. 30, ss. 7, 19; 6 Geo. IV. c. 16, ss. 120, 122; 5 & 6 Vict. c. 122, s. 37; 12 & 13 Vict. c. 106, ss. 198—200, and Sched. Z; 24 & 25 Vict. c. 134, ss. 157, 161; 32 & 33 Vict. c. 71, ss. 48, 49; and 50 & 51 Vict. c. 66.

(*t*) Stat. 32 & 33 Vict. c. 62, ss. 11—23.

(*u*) Stat. 46 & 47 Vict. c. 52, ss. 31, 163—167.

any other misdemeanour or any felony connected with his bankruptcy, unless for special reasons the Court otherwise determines (*x*). And if the bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities and he does not satisfy the Court that this fact has arisen from circumstances for which he cannot justly be held responsible, or if he has on any previous occasion been adjudged bankrupt, or made a composition or arrangement with his creditors, and in several specified cases of misconduct on the bankrupt's part (*y*), the Court shall either refuse the discharge, or suspend it for not less than two years or until a dividend of ten shillings in the pound has been paid to the creditors, or require the bankrupt as a condition of his discharge to consent to judgment being entered up against him (*z*) by the official receiver or trustee for the whole or part of any unsatisfied balance of the debts provable in the bankruptcy to be paid out of the bankrupt's future earnings, or after-acquired property as the Court may direct. In the last case, execution shall not be issued on the judgment without the Court's leave, which may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts. If at any time after the expiration of two years from the date of any order made on the bankrupt's application for his discharge he shall satisfy the Court that there is no reasonable probability of his being in a position to comply with the terms of the order, the Court may modify the

(*x*) See *Re Solomons*, 1904, 1 K. B. 106.

(*y*) Omitting to keep proper books of account in his business; trading after knowing himself to be insolvent; contracting debts without expectation of being able to pay; fraud; bringing on bankruptcy by rash and hazardous speculation; unjustifiable extravagance in living; gambling or culpable neglect of his business; and other cases; stat. 53 & 54 Vict. c. 71, s. 8, sub-ss. 3, 4; and see 46 & 47 Vict. c. 52, s. 29, as to fraudulent settlements.

(*z*) See *Re Summers*, 1907, 2 K. B. 166.

terms of the order, or of any substituted order, as it may think fit (*a*). And if the Court should absolutely refuse to discharge the bankrupt, he may afterwards apply to the Court to reconsider the decision (*b*). An order of discharge shall not release the bankrupt (1) from any debt on a recognizance, nor from any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer on a bail bond entered into for the appearance of any person prosecuted for any such offence, unless the Treasury certify in writing their consent to his being discharged from such debts; nor (2) from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the bankrupt was a party (*c*); nor (3) from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party (*d*); nor (4) from any liability under a judgment against him in an action for seduction, or under an affiliation order, or as co-respondent in a matrimonial cause, except to such an extent as the Court expressly orders in respect of such liability (*e*). An order of discharge shall release the bankrupt from all other debts and liabilities provable in bankruptcy (*f*): but shall not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt or was jointly bound or had made any joint contract with him, or any person who was surety or in the nature of a surety for him (*g*).

Effect of order of discharge.

(*a*) Stat. 53 & 54 Vict. c. 71, s. 8, replacing 46 & 47 Vict. c. 52, s. 28; rules (1890) 43–55; see *Re Barker*, 25 Q. B. D. 285; *Re John Roberts & Co.*, 1901, 2 K. B. 299.

(*b*) *Re Tobias & Co.*, 1891, 1 Q. B. 405.

(*c*) See *Re Greer*, 1895, 2 Ch. 217.

(*d*) Stat. 46 & 47 Vict. c. 52, s. 30, subs. 1.

(*e*) Stat. 53 & 54 Vict. c. 71, s. 10.

(*f*) See *ante*, pp. 218, 289, 290.

(*g*) Stat. 46 & 47 Vict. c. 52, ss. 30 (subss. 2, 4), 155.

Power for Court to annul adjudication in certain cases.

Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full, the Court may, on the application of any person interested, by order annul the adjudication. Where an adjudication is so annulled, all sales and dispositions of property and payments duly made, and all acts theretofore done, by the official receiver, trustee, or other person acting under their authority, or by the Court, shall be valid, but the property of the debtor who was adjudged bankrupt shall vest in such person as the Court may appoint, or in default of any such appointment revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order (*h*). A receiving order may be annulled on the same principles as an order of adjudication (*i*).

Annulment of receiving order.

Property acquired after bankruptcy.

We have seen that a bankrupt's property divisible amongst his creditors comprises all such property as may be acquired by or devolve on him before his discharge (*k*). It is held, however, with regard to goods acquired by an undischarged bankrupt after his bankruptcy, that the same do not vest absolutely in the trustee in bankruptcy in the same manner as property belonging to the bankrupt at the commencement of the bankruptcy (*l*): but until the trustee intervenes, all transactions by the bankrupt with any person dealing with him *bonâ fide* and for value in respect of such after-acquired goods, whether with or without knowledge of the bankruptcy, are valid as against the trustee (*m*). Thus

(*h*) Stat. 46 & 47 Vict. c. 52, s. 35; see s. 30; *Re Taylor*, 1901, 1 K. B. 711; *Re Beer*, 1903, 1 K. B. 628; *Re Keet*, 1905, 2 K. B. 668.

(*i*) *Re Dennis*, 1896, 2 Q. B. 330.

(*k*) *Ante*, p. 280.

(*l*) *Ante*, p. 279.

(*m*) *Cohen* v. *Mitchell*, 25 Q. B. D. 262, 267, 268; *Re Behrend's Trust*, 1911, 1 Ch. 687.

an undischarged bankrupt may sue upon contracts made with or wrongs suffered by himself in respect of such after-acquired goods, and may alienate his rights in respect of the same to persons dealing in good faith and for value, if the trustee do not intervene (*n*). It has been held that this doctrine is not applicable to the case of real estate devolving upon a bankrupt after his bankruptcy (*o*). But there appears to be no exception in the case of personal estate; as the doctrine has been applied to leaseholds acquired by (*p*), and to a legacy and a share of residuary personal estate bequeathed to an undischarged bankrupt (*q*), to the share of a partner, being an undischarged bankrupt, in freehold land bought for partnership purposes after the bankruptcy (which share is personal estate in equity) (*r*), and to an undischarged bankrupt's interest acquired after his bankruptcy in settled personalty vested in the hands of trustees (*s*). Subject to the title which may be so gained by some person dealing in good faith and for value with the bankrupt, the rule is that all property acquired by or devolving upon the bankrupt before his discharge vests in the trustee (*t*). An undischarged bankrupt may, however, maintain an action for his personal labour performed after his bankruptcy (*u*), and is entitled

(*n*) *Webb* v. *Fox*, 7 T. R. 391; 1 R. R. 172; *Drayton* v. *Dale*, 2 B. & C. 293; 26 R. R. 356; *Herbert* v. *Sayer*, 5 Q. B. 965; *Jameson* v. *Brick and Stone Co., Ld.*, 1 Q. B. D. 208; *Cohen* v. *Mitchell*, 25 Q. B. D. 262; see *Crofton* v. *Poole*, 1 B. & Ad. 568; 35 R. R. 380; *Emden* v. *Carte*, 17 Ch. D. 169, 768.

(*o*) *Re New Land Development Association and Gray*, 1892, 2 Ch. 138; *Bird* v. *Philpott*, 1900, 1 Ch. 822, 831.

(*p*) *Re Clayton and Barclay's Contract*, 1895, 2 Ch. 212.

(*q*) *Hunt* v. *Fripp* 1898, 1 Ch. 675.

(*r*) *Re Kent County Gas, &c., Co., Ld.*, 1909 2 Ch. 195; see *post*, Part III. Ch. II.

(*s*) *Re Behrend's Trust*, 1911, 1 Ch. 687; see *post*, Part III. Ch. I.

(*t*) *Re Rogers*, 1894, 1 Q. B. 425, 432; *Re Clark*, 1894, 2 Q. B. 393; *Re Beak*, 1899, 1 Q. B. 688; *Re Roberts*, 1900, 1 Q. B. 122; *Shoolbred* v. *Roberts*, 1900, 2 Q. B. 497; *Re Hancock*, 1901, 1 K. B. 585; *Re Bennett*, 1907, 1 K. B. 149.

(*u*) *Silk* v. *Osborne*, 1 Esp 140; *Bailey* v. *Thurston*, 1903, 1 K. B. 137, 140 *sq.*; *Affleck* v *Hammond*, 1912, 3 K. B. 162.

to retain money earned by his own labour or skill in order to support himself; for the law does not make the bankrupt a slave to his creditors (*x*). But if he earn more than is sufficient for his support, the trustee will be entitled to claim the surplus for the benefit of the creditors (*y*). And, as we have seen (*z*), if the bankrupt be in receipt of a salary or income in return for his personal services, the Court may order the whole or part thereof to be paid to the trustee (*a*). The bankrupt, and not the trustee, is entitled to any damages recovered in an action by the bankrupt for any personal wrong, for which the right of action does not pass, on the bankruptcy, to the trustee (*b*). But if the bankrupt retain and invest any money so recovered, the trustee will, it seems, become entitled to take the investments thereof for the benefit of the creditors (*c*).

Small bankruptcies.

Debtor's estates which are not likely to exceed 300*l.* in value may be ordered to be administered in a summary manner (*d*). We have seen (*e*) that a man's creditors are not entitled to present a bankruptcy petition against him, unless their debts amount together to 50*l.* Under the present Bankruptcy Act, however, a County Court may make an order for the administration of the estate of a person, whose whole indebtedness amounts to a sum not exceeding 50*l.*; and the debtor may be discharged from his debts by means of such an order (*f*).

Debtors owing not more than 50*l.*

(*x*) See *Ex parte Vine, Re Wilson*, 8 Ch. D. 364; *Emden* v. *Carte*, 17 Ch. D. 169, 768; *Re Shine*, 1892, 1 Q. B. 522; *Affleck* v. *Hammond*, 1912, 3 K. B. 162.

(*y*) *Re Graydon*, 1896, 1 Q. B. 417; *Re Roberts*, 1900, 1 Q. B. 122; *Re Hancock*, 1904, 1 K. B. 585.

(*z*) *Ante*, p. 283.

(*a*) *Re Shine*, 1892, 1 Q. B. 522; *Re Rogers*, 1894, 1 Q. B. 425.

(*b*) *Ante*, p. 168.

(*c*) *Ex parte Vine, Re Wilson*, 8 Ch. D. 364.

(*d*) Stat. 46 & 47 Vict. c. 52, s. 121; rules (1886) 262, (1890) 63.

(*e*) *Ante*, p. 273.

(*f*) Sect. 122; see rules thereunder, W. N. 2nd Aug., 1902; *Pearson* v. *Woodcock*, 1906, 2 K. B. 146.

Administration in bankruptcy of estate of person dying insolvent.

Under the present bankruptcy law, as has been previously noticed (*g*), an order may be made by a Court exercising bankruptcy jurisdiction (*h*), on the application of any creditor or creditors, whose debt or debts would have been sufficient to support a bankruptcy petition (*i*), for the administration of the insolvent estate of a deceased debtor, according to the law of bankruptcy; or, if proceedings have been commenced in any Court of Justice for the administration of such an estate, the Court may transfer the proceedings to a Court exercising bankruptcy jurisdiction (*k*); when a like order for administration of the estate in bankruptcy may be made (*l*). Upon such an order being made, the property of the deceased debtor will vest in the official receiver as trustee, and then in the trustee appointed by the creditors. And the estate will be administered by the trustee, under the direction of the creditors and the committee of inspection, in the same manner as a bankrupt's estate (*m*). Subject to the payment in full, in priority to all other debts, of the proper funeral and testamentary expenses, the debts will be payable in the same order as prevails in bankruptcy (*n*); and a landlord's right of distress will be similarly restricted (*o*). Any surplus remaining after payment of the debts in full, together with the costs of administration and interest as in bankruptcy (*p*) shall be paid over to the legal personal representative of the deceased, or dealt with in such

(*g*) *Ante*, pp. 114, 223, 244.

(*h*) See *Re Evans*, 1891, 1 Q. B. 143.

(*i*) See *ante*, pp. 223, and n. (*a*), 273.

(*k*) The ordering of such a transfer is in the discretion of the Court; *Re Baker*, 44 Ch. D. 262; *Re Briggs*, 7 Times L. R. 494, 572.

(*l*) Stat. 46 & 47 Vict. c. 52, s. 125, amended by 53 & 54 Vict. c. 71, s. 21; see rules (1886) 274—279, (1890) 64.

(*m*) Stat. 46 & 47 Vict. c. 52, s. 125, sub-ss. 5, 6, amended by 53 & 54 Vict. c. 71, s. 21, sub-s. 3.

(*n*) Stat. 46 & 47 Vict. c. 52, s. 125, sub-s. 7; *ante*, p. 288.

(*o*) Sect. 42, amended by stat. 53 & 54 Vict. c. 71, s. 28; *ante*, p. 288.

(*p*) *Ante*, pp. 287, 290, 291; see *Re Whitaker*, 1904, 1 Ch. 299; *ante*, p. 243, n. (*z*).

other manner as shall be prescribed (*q*). The provisions of the Bankruptcy Act, 1883, as to the avoidance of voluntary settlements (*r*) and of executions not completed (*s*), do not apply in the administration in bankruptcy of the insolvent estate of a deceased person (*t*). But those relating to the disclaimer of onerous property (*u*) are applicable in such proceedings (*x*).

(*q*) Stat. 46 & 47 Vict. c. 52. s. 125, sub-s. 8.
(*r*) *Ante*, pp. 294. 295.
(*s*) *Ante*, pp. 293, 294.
(*t*) *Ex parte Official Receiver, Re Gould*, 19 Q. B. D. 92; *Haslack* v. *Clark*, 1899, 1 Q. B. 699.
(*u*) *Ante*, p. 281.
(*x*) *Re Mellison*, 1906, 2 K. B. 68.

CHAPTER V.

OF INSURANCE.

HAVING now considered, though very briefly, the subject of debts generally, there remain certain debts, payable on contingencies, which deserve a separate notice, namely, debts arising under contracts to insure effected by policies of insurance.

Policy of insurance.

A policy of insurance, or assurance, is the name given to an instrument by which a contract to insure is entered into; and a contract to insure is a contract either to indemnify against a loss which may arise on the happening of some event, or to pay, on the happening of some event, a sum of money to the person insured. The most usual kinds of insurance are insurance of *lives*, insurance against loss by *fire*, and insurance of *ships* and their cargoes against the perils of the seas.

Life insurance.

And, first, as to life insurance. The advantages of life insurance are now so well known, that there is no occasion to dilate upon them. By payment of a small annual premium during the life of the person insured, a sum of money may be secured at his decease, applicable to the payment of his debts, for a provision for his family, or any other purposes. But as the insurance of lives and other events, in which the person insured has no interest, is often nothing more than a mischievous kind of gaming,

Insurances on lives in which the insured has no interest void.

it is enacted, by an Act of George III., that no insurance shall be made on the life of any person, or on any other event whatsoever, wherein the person for whose use and benefit, or on whose

account, such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every such assurance shall be null and void, to all intents and purposes whatsoever (*a*); and that it shall not be lawful to make any policy on the life of any person, or other event, without inserting in the policy the person's name interested therein, or for whose use or benefit, or on whose account, such policy is made (*b*); and that in all cases where the insured hath an interest in such life or event, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or other event (*c*). Every person is considered to have a sufficient interest in the duration of his own life to sustain his own insurance of it (*d*); but if he should afterwards put an end to his life, or die by the sentence of the law, the insurance will be void in the hands of his executors; and no provision to the contrary contained in the policy of insurance will be of any avail (*e*). The assignee of a person who has insured his own life is not required by the above-mentioned statute to have any interest in the life of such person, for the statute makes no mention of the assignment of policies (*f*). A creditor has an insurable interest in the life of his debtor to the extent of his debt; but if the debt should be discharged from any other source, it was formerly held that the policy would thenceforth be void for

A person may insure his own life.

A creditor has an insurable interest in the life of his debtor.

(*a*) Stat. 14 Geo. III. c. 48, s. 1; *Shilling* v. *Accidental Death Insurance Co.*, 2 H. & N. 42; *Hebdon* v. *West*, 3 B. & S. 579. See *ante*, p. 191.

(*b*) Sect. 2; *Hodson* v. *Observer Life Assurance Society*, 8 E. & B. 10.

(*c*) Sect. 3. By sect. 4. this Act does not extend to insurances *bonâ fide* made on ships, goods or merchandises, with respect to which provisions have been made by stat. 19 Geo. II. c. 37, amended by 27 & 28 Vict. c. 56, s. 1.

(*d*) *Griffiths* v. *Fleming*, 1909, 1 K. B. 805, 814, 820, 821.

(*e*) *Amicable Insurance Society* v. *Bolland*, 4 Bligh, N. S. 194, reversing *Bolland* v. *Disney*, 3 Russ. 351; see *Clift* v. *Schwabe*, 3 C. B. 437. And see Bunyon on Life Insurance, 94—104, 3rd ed.

(*f*) *Ashley* v. *Ashley*, 3 Sim. 149; 38 R. R. 139.

want of interest (*g*). This strict law was not, however, usually taken advantage of by the assurance offices, who generally paid the sums insured without any inquiry as to the extent of the interest of the party insured in the life on which the insurance had been effected (*h*). And by subsequent decisions (*i*), the doctrine that a contract for life assurance is a contract for indemnity only was overruled; so that if the person insuring has an insurable interest at the time of effecting the policy, the subsequent loss of such interest will not render the policy void. An interest as trustee is sufficient to support a life insurance (*k*). And a husband has an insurable interest in his wife's life, and a wife in her husband's (*l*). But a father has not such an interest in the life of his son as to warrant an insurance of it for his own benefit (*m*). And a child has not, as such, an insurable interest in his or her parent's life (*n*). By the Stamp Act, 1891 (*o*), policies of life insurance are required to be duly stamped according to the table in the note (*p*).

Trustee.

Husband and wife.

Father and son.

Child and parent.

(*g*) *Godsall* v. *Boldero*, 9 East, 72; S. C. 2 Smith, L. C.

(*h*) Lloyd & Goold, Cas. temp. Sugden, 291.

(*i*) *Dalby* v. *India & London Life Assurance Co.*, 15 C. B. 365; *Law* v. *London Indisputable Life Policy Co.*, 1 K. & J. 223.

(*k*) *Tidswell* v. *Angerstein*, Peake, N. P. Cases, 151; *Collett* v. *Morrison*, 9 Hare, 162, 176.

(*l*) *Griffiths* v. *Fleming*, 1909, 1 K. B. 805, 814, 820.

(*m*) *Halford* v. *Kymer*, 10 B. & C. 724; *Worthington* v. *Curtis*, 1 Ch. D. 419; *A.-G.* v. *Murray*, 1904, 1 K. B. 165.

(*n*) *Howard* v. *Refuge Friendly Society*, 54 L. T. 644; *Harse* v. *Pearl Life Assurance Co.*, 1903, 2 K. B. 92; 1904, 1 K. B. 558; cf. *Barnes* v. *London, Edinburgh & Glasgow Life Insurance Co.*, 1891, 1 Q. B. 864.

(*o*) Stats. 33 & 34 Vict. c. 97, 54 & 55 Vict. c. 39, ss. 98—100 and First Schedule.

(*p*)

	s.	d.
Where the sum insured does not exceed £10	0	1
Exceeds £10, but does not exceed £25	0	3
Exceeds £25, but does not exceed £500—		
For every full sum of £50, and also for any fractional part of £50, of the amount insured	0	6
Exceeds £500, but does not exceed £1,000 —		
For every full sum of £100, and also for any fractional part of £100 of the amount insured	1	0
Exceeds £1,000—		
For every full sum of £1,000, and also for any fractional part of £1,000 of the amount insured ..	10	0

Assignees of life policies may sue in their own names.

The Policies of Assurance Act, 1867 (*q*), enabled any person entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual discharge for the moneys thereby assured, to sue at law in his own name to recover such moneys (*r*). But no assignment made after the passing of the Act of a policy of life assurance should confer on the assignee therein named, his executors, administrators or assigns, any right to sue for the amount of such policy, or the moneys assured thereby, until a written notice of the date and purport of such assignment should have been given to the assurance company liable under such policy at their principal place of business for the time being; and the date on which such notice should be received should regulate the priority of all claims under any assignment (*s*). As we have seen (*t*), since 1875 all legal choses in action have been directly assignable, so that the assignees may sue therefor in their own names at law. Assignments of policies of life insurance must be duly stamped, or the assignee will have no right to sue or give a valid discharge for the moneys assured (*u*).

Notice of assignment to be given.

Life insurance by married woman.

By the Married Women's Property Act, 1882 (*x*), a married woman may, by virtue of the power of

For any payment agreed to be made upon the death of any person, only from accident or violence or otherwise than from a natural cause	s.	d.
	0	1

(*q*) Stat. 30 & 31 Vict. c. 144; see *ante*, p. 38 and n. (*z*).

(*r*) Sect. 1.

(*s*) Sect. 3. The date of the receipt of the statutory notice does not conclusively determine the rights of successive assignees of the money assured, as between themselves; *Newman* v. *Newman*, 28 Ch. D. 674.

(*t*) *Ante*, p. 39.

(*u*) Stat. 54 & 55 Vict. c. 39, s. 118, replacing 51 Vict. c. 8, s. 19.

(*x*) Stat. 45 & 46 Vict. c. 75, s. 11, replacing 33 & 34 Vict. c. 93, s. 10, as to the effect of which see *Holt* v. *Everall*, 2 Ch. D. 266; *Re Seyton*, 34 Ch. D. 511; *Re Davies' Policy Trusts*, 1892, 1 Ch. 90; *Re Kuyper's Policy Trusts*, 1899, 1 Ch. 38; *Re Parker's Policies*, 1906, 1 Ch. 520.

and for wife, husband or children.

making contracts therein contained, effect a policy upon her own life, or the life of her husband for her separate use; and a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts (*y*); provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid.

Fire insurance.

Insurance against fire is a contract to indemnify against loss by fire, and is usually renewed from year to year on payment of a premium. The person who effects such an insurance must have an interest in the property insured, and he cannot recover beyond the extent of his interest. Neither can he, as a rule, assign his policy without the consent of the insurers; for policies of fire insurance usually take the form of a contract to indemnify the insured personally, or his representatives in law, but not his assigns otherwise than by will (*z*). When a house or other building is insured, by a provision of the old Metro-

(*y*) See *Cleaver* v. *Mutual Reserve Fund Life Association*, 1892, 1 Q. B. 147.

(*z*) *Lynch* v. *Dalzell*, 4 Bro. Parl. Cas. 431; *Saddlers' Co.* v. *Badcock*, 2 Atk. 554; *Darrell* v. *Tibbitts*, 5 Q. B. D. 560; *Castellain* v. *Preston*, 11 Q. B. D. 380; *West of England Fire Insurance Co.* v. *Isaacs*, 1897 1 Q. B. 226; Bunyon on Fire Insurance, 11, 182, 303, 304; Porter on Insurance, 300, 2nd ed.; see 1 Wms. V. & P. 508 and n. (*d*), 2nd ed.

politan Building Act, any person interested may procure the insurance money, in case of fire, to be laid out in repairs or rebuilding (*a*). It has been held that the operation of this provision is general, and is not confined to houses or buildings within the limits of the metropolis (*b*). The insurers are the proper parties to rebuild under this enactment. But a distinct request must be addressed to the insurers by a person interested in the house or building damaged, that the insurance money may be applied in reinstating the premises. If no such request be made, the insurers may pay the money to the person who effected the insurance (*c*). In consequence of this enactment, a covenant to insure a house or other building is tantamount to a covenant to repair to the extent of such insurance, and, if entered into by a lessee in his lease, will *run with the land*, so as to be binding on the assignee of the lease (*d*). But, upon the sale of a house or other building insured by a vendor, who was under no obligation to insure, the benefit of the contract of insurance does not pass to the purchaser, unless expressly assigned (*e*).

Insurance of ships.

The insurance of ships and their cargoes from the

(*a*) Stat. 14 Geo. III. c. 78, s. 83; see 1 Wms. V. & P. 510, 511, 2nd ed.; *Sinnott* v. *Bowden*, 1912, 2 Ch. 414. This section is not repealed by stat. 18 & 19 Vict. c. 122, s. 109.

(*b*) *Ex parte Gordey*, 4 De G., J. & S. 477; followed in *Re Quicke's Trusts*, 1908, 1 Ch. 887, and *Sinnott* v. *Bowden*, 1912, 2 Ch. 414, notwithstanding the doubt expressed in *Westminster Fire Office* v. *Glasgow Provident Investment Society*, 13 App. Cas. 699, 716.

(*c*) *Simpson* v. *Scottish Union Insurance Co.*, 1 H. & M. 618; see also *Collingridge* v. *Royal Exchange Corporation*, 3 Q. B. D. 173; Cotton, L. J., 18 Ch. D. 7; Bowen, L. J., 11 Q. B. D. 401.

(*d*) *Vernon* v. *Smith*, 5 B. & Ald. 1; 24 R. R. 257; see Williams, R. P. 512, 21st ed.

(*e*) *Paine* v. *Meller*, 6 Ves. 349, 352, 353; 5 R. R. 327; *Poole* v. *Adams*, 12 W. R. 683; *Rayner* v. *Preston*, 14 Ch. D. 297; 18 Ch. D. 1; *Phœnix Assurance Co.* v. *Spooner*, 1905, 1 K. B. 753; see 1 Wms. V. & P. 508—511; *Sinnott* v. *Bowden*, 1912, 2 Ch. 414. As to the benefit of a contract of insurance upon a mortgage of the property insured, see Williams' Conveyancing Statutes, pp. 156—159.

perils of the sea is a matter belonging rather to mercantile law than to the department of conveyancing. The law of such insurance has been codified by the Marine Insurance Act, 1906 (*f*). We have seen that this Act makes void all contracts of marine insurance by way of gaming or wagering, including those where the assured has not an insurable interest as defined by the Act, and the contract is entered into with no expectation of acquiring such an interest (*g*). Like a fire insurance policy, a policy of marine insurance is a contract of indemnity (*h*). Contracts of marine insurance are inadmissible in evidence unless embodied in a marine policy in accordance with the Act (*i*); and this policy must be signed by or on behalf of the insurer (*k*), and must be duly stamped (*l*). A marine policy is assignable unless it contains terms expressly prohibiting assignment. And it may be assigned either before or after loss (*m*), and by indorsement thereon or in any other customary manner (*n*). Where a marine policy has been assigned so as to pass the beneficial interest therein, the assignee is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been

Assignment of policies of marine insurance.

(*f*) Stat. 6 Edw. [illegible] c. 41.

[illegible] Sect. 4; see [illegible] 14; ante, p. 195, and n. (*e*).

(*g*) Stat. 6 Edw. [illegible] 14, s. 1 (codifying the law as to which see *Poole* v. *Innes* [illegible] 10; *Barnard* v. [illegible] 7 App. Cas. 333 [illegible] ss. 57, 79; *Wilson* [illegible] *Lee* v. [illegible] B. 374. [illegible]

Stat. 6 Edw. [illegible] s. [illegible] Sect. 4 [illegible] case of a corporation, [illegible] porate may [illegible] the subscription of a corporation is not required to be under seal. As to contracts by corporations, see Wms. V. & P. 949, *sq.* 2nd ed.

(*h*) Stat. 54 & 55 Vict. c. 39, ss. 91, 93, 95, 97 and First Schedule, amended by 1 Edw. VII. c. 11, and 2 & 3 Geo. V. c. 8, s. 1, and preserved by 6 Edw. VII. c. 41, s. 91; *Home Marine Insurance Co.* v. *Smith*, 1898, 2 Q. B. 351.

(*i*) Stat. 6 Edw. VII. c. 41, s. 50 (1).

(*k*) Sect. 50 (2).

(*l*) Sect. 50 (3).

(*m*) Sect. 50 (3).

brought in the name of the person by or on behalf of whom the policy was effected (*o*). Unlike policies of fire insurance, the terms of a policy of marine insurance usually extend its benefit to the assigns of the insured, as well as himself (*p*). But where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement to that effect (*q*). The benefit of a policy of marine insurance does not pass, therefore, upon the sale of the goods insured, unless expressly or impliedly assigned (*r*). But goods, which are at sea, or which are to be delivered by sea, are very frequently sold under a contract, commonly called a c.i.f. contract, that the price shall include freight and insurance as well as the cost of the goods, and shall be payable on receipt of the shipping documents (*s*). In such cases, it is understood that the shipping documents shall comprise a proper policy of insurance effected by the shipper, and that the benefit of such a policy is included in the sale (*t*). C.i.f. contract.

(*o*) Sect. 50 (2); see *William Pickersgill & Sons, Ld.* v. *London and Provincial, &c. Insurance Co., Ld.*, 1912, 3 K. B. 614, allowing the defence of non-disclosure of a material fact to be raised in an action by the assignee of a marine policy; *ante*, pp. 37—40. This enactment replaced 31 & 32 Vict. c. 86, s. 1, which first enabled the assignee of a marine policy to sue thereon in his own name; see *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299. The benefit of a contract of marine insurance was also assignable under the Judicature Act of 1873; *ante*, pp. 38, 39, 200, 307.

(*p*) Arnould on Marine Insurance, i. 107, 112, 231, 234, 6th ed.

(*q*) Stat. 6 Edw. VII. c. 41, s. 15 (1), which does not affect a transmission of interest by operation of law; s. 15 (2).

(*r*) *Powles* v. *Innes*, 11 M. & W. 10; *North of England Pure Oil-Cake Co.* v. *Archangel Maritime Insurance Co.*, L. R. 10 Q. B. 249; codified by the enactment stated in the previous sentence.

(*s*) See *Biddell* v. *E. Clemens Horst Co.*, 1911, 1 K. B. 214, 931; 1912, A. C. 18.

(*t*) *Tamvaco* v. *Lucas*, 1 B. & S. 185; 3 B. & S. 89; *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299, 303; *North of England Pure Oil-Cake Co.* v. *Archangel Maritime Insurance Co.*, L. R. 10 Q. B. 249, 254; *Landauer* v. *Craven*, 1912, 2 K. B. 94, 106, 107; *Orient Co., Ld.* v. *Brekke*, 1913, 1 K. B. 531; cf. *Strass* v. *Spillers and Bakers, Ld.*, 1911, 2 K. B. 759.

CHAPTER VI.

OF PERSONAL ANNUITIES, STOCKS AND SHARES.

In addition to the things in action known to the old common law, we have seen that there exist in modern times several other species of property classed equally as personal, and consisting equally of mere rights, unaccompanied with the possession of anything corporeal (*a*). To these we now propose to direct our attention.

Personal annuity.

Amongst personal property of this description we shall first mention a *personal annuity*. This kind of property is not indeed of so modern an origin as some of those which we shall hereafter mention. It consists of an annual payment, not charged on real estate; but it may nevertheless be limited to the heirs, or the heirs of the body, of the grantee. In former times it was doubted whether an annuity was not a mere *chose in action*, and therefore incapable of assignment (*b*); but this objection has long been overruled. When limited to the heirs of the grantee it will, on his intestacy, descend, like real estate, to his heir; but it is still personal property (*c*), and will pass by his will under a bequest of all his personal estate (*d*). When given to the grantee and the heirs of his body, the grantee does not acquire an estate tail; for this kind of inheritance is not a *tenement* within the meaning

(*a*) *Ante*, pp. 40–44.
(*b*) Co. Litt. 144 b, n. (1).
(*c*) *Duf of Stafford* v. *Buckley*, 2 Ves. sen. 171; *Radburn* v. *Jervis*, 3 Beav. 450, 461.
(*d*) *Aubin* v. *Daly*, 4 B. & Ald. 59; 22 R. R. 623.

of the statute *De Donis Conditionalibus* (*e*). The grantee has merely a fee simple *conditional* on his having issue, such as a grantee of lands would have had under a similar grant prior to the statute *De Donis* (*f*), or as a copyholder would now take in manors where there is no custom to entail (*g*). When the grantee has issue, he may therefore alien the annuity in fee simple by a mere assignment; but should he die without issue the annuity will fail. A personal annuity given to a man *for ever* will devolve on the executor, and not on the heir of the grantee (*h*).

Stock or bank annuities did not exist before the Revolution.

Let us next consider stock in the public funds, or bank annuities. Previously to the Revolution in 1688 there was no funded debt properly so called; although King Charles I. and King Charles II. both found occasion to raise money by the grant of annuities in fee simple chargeable on particular branches of the revenue. These annuities, not being payable out of real estate, appear to have been the first instances of personal annuities limited to the grantees and their heirs, and they gave occasion to those lawsuits by which the legal nature and incidents of personal annuities have been determined; although some mention of such annuities is certainly to be found in the old books (*i*).

The funds are redeemable annuities.

Soon after the Revolution, however, a portion of the public debt was funded, or transferred into perpetual annuities payable by way of interest on the capital advanced, which capital was to be repaid by the government in the manner agreed on. And from that time to the present, the funded debt of the country has, by several Acts of Parliament, been

(*e*) Stat. 13 Edw. 1. c. 1; *Turner* v. *Turner*, 2 Amb. 776, 782; *Earl of Stafford* v. *Buckley*, *ubi sup.*

(*f*) See Williams, R. P. 92, 93, 21st ed.

(*g*) *Ibid.* 471.

(*h*) *Taylor* v. *Martindale*, 12 Sim. 158.

(*i*) Co. Litt. 144 b; Fit. . II 152 a.

greatly increased. Stock in the funds, therefore, is merely a right to receive certain annuities, by half-yearly or quarterly dividends, as they become due (*k*), subject to the right of the government to redeem such annuities on payment of a stipulated sum, which sum is the nominal value of the stock. Thus, 100*l.* 2*l.* 10*s.* per cent. Consolidated Stock is a right to receive 2*l.* 10*s.* per annum for ever, subject to the right of the government to redeem this annuity on payment of 100*l.* sterling (*l*). The actual value of 100*l.* 2*l.* 10*s.* per cent. Consolidated Stock of course depends on the state of the stock market, being sometimes lower, sometimes higher, than the nominal price, which is called *par*.

Consols formerly the investment of the Court of Chancery.

The public funds have been, from time to time, composed of several separate stocks, of which, however, by far the largest and most important were the Consolidated 3*l.* per cent. Bank Annuities, shortly termed *Consols*. In this fund alone the Court of Chancery formerly invested all the money committed to its care belonging to the suitors in that Court: and as it is a rule of equity, that whatever the Court would certainly order to be done may be done without applying to the Court, every trustee and executor was justified in investing in consols any money which he might have held in trust, without any express direction for that purpose (*m*). At the present time, however, the investments in which money in Court may be placed, and those to which trustees may resort, in the absence of express directions, have been largely extended by rules of Court and statute (*n*). A

(*k*) *Widdman* v. *Widdman*, 9 Ves. 174, 177; 7 R. R. 153; *Rawlings* v. *Jennings*, 13 Ves. 38, 45; 9 R. R. 137.

(*l*) Stat. 51 Vict. c. 2, s. 2.

(*m*) *Howe* v. *Lord Dartmouth*, 7 Ves. 150; 6 R. R. 90; *Holland* v. *Hughes*, 16 Ves. 111; *Tibbs* v. *Carpenter*, 1 Mad. 306; 16 R. R. 224; *Norbury* v. *Norbury*, 4 Mad. 191.

(*n*) Stats. 23 & 24 Vict. c. 38, s. 10; 56 & 57 Vict. c. 53, pt. 1; R. S. C. Order XXII. r. 17.

table of these investments is given in a subsequent chapter (*o*). In 1888, the 3*l*. per cent. consols, together with two other stocks known as the New and the Reduced 3*l*. per cents., were converted into Consolidated Stock yielding dividends at the rate of 2*l*. 15*s*. per annum until the 5th of April, 1903, and thereafter at the rate of 2*l*. 10*s*. per annum (*p*); and this stock now forms the bulk of the National Debt (*q*). Conversion of Consols.

The legal nature and incidents of stock in the public funds were fixed by the various Acts of Parliament by which these funds were created. These statutes are far too numerous to be here mentioned; but their provisions are generally similar. They were all consolidated, with amendments, by the National Debt Act, 1870 (*r*). By one of the earliest of these statutes (*s*), it was provided, that all persons who should be entitled to any of the annuities thereby created, and all persons lawfully claiming under them, should be possessed thereof *as of a personal estate, and the same should not be descendible to the heir*. And the National Debt Act, 1870, provides that the perpetual annuities, which form part of the national debt, shall continue to be personal estate, and not descendible to heirs (*t*). The National Debt Act, 1870. Stock is personal estate.

The transfer of stock in the public funds (excepting that comprised in stock certificates or registered as transferable by deed as mentioned below) is effected only by the signature of the books at the Bank of Transfer of stock.

(*o*) *Post*, Part III., Ch. I.

(*p*) Stat. 51 Vict. c. 2.

(*q*) The British Funds also comprise other 2½ per cent. stock and certain 2¾ per cent. stock; see the Stock Exchange Official Intelligence.

(*r*) Stat. 33 & 34 Vict. c. 71.

(*s*) Stat. 1 Geo. 1. st. 2. c. 19. s. 9, now repealed by stat. 33 & 34 Vict. c. 69.

(*t*) Stat. 33 & 34 Vict. c. 71. s. 9, applied to consolidated 2*l*. 15*s*. per cent. stock by stat. 51 Vict. c. 2. s. 2. sub-s. 5.

England in the manner prescribed by Act of Parliament; and this transfer may be effected either in person or by attorney thereunto lawfully authorised, by writing under hand and seal, attested by two or more credible witnesses (*u*). The legal title to stock belongs to the person in whose name it is standing in the bank books; and the bank refuses to recognise trusts, or to keep more than one account for the same person; neither will it allow of the transfer of any stock into the names of more than four persons.

Dividends.

Formerly the right to stock always carried the right to the current dividends, and the transfer books were closed for some days prior to the days of payment of the dividends. But a day for closing the books is now fixed in the month preceding that in which the dividends are payable, and the person whose name then appears inscribed in the books as proprietor is, as between him and the transferee, entitled to the current dividend; and after that day the person to whom any transfer is made is not entitled to the current dividend (*x*).

Stock in the name of a trustee.

When stock is standing in the name of a trustee, the beneficial owner may transfer his equitable interest in any manner he pleases. As the claim of the beneficial owner is equitable only, there was never any occasion to give to the transferee a power of attorney to sue in the name of the transferor (*y*);

(*u*) Stat. 33 & 34 Vict. c. 71, s. 22.

(*x*) Stat. 33 & 34 Vict. c. 71, s. 25, replacing 24 Vict. c. 3, s. 7. Dividends on government stock are now paid, as a rule, by dividend warrants, which are equivalent to cheques on the Bank of England, sent by post to the address of a sole stockholder or the first stockholder in joint accounts. But on request duly made at the bank, the dividend warrants may be sent by post to any nominee of the stockholder, or the dividends may be paid on personal attendance at the bank. Any one of several joint holders of stock may give an effectual receipt for any dividend thereon, unless notice to the contrary has been given to the bank by any other of the holders. See stats. 33 & 34 Vict. c. 71, ss. 12–21; 51 Vict. c. 2, s. 30; and 52 Vict. c. 6, s. 4. No stamp duty is payable in respect of any dividend warrant, transfer or stock certificate of government stock; stat. 33 & 34 Vict. c. 71, s. 71.

(*y*) See *ante*, p. 36.

and the transferee, on giving notice of the transfer to the trustees, will be entitled to a legal transfer of the stock into his own name in the books at the bank. Provision is made by the National Debt Act, 1870, for the conversion of stock, transferable only at the Bank, into stock certificates payable to bearer, and transferable accordingly from hand to hand (*z*). And by the Finance Act, 1911, any stock transferable in the books of the Bank under the National Debt Act, 1870, may be registered as stock transferable by deed, and will then be transferable by deed in manner provided in the regulations made thereunder, instead of in the Bank books (*a*). It seems that stock was not *goods, wares* or *merchandise* within the 17th section of the Statute of Frauds (*b*), and is a thing in action within the meaning of the Sale of Goods Act, 1893 (*c*); so

Stock certificates.

Stock transferable by deed.

Contract for sale of stock not within the Statute of Frauds or Sale of Goods Act, 1893.

(*z*) Stat. 33 & 34 Vict. c. 71, part 5, ss. 26 *sq.*, replacing 26 Vict. c. 28.

(*a*) Stat. 1 & 2 Geo. V. c. 48, s. 17, also providing that no stamp duty shall be payable in respect of any deed of transfer of such stock. By the Regulations made thereunder (see W. N. 13th of April, 1912), any stock desired to be made transferable by deed may be registered, on the demand of the stockholder, in the separate register called the Transfer by Deed Register. When any stock is so registered, the Bank is to issue to the holder of the stock a register certificate, which is to be *prima facie* evidence of the title of the person named therein to the amount of stock specified therein. Every deed of transfer of stock so registered must be in the form set out in the Schedule to the Regulations, or with such variations therefrom as are not material and are approved by the Bank, and must be executed by all parties thereto, the execution by each party being attested by one or more credible witnesses. The deed, accompanied by the register certificate, is to be delivered to and retained by the Bank; and the transfer is to be completed by the Bank making such alterations in the Transfer by Deed Register as are necessary to show the effect of the transfer. And on the completion of the transfer, a new register certificate is to be issued to the transferee. The Bank is not to recognise any transfer of stock transferable by deed other than a transfer by deed completed in accordance with these Regulations. And no notice of any trust, expressed, implied or constructive, is to be entered on the Transfer by Deed Register or be receivable by the Bank in respect of a register certificate. Stock so registered may, on the demand of the stockholder, be removed from the Transfer by Deed Register, and again be made transferable in the Bank books.

(*b*) Stat. 29 Car. II. c. 3. See *ante*, p. 80 and n. (*g*).

(*c*) Stat. 56 & 57 Vict. c. 71, ss. 4, 62; *ante*, pp. 77, n. (*p*), 80.

that a written memorandum is not thereby required for a contract for its sale, if the value exceeds ten pounds and the buyer does not accept and receive any part, or give something in earnest to bind the bargain, or in part payment (*d*). But by the Finance Act, 1910 (*e*), a contract note, which must be duly stamped (*f*), is required (*g*) to be executed on any sale or purchase made of any stock or marketable security (*h*) of the value of five pounds or upwards by any broker or agent, or by any person who by

Contract notes on sale of stock or marketable security worth 5*l.* or more.

(*d*) See *Numes* v. *Scipio*, 1 Com. 356; *Pickering* v. *Appleby*, 1 Com. 354; 2 P. Wms. 308; *Poole* v. *Gunn*, 4 Bing. N. C. 445; *Humble* v. *Mitchell*, 11 A. & E. 205; *Knight* v. *Barber*, 16 M. & W. 66.

(*e*) Stat. 10 Edw. VII. c. 8, s. 78, replacing 54 & 55 Vict. c. 39, ss. 52, 53, amended by 56 Vict. c. 7, s. 3; 61 & 62 Vict. c. 46, s. 7 (1); and 61 & 62 Vict. c. 9, s. 13. By stat. 10 Edw. VII. c. 8, s. 79, the same requirement is applied to contracts giving an option to purchase or sell any stock or marketable security at a future time at a certain price: but such contracts are chargeable with one half only of the stamp duty.

(*f*) See sect. 77 (2, 3, 4). By sect. 77 (1), the stamp duty is, where the value of the stock and marketable security is:—

				£	*s.*	*d.*
£5 and does not exceed			£100 ..	0	0	6
exceeds	£100	„	„ £500 ..	0	1	0
„	£500	„	„ £1,000 ..	0	2	0
„	£1,000	„	„ £1,500 ..	0	3	0
„	£1,500	„	„ £2,500 ..	0	4	0
„	£2,500	„	„ £5,000 ..	0	6	0
„	£5,000	„	„ £7,500 ..	0	8	0
„	£7,500	„	„ £10,000 ..	0	10	0
„	£10,000	„	„ £12,500 ..	0	12	0
„	£12,500	„	„ £15,000 ..	0	14	0
„	£15,000	„	„ £17,500 ..	0	16	0
„	£17,500	„	„ £20,000 ..	0	18	0
„	£20,000	..	.. .. ..	1	1	0

(*g*) On pain of a fine of 20*l.* for not executing the contract note, and a fine of 20*l.* for executing a contract note not duly stamped, and of being deprived of any legal claim to any charge for brokerage, commission or agency with reference to the transaction; s. 78 (1, 2, 3).

(*h*) In this enactment "stock" includes any share in any stocks or funds transferable at the Bank of England or Ireland, and India promissory notes, and any share in the stocks or funds of any foreign or colonial state or government, or in the capital stock or funded debt of any county council, corporation, company or society in the United Kingdom, or of any foreign or colonial corporation, company or society; and "marketable security" means a security capable of being sold in any stock market in the United Kingdom; stats. 54 & 55 Vict. c. 39, s. 122; 10 Edw. VII. c. 8, s. 90 (5) see below, pp. 324 *sq.*

way of business deals, or holds himself out as dealing, as a principal in any stock or marketable security; and such contract note must be transmitted to the principal or the vendor or purchaser, as the case may be. This requirement, however, does not extend to the case of transactions carried out in the course of their ordinary business relations between members of stock exchanges in the United Kingdom (*i*).

Distringas.

When any person had an interest in stock standing in the name of another, he was formerly enabled to restrain the transfer of such stock, or as it was said, to *put a stop upon it*, by means of a writ of *distringas* to be served upon the Bank of England (*k*). Under the present practice, however, such writs are no longer issued (*l*). But any person claiming to be interested in any stock standing in the books of the

Notice in lieu of *distringas*.

(*i*) Stat. 10 Edw. VII. c. 8, s. 78 (1); and see s. 77 (3).

(*k*) The writ of *distringas* was in strictness a proceeding in a suit supposed to have been commenced by the party obtaining it against the bank and the legal owner of the stock; but in practice a suit was not commenced unless the right to stop the stock were disputed. This writ formerly issued only out of the equity side of the Court of Exchequer; but when in 1841 the equitable jurisdiction of the Court was transferred to the Court of Chancery, it was provided that a writ of *distringas* should issue out of the latter Court, to have the same effect as the writ previously in use. The writ commanded the sheriff to *distrain* the bank by their lands and chattels, so that they appeared in Court to answer a bill of complaint lately exhibited against them and other defendants by the person obtaining the writ. The object of the writ was stated in a notice, which was served along with it, to be for the purpose of restraining any transfer of the stock until the order of the Court were obtained. When a *distringas* was so put upon any stock, the bank would not permit any transfer to be made without notice to the person who had obtained the writ; but if he did not commence an actual suit, or obtain an order restraining the transfer of the stock within a short time, afterwards fixed by order at eight days, after an application for a transfer had been made, the bank would no longer regard the *distringas*. A writ of *distringas* might at any time be discharged by order of the Court. See Wilkinson on the Funds, 235–252; stat. 5 Vict. c. 5, ss. 4, 5; *Scott* v. *Bank of England*, 2 Y. & J. 327; *Ex parte Amyot*, 1 Ph. 130, n.; *Etty* v. *Bridges*, 2 Y. & C. C. C. 486, 491; *Re Cross*, 1 Dr. & Sm. 580; Orders of 17th Nov., 1841, 11 L. J. N. S. Ch. 3; Consold. Order (1860) XXVII.; 2nd Rep. of Chancery Commrs. (1854), p. 122.

(*l*) R. S. C. 1883, Order XLVI. r. 2, replacing R. S. C. April, 1880.

Bank of England or dividends thereon, may, on filing in the central office of the Supreme Court an affidavit as to his interest, with a notice to restrain the transfer of or the receipt of the dividends upon the amount of stock in question, serve on the bank an office copy of the affidavit and a duplicate of the notice authenticated by the official seal (*m*); and such service shall have the same effect as the issue of a writ of *distringas* would formerly have had (*n*). The bank will then give notice to the person so serving them of any application for a transfer of the stock or the payment of the dividends thereon, and will refuse to permit any transfer to be made, or the dividends to be paid for eight days after the date of such application (*o*). But the bank is not to refuse to permit the transfer to be made, or to withhold payment of the dividends, for a longer period, without the order of the Court or a Judge (*p*). An order restraining the transfer or payment of the dividends may be made in a summary way upon motion or petition of the person who has served the notice (*q*). A notice in lieu of *distringas* may be withdrawn by the person by whom or on whose behalf it was given, on a written request signed by him, or its operation may be made to cease by order to be obtained by any other person claiming to be interested in the stock or dividends (*r*). It is surprising that a course by which a cestui que trust of stock may be so effectually protected from any fraudulent transfer by his trustee should not be more frequently adopted.

Stock may be charged with judgment debts.

Stock, being a *chose in action*, could not formerly have been sold under a *fieri facias* issued in execution

(*m*) R. S. C. 1883, Order XLVI. r. 4. amended by R. S. C. 1888, No. 3.

(*n*) R. S. C. 1883, Order XLVI. r. 8; see note (*k*) above.

(*o*) *Re Blakeley's Trusts*, 23 Ch. D. 549.

(*p*) R. S. C. 1883, Order XLVI. r. 10.

(*q*) Stat. 5 Vict. c. 5, s. 4; *Re Blakeley's Trusts*, 23 Ch. D. 549.

(*r*) R. S. C. Order XLVI. r. 9.

of a judgment against the owner (*s*). And, in fact, in the Acts by which stocks were created, it was declared that they should not be taken in execution (*t*). But under the Judgments Act, 1838 (*u*), any Divisional Court or a Judge (*x*), on the application of any judgment creditor, may order that any government stock of the debtor standing in his own name in his own right, or in the name of any person in trust for him, shall stand charged with the payment of the judgment debt and interest; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the debtor (*y*); but no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*z*). And under the Judgments Act, 1840 (*a*), a similar order may be made as to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in such stock as in the dividends or annual produce thereof, and also in any stock lodged in Court in which the debtor may be interested or the dividends thereon (*b*). And in order to prevent any judgment debtor from disposing of the

(*s*) *Dundas* v. *Dutens*, 1 Ves. jun. 198; 1 R. R. 112; *ante*, p. 107, n. (*p*).

(*t*) *Bank of England* v. *Lunn*, 15 Ves. 577.

(*u*) Stat. 1 & 2 Vict. c. 110, s. 14.

(*x*) R. S. C. 1883, Order XLVI. r. 1, replacing Order XLVI. r. 1, of stat. 38 & 39 Vict. c. 77, First Schedule.

(*y*) See *Savage* v. *Norton*, 1908, 1 Ch., 290.

(*z*) See *Watts* v. *Jefferys*, 3 Mac. & G. 372; *Watts* v. *Porter*, 3 E. & B. 743; *contra*, *Bearan* v. *Earl of Orford*, 6 De Gex, M. & G. 524, 525, 532; *Scott* v. *Lord Hastings*, 4 Kay & J. 633, 638; *Crow* v. *Robinson*, L. R. 3 C. P. 264, 267; *Pickering* v. *Ilfracombe Railway Company*, L. R. 3 C. P. 235, 251; *Re Lowndes*, 1891, 2 Ch. 1; *Stewart* v. *Rhodes*, 1900, 1 Ch. 386.

(*a*) Stat. 3 & 4 Vict. c. 82, s. 1. See *Hulkes* v. *Day*, 10 Sim. 41.

(*b*) See *Warburton* v. *Hill*, Kay, 470; *Haly* v. *Barry*, L. R. 3 Ch. 452, 456, 457; *Bolland* v. *Young*, 1904, 2 K. B. 824; stats. 35 & 36 Vict. c. 44; 46 & 47 Vict. c. 29; and Supreme Court Funds Rules, 1886, W. N. 9th Oct., 1886.

stock authorised to be charged, an order may be procured by the creditor, in the first instance *ex parte*, charging the stock and restraining the Bank of England from permitting a transfer of the stock until the order shall either be made absolute (that is, confirmed and continued) or discharged; and no disposition of the judgment debtor in the meantime shall be valid or effectual as against the creditor. And the order will be made absolute if the debtor do not, within a time mentioned in the order, show cause to the contrary (*c*). Such orders are known as charging orders *nisi*, and charging orders absolute. When the debtor is entitled to the dividends of stock standing in the names of trustees, the order obtained by the creditor charging such dividends will be binding on the trustees; but the bank must still pay the dividends to the trustees as legal owners (*d*). As we have seen (*e*), a trustee in bankruptcy is empowered to transfer the bankrupt's stock to the same extent as the bankrupt himself might have transferred it. And stock appears to be a thing in action (*f*) so as to be excepted from the operation of the reputed ownership clauses of the bankruptcy law (*g*).

Charging orders.

Transfer of bankrupt's stock.

Transmission of stock by will.

The history of the law respecting the transmission of stock by will affords a curious instance of the enactments of the legislature having been virtually overruled by the decisions of the Court of Chancery. The Acts by which the funds were created provided that any person possessed of stock might devise the same by will in writing *attested by two or more credible witnesses*, but that such devisee should receive no

(*c*) Stat. 1 & 2 Vict. c. 110, s. 15.

(*d*) *Churchill* v. *Bank of England*, 11 M. & W. 323; *Bristead* v. *Wilkins*, 3 Hare, 235; *South Western Loan and Discount Co.* v. *Robertson*, 8 Q. B. D. 17; and see *Taylor* v. *Turnbull*, 4 H. & N. 495.

(*e*) *Ante*, p. 282.

(*f*) *Ante*, pp. 42, 317.

(*g*) *Ante*, pp. 253, 254, 281.

payment till so much of the will as related to the stock had been entered in the office at the bank; and in default of such devise the stock should go to the executors or administrators (*h*). The Court of Chancery, however, held, that as stock had been declared by Parliament to be personal estate, it must, like all other personal estate, devolve, in the first instance, on the executor for payment of debts, even though it should have been specifically bequeathed (*i*), and that the executor, having it in his hands by virtue of his office of executor, was bound, after payment of debts, to dispose of it according to the will of his testator, even although such will were unattested (*k*). For, previously to the Wills Act of 1837 (*l*), a will of personal estate required no attestation. In effect, therefore, a person was enabled to bequeath his stock by a will unattested. All wills, however, are now required to be attested by two witnesses. And by an Act of 1845 the provisions of the old Acts, which had virtually been disregarded, were formally repealed; and it is now declared that the interest of a stockholder dying in stock shall be transferable by his executors or administrators, notwithstanding any specific bequest thereof; but the Bank shall not be required to allow of such transfer, or of the receipt of any dividend on the stock, until the probate of the will or the letters of administration shall have been left at the Bank for registration. And the Bank may require all the executors who have proved the will to concur in the transfer (*m*). And the registry of specific bequests of stock is no longer required.

Transfer of deceased person's stock.

(*h*) Stat. 1 Geo. I. stat. 2, c. 19, s. 12, and subsequent Acts.

(*i*) *Bank of England* v. *Moffatt*, 3 Bro. C. C. 260; *Bank of England* v. *Parsons*, 5 Ves. 665; *Bank of England* v. *Lunn*, 15 Ves. 569.

(*k*) *Ripley* v. *Waterworth*, 7 Ves. 440; *Franklin* v. *Bank of England*, 1 Russ. 575, 589.

(*l*) Stat. 7 Will. IV. & 1 Vict. c. 26; *post*, part III., ch. III.

(*m*) Stat. 33 & 34 Vict. c. 71, ss. 17, 23, replacing 8 & 9 Vict. c. 97, s. 1.

India and Colonial Government Stock.

Other personal property resembling generally stock in the British government funds in its legal incidents is India stock, and the stocks of the various British colonial governments inscribed in the books of the Bank of England or some other bank (*n*). Each of these stocks represents a certain amount of funded debt of the government which has issued the stock, gives the right to half-yearly or quarterly payments by way of interest at a fixed rate, and is redeemable at a given time: but of course the security is not the same as in the case of the British funds, being that of the Indian or colonial governments and their revenues respectively, and not that of the Home Government and its resources.

Municipal Corporation Stock.

The stocks inscribed in bank books of various municipal corporations, or other public bodies, such as the Corporation of Manchester or the London County Council, possess like incidents; although these last are often transferable by deed, and not, like government stock, by mere entry of the transfer in the bank books (*o*). Such stocks also represent funded debt of the public bodies issuing them, and are generally secured upon the rates leviable by or other corporate or public revenues of such public bodies.

Contract notes.

Contract notes are required in the cases above specified on the sale or purchase of all of the stocks mentioned in this paragraph (*p*). The provisions above stated as to the transfer of British government stock by executors or administrators (*q*) and the receipt of dividends thereon (*r*) apply to all stock of any company or corporation, funds or annuities transferable in the books of the Banks of England or Ireland (*s*). And notice in lieu of *distringas* (*t*) may be served in respect of any stock

Notice in lieu of *distringas*.

(*n*) See stat. 40 & 41 Vict. c. 59.

(*o*) See the Stock Exchange Official Intelligence.

(*p*) *Ante*, p. 318 and n. (*h*).

(*q*) *Ante*, p. 323.

(*r*) *Ante*, p. 316 and n. (*x*).

(*s*) Stats. 33 & 34 Vict. c. 71, s. 73; 52 Vict. c. 6, s. 4, sub-s. 6.

(*t*) *Ante*, pp. 319, 320.

standing in the books of the Bank of England or any other public company, whether incorporated or not (*u*). The jurisdiction to make charging orders is, however, limited to any government stock, funds or annuities, or any stock or shares of or in any public company in England (*x*). As we have seen (*y*), a trustee in bankruptcy is empowered to transfer any stock or other property of the bankrupt transferable in the books of any company, office or person to the same extent as the bankrupt might have transferred the same.

Charging orders.

Transfer of bankrupt's stock.

We will now proceed to examine the nature of shares in joint stock companies. A share in a trading company, regarded as a source of emolument, is a mere right to receive a certain share of the profits made by the company; and it is in some cases accompanied by the liability to make a certain contribution towards payment of the company's debts (*z*). Joint stock companies were formerly of two kinds, those which were incorporate, or made into *corporations*, and those which were not so.

Shares.

Corporations are legal personages, always known by the same name, and preserving their identity through a perpetual succession of natural persons. They are either corporations *sole*, composed only of one person, such as a bishop, a parson, or the chamberlain of London; or corporations *aggregate*, composed of many persons acting on all solemn occasions by the medium of their *common seal* (*a*); and it is of such corporations that we are now about to speak.

Corporations sole and aggregate.

(*u*) R. S. C. 1883, Order XLVI. r. 3.

(*x*) Stat. 1 & 2 Vict. c. 110, s. 14; *Brereton* v. *Edwards*, 21 Q. B. D. 488, 493, 497.

(*y*) *Ante*, p. 282.

(*z*) See *ante*, pp. 41, 42; Williams, R. P. f. 30, 21st ed., and cases there cited; *Nunney* v. *Morgan*, 37 Ch. D. 346, 352; *Borland's Trustee* v. *Steel*, 1901, 1 Ch. 280; *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ltd.*, 1903, 1 K. B. 461; 1904, A. C. 165.

(*a*) See Bac. Abr., tit. Corporations; 1 Black. Comm. ch. xviii.; Williams, R. P. 302, 21st ed.

Such corporations may exist either by force of the common law, or of some statute. In the former case they must have been created by royal letters-patent, or they must be corporations by prescription (as the Corporation of London is), that is, they must have existed as corporations from time immemorial, when the royal assent to their incorporation is assumed (*b*). The individual members of a common law corporation, and their private property, are not liable in respect of any debts incurred by the corporation (*c*). But in the case of a corporation existing by force of statute, the members will be subject to any liability, which may have been imposed on them by the terms of the statute, to contribute to the payment of the corporation's debts. We have already noticed the early incorporation of certain trading companies by royal charter (*d*). Towards the end of the seven. enth and early in the eighteenth century a few great companies were incorporated pursuant to Act of Parliament. The principle adopted in these cases was that a joint stock of trading capital of a certain amount should be raised by subscription, and that the shares of the members of the company in such joint stock of capital should be liable to the company's debts, but that the members themselves should not be liable for such debts beyond the extent of their shares in the capital stock so raised (*e*). As modern commerce increased, other companies obtained special Acts for their incorporation, sometimes imposing no liability on the members for the company's debts, sometimes imposing on them a liability for such debts limited to the extent of their shares in the amount of

(*b*) 1 Black. Comm. 472—473.

(*c*) 6 Vin. Abr. 299 (Corporation, pl. 5—8).

(*d*) *Ante*, p. 11.

(*e*) See Stats. 5 & 6 W. & M. c. 20, ss. 20—26, amended by 8 & 9 Will. III. c. 20, ss. 20—26, 30, 35, 40, as to the Bank of England; 9 & 10 Will. III. c. 44, s. 86, as to the East India Co.; 6 Geo. I. c. 18, s. 7, as to the Royal Exchange Assurance and London Assurance Corporation.

capital to be raised (*f*). Besides such incorporated companies, however, there also grew up a number of joint stock companies, which had not obtained the sanction of a royal charter or a statute, and therefore had no corporate existence (*g*). Such associations were in law nothing more than private partnerships on an extended scale; and every member was liable to the whole extent of his resources, for all the company's debts (*h*). In Queen Victoria's reign, as we shall see, provision was made for the incorporation of all public joint stock companies by registration in accordance with certain statutory requirements (*i*); but such companies as are incorporated by letters-patent or special Act of Parliament still enjoy peculiar privileges. These companies, therefore, first require notice.

Companies incorporated by charter or Act.

The nature and incidents of shares in the joint stock of companies incorporated by letters-patent or Act of Parliament have generally been determined by their respective charters or Acts of incorporation. And in the great majority of cases, and in all the modern charters and Acts of incorporation, the shares are declared to be personal estate, and transmissible as such (*k*). In a few of the older companies, of which the New River Company is an instance (*l*), the shares are real estate in the nature of incorporeal hereditaments. Since the year 1845, however, the incidents of all joint stock companies incorporated by special Act of Parliament have generally been the same. For in that year an Act was passed, called

(*f*) Lindley on Companies, 4, 5th ed.

(*g*) Lindley on Companies, 2, 3, 5th ed.

(*h*) See *Bourne* v. *Freeth*, 9 B. & C. 632; 33 R. R. 275; *Fox* v. *Clifton*, 6 Bing. 776; 31 R. R. 530; *Walburn* v. *Ingilby*, 1 My. & K. 61, 76; *Ex parte Marston*, Mont. & Ch. 576; *Pitchford* v. *Davis*, 5 M. & W. 2.

(*i*) *Post*, p. 331 and n. (*o*).

(*k*) See *ante*, p. 42.

(*l*) *Drybutter* v. *Bartholomew*, 2 P. Wms. 127.

the Companies Clauses Act, "for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature" (*m*); and it was provided (*n*) that the provisions of this general Act should apply to every joint stock company which should thereafter be incorporated by special Act of Parliament, save so far as such provisions should be varied or excepted by the special Act. A uniformity was thus given to the constitution of such companies, and the length of the Acts of Parliament required to establish them was greatly diminished. Since provision has been made by statute for the incorporation of joint stock trading companies by registration (*o*), the companies incorporated by special Act of Parliament have generally been those formed with the object of constructing and carrying on works of public utility, such as railways, tramways, gas or waterworks, docks or canals; especially companies requiring powers to take lands compulsorily for the purposes of their undertakings. Such powers must necessarily be given by the authority of a special Act; but when this authority is obtained, the procedure in the matter of taking the lands is regulated by another general Act of the year 1845, called the Lands Clauses Act (*p*).

Companies Clauses Act, 1845.

Under the Companies Clauses Act, the capital of the company is divided into shares (*q*), which are personal estate and transmissible as such (*r*). A register of shareholders is to be kept (*s*). Certificates

Share certificates.

(*m*) Stat. 8 & 9 Vict. c. 16; extended by 26 & 27 Vict. c. 118; amended by 32 & 33 Vict. c. 48.

(*n*) Stat. 8 & 9 Vict. c. 16, ss. 1, 2.

(*o*) *Ante*, p. 327, and pp. 331, 332, *post*.

(*p*) Stat. 8 & 9 Vict. c. 18, extended by 23 & 24 Vict. c. 106.

(*q*) Stat. 8 & 9 Vict. c. 16, s. 6.

(*r*) Sect. 7.

(*s*) Sect. 9.

of their shares are to be issued to the shareholders (*t*), and are *primâ facie* evidence of their title (*u*). Shares are transferable by deed duly stamped, in which the consideration shall be truly stated (*x*); but the transfer is not complete until the deed, being duly executed and otherwise in order, has been delivered to the secretary of the company for registration (*y*). And no shareholder is entitled to transfer any share not fully paid up, until he shall have paid all calls for the time being due on every share held by him (*z*). The amount of capital subscribed for by each shareholder is payable on calls made by the company (*a*). In default of payment of any call, the shareholder may be sued by the company for the amount of the call (*b*), and his shares may be forfeited (*c*). The remedies of creditors of the company against the shareholders are confined to levying execution against them, by order of the Court, to the extent of their shares in the capital of the company not then paid up, and may be exercised only in case there cannot be found sufficient property or effects of the company whereon to levy execution (*d*). Fully paid up shares may be consolidated into stock (*e*), transferable in the same manner as shares (*f*).

Transfer of shares.

Great inconvenience was experienced in the case of joint stock companies which had not obtained

Inconvenience of unincorporated joint stock companies.

(*t*) Sect. 11.
(*u*) Sect. 12.
(*x*) Sect. 14; see *Powell* v. *London & Provincial Bank*, 1893, 2 Ch. 555. As to the stamp duty payable, see *ante*, p. 75, n. (*c*).
(*y*) Sect. 15; *Nanney* v. *Morgan*, 37 Ch. D. 346.
(*z*) Sect. 16; *Hull* v. *Norfolk Estuary Co.*, 16 Jur. 140; *R.* v. *Londonderry & Coleraine Ry. Co.*, 13 Q. B. 998; *Hubbersty* v. *Manchester, Sheff. & Lin. Ry. Co.*, L. R. 2 Q. B. 471.
(*a*) Sects. 21–24.
(*b*) Sects. 25–27.
(*c*) Stat. 8 & 9 Vict. c. 16, ss. 29–35.
(*d*) Sect. 30; *Hitchins* v. *Kilkenny, &c. Ry. Co.*, 10 C. B. 160; *Devereux* v. *Kilkenny, &c. Ry. Co.*, 5 Ex. 834; *Nixon* v. *Brownlow*, 3 H. & N. 686; *Ilfracombe Ry. Co.* v. *Pollimore*, L. R. 3 C. P. 289; *Lee* v. *Bude, &c. Ry. Co.*, L. R. 6 C. P. 576.
(*e*) Sects. 61–64.
(*f*) Sects. 62, 14.

letters-patent or special Acts of incorporation whenever there was occasion for any legal proceedings between them and any of their shareholders. For such a company, however extensive, was in law merely a partnership; and a partner who owes or is owed money to or by the partnership of which he is a member, evidently owes or is owed a portion of it to or by himself according to his interest in the joint stock. In each case, therefore, an account must be settled before the exact debt or credit of the partner can be ascertained (*g*). In order to obviate the difficulties which thus arose, many joint stock companies obtained special Acts of Parliament, enabling them to sue and be sued in the name of some officer; in such Acts, however, the full liability of the shareholders for the company's debts was always expressly preserved (*h*). And in the year 1837 an Act of Parliament (*i*) was passed empowering the Crown to grant, by letters-patent, charters to companies for any trading or other purposes whatsoever, which, without incorporating such companies, would empower them to sue and be sued in the name of some officer appointed and registered for the purpose. This Act is still in force, and it contains a valuable provision, empowering the Crown to limit, by the letters-patent, the liability of the individual members of the company for its engagements to a given extent per share (*k*).

Letters-patent.

Banking companies.

Banking companies, whose shareholders are generally their customers, were peculiarly subject to the inconvenience above referred to in suing and being sued. Accordingly by modern statutes (*l*), all such

(*g*) See *Richardson* v. *Bank of England*, 4 My. & Cr. 165; *Evans* v. *Stokes*, 1 Keen, 24.

(*h*) Lindley on Companies, 4, 5th ed.

(*i*) Stat. 7 Will. IV. & 1 Viet. c. 73, replacing 4 & 5 Will. IV. c. 94.

(*k*) Stat. 7 Will. IV. & 1 Viet. c. 73, s. 4, replacing 6 Geo. IV. c. 91, s. 2.

(*l*) Stats. 7 Geo. IV. c. 46, s. 9 *sq.*; 1 & 2 Viet. c. 96; extended by 3 & 4 Viet. c. 111; made perpetual by 5 & 6 Viet. c. 85; 27 & 28 Viet. c. 32; see stat. 8 Edw. VII. c. 69, s. 286 (1, d).

banking companies as consisted of more than six members were allowed to appoint some public officer who must sue and be sued on behalf of the company (*m*); but these statutes did not in any way limit the shareholder's liability (*n*).

Incorporation of companies with limited liability, under the Companies Act, 1862.

In the late Queen's reign, after various partial statutory remedies (*o*), provision was made by the Companies Act, 1862 (*p*), for the incorporation of joint stock companies by registration under that Act, and for limiting the liability of the shareholders for the debts of the company, either to the amount unpaid by them on their shares in the capital of the company, or to the amount guaranteed by them under the constitution of the company. This Act was amended by many subsequent statutes; and all these Acts were repealed and their provisions consolidated by the Companies (Consolidation) Act, 1908 (*q*).

Incorporation of companies by registration under the Companies (Consolidation) Act, 1908.

Under this Act any seven or more persons (or, where the company to be formed will be a private company within the meaning of this Act (*r*), any

(*m*) *Chapman* v. *Milvain*, 5 Ex. 61; *Steward* v. *Greaves*, 10 M. & W. 711.

(*n*) See stat. 7 Geo. IV. c. 46, ss. 11–13; *Ex parte Marston*, Mont. & Ch. 576.

(*o*) See stats. 7 & 8 Vict. c. 110, amended by 10 & 11 Vict. c. 78, for the incorporation by registration of commercial and insurance companies, and 7 & 8 Vict. c. 113, for the incorporation by letters-patent of banking companies, under which Acts the shareholders were fully liable to the creditors of the company, though a person's liability ceased at the end of three years after he had ceased to be a shareholder; 18 & 19 Vict. c. 133, enabling joint stock companies to be registered under the Act of 1844 with limited liability, and extended by 19 & 20 Vict. c. 47; 20 & 21 Vict. cc. 14, 49, 80; 21 & 22 Vict. cc. 60, 91; all repealed by 25 & 26 Vict. c. 89.

(*p*) Stat. 25 & 26 Vict. c. 89, ss. 6–9.

(*q*) Stat. 8 Edw. VII. c. 69; see s. 286 and Sixth Schedule, part I. In the pages following references are given in the notes to the provisions of the repealed Companies Acts, which are now replaced by enactments of the Act of 1908.

(*r*) In this Act a private company means a company which by its articles restricts the right to transfer its shares, and limits the number of its members (exclusive of persons who are in

two or more persons) associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of the Acts in respect of registration, form an incorporated company, with or without limited liability (*s*). And any company registered as unlimited may register as a limited company, subject to the provisions of the Act (*t*).

Prohibition of certain unregistered companies and partnerships.

No company, association or partnership of more than ten persons shall be formed for carrying on the business of banking, and no company, association or partnership consisting of more than twenty persons shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by itself or by its individual members (*u*), unless it be registered as a company under this Act or be formed in pursuance of some other Act of Parliament, or of letters-patent; or in the case of a company engaged in working mines, unless it be within and subject to the jurisdiction of the Stannaries (*x*).

Liability may be limited.

The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respec-

the employment of the company) to fifty, and prohibits any invitation to the public to subscribe for any shares or debentures of the company; stat. 8 Edw. VII. c. 69, s. 124 (1), replacing 7 Edw. VII. c. 50, s. 37 (1). As to the privileges and exemptions given to private companies, see stat. 8 Edw. VII. c. 69, ss. 20 (3), 65 (10), 72 (3), 82 (2), 85 (7), 87 (6), 114 (2). A private company may turn itself into a public company; see sect. 121 (2). And a public company may turn itself into a private company by complying with the conditions of the Act in respect of private companies.

(*s*) Stat. 8 Edw. VII. c. 69, s. 2, replacing 25 & 26 Vict. c. 89, s. 6; see *Salomon* v. *Salomon & Co.*, 1897, A. C. 22.

(*t*) Stat. 8 Edw. VII. c. 69, s. 57, replacing 42 & 43 Vict. c. 76, s. 4. But a bank of issue registered as a limited company shall not be entitled to limited liability in respect of its notes; stat. 8 Edw. VII. c. 69, s. 251, replacing 42 & 43 Vict. c. 76, s. 6.

(*u*) See *Smith* v. *Anderson*, 15 Ch. D. 247; *Re Padstow Total Loss and Collision Assurance Association*, 20 Ch. D. 137; *Jennings* v. *Hammond*, 9 Q. B. D. 225; *Shaw* v. *Benson*, 11 Q. B. D. 563.

(*x*) Stat. 8 Edw. VII. c. 69, s. 1, replacing 25 & 26 Vict. c. 89, s. 4.

tively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up. In the former case the company is said to be limited by shares; and in the latter to be limited by guarantee (*y*). And the liability of the directors or managers, or managing director of a limited company may, if so provided by the memorandum of association or fixed by special resolution, be unlimited (*z*).

Company may have directors with unlimited liability.

The memorandum of association must (amongst other things) state the name, situation and objects of the company (*a*), and the amount of its capital, if limited by shares (*b*), or of the members' liability, if limited by guarantee (*c*). The memorandum may, in the case of a company limited by shares, and must in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing regulations for the company. These articles may adopt all or any of the regulations contained in Table A, in the first schedule to the Act, which is a form of regulations for the management of a company limited by shares. And in the case of such a company, if articles are not registered, or if

Memorandum and articles of association.

(*y*) Stat. 8 Edw. VII. c. 69, s. 2, replacing 25 & 26 Vict. c. 89, s. 7; see stat. 8 Edw. VII. c. 69, ss. 4, 21, as to companies limited by guarantee.

(*z*) Stat. 8 Edw. VII. c. 69, ss. 60, 61, 123 (2), 165 (2), replacing 30 & 31 Vict. c. 131, ss. 4—8.

(*a*) See stat. 8 Edw. VII. c. 69, s. 9, replacing 53 & 54 Vict. c. 62, ss. 1, 2, as to altering the objects of a company.

(*b*) The capital of a company limited by shares may be reduced with the sanction of the Court, and in certain other ways; stat. 8 Edw. VII. c. 69, ss. 40, 41 (1, c), 46—55, replacing 30 & 31 Vict. c. 131, ss. 9—20; 40 & 41 Vict. c. 26, ss. 3—5; 43 Vict. c. 19, ss. 3—6; *British, &c. Finance Corporation* v. *Cowper*, 1894, A. C. 399.

(*c*) Stat. 8 Edw. VII. c. 69, ss. 3, 4, 5, replacing 25 & 26 Vict. c. 89, ss. 8, 9, 10; see note (*y*) above.

articles are registered, then in so far as they do not exclude or modify the regulations in Table A., those regulations shall, so far as applicable, be the regulations of the company in the same manner as if they were contained in registered articles (*d*). The memorandum and articles, if any, are to be registered by the Registrar of Companies, who is to certify under his hand that the company is incorporated; and thereupon the company will be incorporated as from the date mentioned in the certificate (*e*). And the certificate of incorporation is conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto, have been complied with, and that the association is a company authorised to be registered and duly registered under the Act (*f*).

Registration.

Company incorporated.

Issue and allotment of shares.

When a company limited by shares has been registered, the shares authorised by the memorandum, or some of them, are issued and are allotted to the persons who have agreed or may agree to take them (*g*). A person who agrees to take shares in such a company comes under an obligation to pay to the company the amount of the shares allotted to him; for example, 10*l*. for each share, or whatever other sum has been fixed as the amount

(*d*) Stat. 8 Edw. VII. c. 69, ss. 10, 11, replacing 25 & 26 Vict c. 69, ss. 14, 15.

(*e*) Stat. 8 Edw. VII. c. 69, ss. 15, 16, replacing 25 & 26 Vict. c. 89, ss. 17, 18.

(*f*) Stat. 8 Edw. VII. c. 69, s. 17, replacing 63 & 64 Vict. c. 48, s. 1 (1), which amended 25 & 26 Vict. c. 89, s. 18, as interpreted in *Re National Debenture and Assets Corporation*, 1891, 2 Ch. 505; see also *Re Laxon & Co.*, 1892, 3 Ch. 555.

(*g*) But before any allotment of share capital can effectually be made, the conditions of the Act as to issuing a prospectus or a statement in lieu of prospectus, and as to the required minimum subscription of share capital being made, must be complied with. Private companies, however, are exempt from these conditions; and companies, which have allotted any shares or debentures before the 1st of July, 1908, are exempt from some of them; see stat. 8 Edw. VII. c. 69, ss. 80—86, replacing 63 & 64 Vict. c. 48, ss. 4, 5, 9, 10; 7 Edw. VII. c. 50, ss. 1—3.

of the share (*h*). The time or times for payment of this amount is usually fixed by the terms of the contract to take the shares; and very frequently payment of the whole amount of the share is not immediately required, in which case the shareholder remains under a liability to pay the balance unpaid whenever it shall be called for. When the amount of the share has been fully paid up, there is no further liability on the shareholder. Under the Companies Act, 1862 (*i*), it was not necessary that shares allotted should be paid for in *money*; an agreement to take shares in consideration of *money's worth* was perfectly valid, and was not required to be attended with any particular formality. Thus, if shares were allotted to a man as fully paid up in consideration of services rendered by him, or as the price of property sold by him, his liability for the amount of the shares was equally well discharged as by payment in money (*k*). And the same law was applicable if, for a like valuable consideration, shares were allotted as partly paid up to an amount specified; the shareholder being then liable only for balance of the amount of the share (*l*). But by section 25 of the Companies Act, 1867 (*m*), every share in any company was to be deemed to have been issued subject to the payment of the whole amount thereof *in cash* (*n*), unless the same should

(*h*) See stat. 8 Edw. VII. c. 69, ss. 14, 123, and Table A., rr. 9—17, replacing 25 & 26 Vict. c. 89, ss. 16, 38; *Ooregum, &c. Co.* v. *Roper*, 1892, A. C. 125, 134—137, 145; *Welton* v. *Saffery*, 1897, A. C. 299.

(*i*) Stat. 25 & 26 Vict. c. 89.

(*k*) *Drummond's case*, L. R. 4 Ch. 772, 779; *Pell's case*, L. R. 5 Ch. 11; *Re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346; and see *Re Wragg, Limited*, 1897, 1 Ch. 796.

(*l*) See same cases.

(*m*) Stat. 30 & 31 Vict. c. 131.

(*n*) It was held, however, that any transaction which would support a plea of payment in an action at law for calls on the shares, was equivalent to "payment in cash;" so that where a company was indebted in a sum immediately payable to a shareholder liable on his shares, there was no occasion to make actual payments in satisfaction of the liabilities on both sides, but the amount of the debt might be set off *pro tanto* against the amount due on the shares; *Spargo's case*, L. R. 8 Ch. 407; *Ferrar's case*,

have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Companies at or before the issue of such shares. Under this Act, the shareholder's liability for the amount payable in respect of his shares might still be satisfied by the company's acceptance of any valuable consideration in the nature of money's worth instead of payment in cash, if so provided in a written contract duly filed (*o*); and the nature of such consideration was required to appear on the face of the written contract: otherwise the shareholder was liable for the amount of the shares (*p*). But it was held that a company might not issue fully paid up shares at a discount, or without any valuable consideration, even though a written contract to that effect were registered (*q*). Section 25 of the Companies Act, 1867 (*r*), was repealed by the Companies Act, 1900 (*s*); and such repeal was maintained by the Act of 1908 (*t*). By this Act (as under the Act of 1900) certain contracts in writing or other particulars are required to be filed within one month after the allotment by a company limited by shares of any shares allotted as fully or partly paid up otherwise than for cash. But default in compliance with these requirements only subjects every director or other officer of the company, who is knowingly a party thereto, to a heavy penalty (*u*); and does not render the share-

L. R. 9 Ch. 355; *Kent's case*, 39 Ch. D. 259; *Re Jones, Lloyd & Co.*, 41 Ch. D. 159; see *Re Johannesburg Hotel Co.*, 1891, 1 Ch. 119; *Larocque* v. *Beauchemin*, 1897, A. C. 358.

(*o*) *Re Wragg, Limited*, 1897, 1 Ch. 796.

(*p*) *Re Kharaskhoma, &c. Syndicate*, 1897, 2 Ch. 451; *Markham and Butler's case*, 1899, 2 Ch. 480. Stat. 61 & 62 Vict. c. 26, enabled the Court to remedy the omission through accident or inadvertence to file a sufficient contract.

(*q*) *Oregum, &c. Co.* v. *Roper*, 1892, A. C. 125; *Re Eddystone, &c. Co.*, 1893, 3 Ch. 9; *Welton* v. *Saffery*, 1897, A. C. 299.

(*r*) Stat. 30 & 31 Vict. c. 131.

(*s*) Stat. 63 & 64 Vict. c. 48, s. 33; see *Re Bratton and Barney, Limited*, 1901, 1 Ch. 637.

(*t*) Stat. 8 Edw. VII. c. 69, s. 286.

(*u*) Stat. 8 Edw. VII. c. 69, s. 88, replacing 63 & 64 Vict. c. 48, s. 7.

holder liable to pay the amount of the shares so allotted to him. Under the present law, therefore, if for valuable consideration in money's worth a man agree to take shares as fully or partly paid up, he is under no liability on the fully paid shares, and is only liable for the balance agreed as unpaid on the partly paid-up shares, although no contract be filed (*x*). But if shares be issued to him at a discount, or for no valuable consideration at all, he will be liable for the amount of the discount or the whole amount of the shares, as the case may be (*y*). A person, who has agreed to take shares, otherwise than by subscribing the memorandum of association, does not become a full member of the company until his name has been entered in the register of members, which is required to be kept (*z*).

Calls on shares.

Any money remaining unpaid of the amount of any shares allotted may be called up by the company, and the members sued (*a*), and their shares forfeited in accordance with the articles of association for non-payment of calls (*b*). Fully paid-up shares may be converted into stock (*c*). A certificate under

(*x*) See cases cited in notes (*k*), (*n*), to p. 335, *ante*; *Gardner* v. *Iredale*, 1912, 1 Ch. 700, 716. But a company may not commence any business or exercise any borrowing power unless (amongst other conditions) shares held subject to the payment of the whole amount thereof in cash have been allotted to an amount not less in the whole than the minimum subscription required. These conditions do not apply to a private company, or to a company registered before the 1st Jan., 1901, or to a company registered before the 1st July, 1908, which does not issue a prospectus inviting the public to subscribe for its shares; stat. 8 Edw. VII. c. 69, s. 87, replacing 63 & 64 Vict. c. 48, s. 6; see *ante*, p. 334, n. (*g*).

(*y*) *Ante*, p. 336, and n. (*q*); and see stat. 8 Edw. VII. c. 69, s. 89, allowing certain commissions for underwriting shares, and replacing 63 & 64 Vict. c. 48, s. 8, amended by 7 Edw. VII. c. 50, s. 8.

(*z*) Stat. 8 Edw. VII. c. 69, ss. 24, 25, replacing 25 & 26 Vict. c. 89, ss. 23, 25; *Nicol's case*, 29 Ch. D. 421.

(*a*) Calls are specialty debts; stat. 8 Edw. VII. c. 69, s. 14, replacing 25 & 26 Vict. c. 89, ss. 11, 16.

(*b*) See stat. 8 Edw. VII. c. 69, 1st Sched., Table A., rr. 9—17, 24—30.

(*c*) Sects. 42, 43 and Table A., rr. 31—34, replacing 25 & 26 Vict. c. 89, ss. 28, 29, and Table A., rr. 31—34.

the common seal of the company specifying any share or shares or stock held by any member is *primâ facie* evidence of his title thereto (*d*). Shares in companies registered under the Companies Act of 1862 or 1908 are personal estate, transferable in manner provided by the articles of the company (*e*). Transfers are sometimes required to be made by deed, sometimes by writing only; and they are not generally complete, so as to pass the legal interest in the shares, until registered at the office of the company (*f*). The transferor is entitled to compel the registration of a transfer made by him of his shares to any person; unless, as is often the case, the articles empower the directors to reject a transfer to any person whom they do not approve, or of shares on which they have a lien, or in other circumstances (*g*). Share warrants to bearer, transferable by delivery, may be issued in respect of any fully paid-up shares or stock (*h*).

Shares personal estate.

Transfers of shares.

Winding-up of companies.

Creditors of companies registered under the Companies Act of 1862 or 1908 have no direct remedy against the shareholders (*i*); but companies may, if unable to pay their debts and in some other cases, be wound up by the Court, and companies

(*d*) Stat. 8 Edw. VII. c. 69, s. 23, replacing 25 & 26 Vict. c. 89, s. 31. See *Re Ottos Kopje Diamond Mines, Ld.*, 1893, 1 Ch. 618; *Balkis Consolidated Co.* v. *Tomkinson*, 1893, A. C. 396; *Longman* v. *Bath Electric Tramways, Ld.*, 1905, 1 Ch. 646.

(*e*) Stat. 8 Edw. VII. c. 69, s. 22, replacing 25 & 26 Vict. c. 89, s. 22.

(*f*) See stat. 8 Edw. VII. c. 69, 1st Sched., Table A., rr. 18, 19; *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North Western Bank*, 1891, 2 Ch. 599; *Dolan* v. *Hart*, 1902, 1 Ch. 522; *Rainford* v. *James Keith, &c., Ld.*, 1905, 1 Ch. 296; 2 Ch. 147. As to the stamp duty on transfers of shares, see *ante*, p. 75, n. (*c*).

(*g*) *Weston's case*, L. R. 4 Ch. 20, 27; *Re Discoverers Finance Corporation, Ld.*, 1910, 1 Ch. 207, 312; see stat. 8 Edw. VII. c. 69, 1st Sched., Table A., r. 20; *Borland's trustee* v. *Steel*, 1901, 1 Ch. 279.

(*h*) Stat. 8 Edw. VII. c. 69, s. 37 and 1st Sched., Table A., rr. 35–40, replacing 30 & 31 Vict. c. 131, ss. 27–33.

(*i*) *Risdon, &c., Works* v. *Furness*, 1906, 1 K. B. 49.

may be wound up voluntarily or subject to the supervision of the Court as provided by the Act of 1908 (*j*). And in the event of a company being wound up, every past and present member is liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the expenses of the winding-up, and for the adjustment of the rights of the contributories among themselves. But a past member is not liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding-up (*k*), or in respect of any debt or liability of the company contracted after he ceased to be a member, or unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act (*l*). In the case of a company limited by shares, no contribution is to be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as a present or past member. In the case of a company limited by guarantee, no contribution is to be required from any member exceeding the amount undertaken to be contributed by him in the event of the company being wound up (*m*). Nothing in the Act is to invalidate any provision contained in any policy of insurance or other contract, whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract. And a sum due to any member

Liability of shareholders on the company being wound up.

(*j*) Stat. Edw. VII. c. 69, Part V., ss. 122 *sq.*, 129, 182, 199, replacing 25 & 26 Vict. c. 89, ss. 79 *sq.*, 129 *sq.*, 147 *sq.*, and 53 & 54 Vict. c. 63; see the Companies Winding-up Rules, 1909. As to the priority of debts in winding-up companies, see *ante*, p. 244.

(*k*) *Re Discoverers Finance Corporation, Ld.*, 1910, 1 Ch. 207, 212.

(*l*) This applies to all companies including those limited by guarantee; *Re Premier Underwriting Association, Ld.* (No. 1), 1913, 2 Ch. 29.

(*m*) See *ante*, p. 333.

of a company, in his character of a member, by way of dividends, profits or otherwise, is not to be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company; but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributories among themselves (*n*). The liabilities of the contributories in the winding-up of a company by the Court are enforceable upon calls made by the liquidator (who is the person appointed to conduct the winding-up), with the sanction of the committee of inspection chosen from among the creditors and contributories or persons holding general powers of attorney from them, or with the leave of the Court; and the amounts due upon such calls are recoverable by order of the Court to be made in the matter of the winding-up in chambers upon summons by the liquidator, or by action brought by the liquidator in the company's name (*o*). In the voluntary winding-up of a company, the contributories' liabilities are enforceable, upon calls made by the liquidators, by the like remedies (*p*).

Liquidator.

Equitable interests in shares may be created and transferred in the same manner, and are governed by the same rules as equitable interests in other personal property (*q*). And a valid equitable charge

Equitable interests in shares.

(*n*) Stat. 8 Edw. VII. c. 69, s. 123 (1), replacing 25 & 26 Vict. c. 89, s. 38.

(*o*) See stat. 8 Edw. VII. c. 69, ss. 125, 149–151, 199, 166, 173; the Companies (Winding-up) Rules, 1903, Nos. 83, 87; replacing 25 & 26 Vict. c. 89, ss. 75, 92–102, 120; 53 & 54 Vict. c. 63, s. 4, 6, 9, 12, 13; Winding up Rules, 1903, Nos. 80–90; *Westmoreland, &c., Co.* v. *Fielden*, 1891, 3 Ch. 15.

(*p*) Stat. 8 Edw. VII. c. 69, s. 186 (v.), 193, 203, replacing 25 & 26 Vict. c. 89, ss. 133 (9), 138, 151; *Re Whitehouse & Co.*, 9 Ch. D. 595.

(*q*) *Ante*, pp. 26–28; *France* v. *Clark*, 22 Ch. D. 830; 26 Ch. D. 257; *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Nanney* v. *Morgan*, 37 Ch. D. 346; *Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *North Western Bank*, 1891, 2 Ch. 599; *Powell* v.

on shares may be created by deposit of the share certificates (*r*). Such deposits are frequently accompanied by a blank transfer of the shares; that is, an instrument of transfer with the transferee's name left blank. In such case, if the shares are transferable by instrument in writing merely (*s*), and not by deed, the deposit of the share certificates and blank transfer may operate as a valid authority to the person, to whom they are handed, to fill up the name of the transferee and so procure himself or his nominee to be registered as the shareholder (*t*). But where the shares are transferable only by deed (*u*), a transfer executed with a blank for the transferee's name is void as a deed for uncertainty, and cannot be made valid by the subsequent insertion of the name of a transferee, unless it be re-executed by the transferor; and the holder of the blank transfer has no power to re-execute it on the transferor's behalf, unless authorised *by deed* to do so (*x*). The mortgagee of shares under an equitable mortgage by deposit of the share certificates has, in the absence of an express power of sale, an implied power to sell the shares on default by the mortgagor in payment of the amount due at the time appointed for payment, or if no time be fixed, then on the expiration of a reasonable notice by the mortgagee requiring payment on a certain day (*y*). It will be seen that the registered

Blank transfers.

Power of sale by mortgagee of shares.

London & Provincial Bank, 1893, 2 Ch. 555; *Ireland* v. *Hart*, 1902, 1 Ch. 522; *Peat* v. *Clayton*, 1906, 1 Ch. 659.

(*r*) See the cases cited in the previous note and note (*t*) below, and *Colonial Bank* v. *Whinney*, 11 App. Cas. 426; *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29.

(*s*) See *ante*, p. 338.

(*t*) *Sargent's case*, L. R. 17 Eq. 273; *France* v. *Clark*, 22 Ch. D. 830, 26 Ch. D. 257; *Ireland* v. *Hart*, 1902, 1 Ch. 522, 527, 528; *Stubbs* v. *Slater*, 1910, 1 Ch. 195, 198, 632; *Fry* v. *Smellie*, 1912, 3 K. B. 282, 286.

(*u*) See *ante*, pp. 320, 338.

(*x*) *Hibblewhite* v. *McMorine*, 6 M. & W. 200; *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20; *Powell* v. *London & Provincial Bank*, 1893, 2 Ch. 555.

(*y*) *Deeregea* v. *Sanderman*, 1902, 1 Ch. 579; *Stubbs* v. *Slater*, 1910, 1 Ch. 632.

holder of shares is not necessarily their beneficial owner. Companies regulated by the Companies Clauses Act are not bound to see to the execution of any trust, to which any of their shares may be subject, and are discharged by the registered shareholder's receipt, whether they have notice of any such trust or not (*z*). And no notice of any trust is to be entered on the register of any company registered in England or Ireland under the Companies Act of 1862 or 1908 (*a*). But notice in lieu of *distringas* may be served on behalf of any person claiming to be interested in any shares or stock standing in the books of any public company (*aa*), whether incorporated or not, and the dividends thereon (*b*), with the like effect as in the case of government stock (*c*).

Notice in lieu of *distringas*.

Shares in joint stock companies were not *goods, wares*, or *merchandise* within the 17th section of the Statute of Frauds (*d*), and they appear to be things in action (*e*) within the meaning of the Sale of Goods Acts, 1893 (*f*); so that they do not require a written memorandum for a contract for their sale, when the value exceeds 10*l*., and the buyer does not accept and receive any part, nor give something in earnest to bind the bargain or in part-payment. But the sale of shares in joint stock banks is now void unless the contract shall set forth in writing the numbers of the shares in the register of the company, or where there is no register by distinguishing numbers, then the names of the registered

Sale of shares not within the Statute of Frauds.

Shares in joint stock banks.

(*z*) Stat. 8 & 9 Vict. c. 16, s. 20.

(*a*) Stat. 8 Edw. VII. c. 69, s. 27, replacing 25 & 26 Vict. c. 89, s. 30; see *Bradford Banking Co.* v. *Briggs*, 12 App. Cas. 29; *Rainford* v. *James Keith, &c., Ltd.*, 1905, 2 Ch. 147.

(*aa*) See next page.

(*b*) R. S. C. 1883, Order XLI. rr. 3, 4, and 4*a* (W. N. 5th Oct., 1888).

(*c*) *Ante*, pp. 319, 320.

(*d*) *Humble* v. *Mitchell*, 11 Ad. & Ell. 205; *Knight* v. *Barber*, 16 M. & W. 66; *Bentley* v. *Bell*, 3 C. B. 281. See *ante*, p. 80, and n. (*q*).

(*e*) *Ante*, p. 13.

(*f*) Stat. 56 & 57 Vict. c. 71, ss. 4, 62; *ante*, pp. 72, n. (*p*), 80, 81.

proprietors of the shares at the time of making the contract (*g*). And the above mentioned requirements of the Finance Act, 1910, as to contract notes on sales extend to shares in companies in the United Kingdom or elsewhere (*h*).

Contract notes on sale of shares.

The provisions above referred to for charging the stock of any debtor with the payment of any judgment debt (*i*) extend to stock and shares in any *public* company in England, whether incorporated or not (*k*). It has been held that any company incorporated under the Companies Acts of 1862 or 1908 is a public company, even though it be a private company as defined in the latter of these Acts (*l*). And a trustee in bankruptcy may transfer the bankrupt's shares, to the same extent as the bankrupt himself might have transferred the same, as we have seen (*m*). The power of a trustee in bankruptcy to disclaim the bankrupt's shares or stock in companies, in case the same should be more onerous than profitable, has also been noticed (*n*). Shares have been held to be things in action, so as to be excluded from the operation of the reputed ownership clauses of the bankruptcy law (*o*).

Judgment debts.

Bankrupt's shares.

In connection with stocks and shares may be mentioned securities negotiable on the Stock Exchange, and debentures. According to English law, a negotiable instrument (*p*) cannot, as a general rule, be created by a contract under seal (*q*). But

Securities negotiable on the Stock Exchange.

(*g*) Stat. 30 Vict. c. 29, known as Lzemann's Act; *see Perry* v. *Barnett*, 15 Q. B. D. 388.

(*h*) *Ante*, p. 318, and n. (*h*).

(*i*) *Ante*, pp. 320–322.

(*k*) Stat. 1 & 2 Vict. c. 110, s. 14. *See Nickalls* v. *Bonnaire*, 6 C. B. N. S. 180; *Cooper* v. *Griffin*, 1892, 1 Q. B. 740; *Howard* v. *Sadler*, 1893, 1 Q. B. 1.

(*l*) *Re* B. *Kite*, 1913, 1 Ch. 231; *see ante*, p. 331, and n. (*e*).

(*m*) *Ante*, p. 282.

(*n*) *Ante*, p. 281.

(*o*) *Colonial Bank* v. *Whinney*, 11 App. Cas. 426; *ante*, pp. 253, 281.

(*p*) *Ante*, p. 24.

(*q*) *Goodwin* v. *Credit Foncier of England*, L. R. 8 Q. B. 451–482, 381.

there are various securities which by established mercantile usage (*r*) are transferable by delivery like money, and are recognised as negotiable instruments by law; so that any person may acquire a good title thereto who takes them in valuable consideration in good faith, notwithstanding any defect in the title of the person from whom he took them. Such are the securities of foreign governments expressed to be payable to bearer and generally known as bonds (*s*); the scrip of loans to foreign governments entitling the bearer thereof to a bond for the amount mentioned therein when issued by the government (*t*); and scrip certificates issued by railway, mining, banking, gas, water, and other companies in contemplation of the allotment of shares, and entitling the bearer on payment of the sum mentioned therein to the number of shares specified therein (*u*). And the same principle has been extended to the debentures made payable to bearer, or so-called debenture bonds, of English or foreign companies, even though created by deed (*x*).

Debentures.

Debentures is the name generally given to instruments made under the seal of a joint stock company, whereby the company charge themselves or their

(*r*) See *ante*, p. 24; *Goodwin* v. *Roberts*, 1 App. Cas. 476; *Colonial Bank* v. *Williams*, 15 App. Cas. 267; *London Joint Stock Bank* v. *Simmons*, 1892, A. C. 201; *Venables* v. *Baring Bros.*, 1893, 3 Ch. 527.

(*s*) *Gorgier* v. *Mieville*, 3 B. & C. 45; 27 R. R. 290 (Prussian bonds); *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171, 180, 190 (Russian, Danish and Dutch bonds); *Williams* v. *Att.-Gen.*, 1910, A. C. 27; see *Picker* v. *London and County Bank*, 18 Q. B. D. 515.

(*t*) *Goodwin* v. *Roberts*, 1 App. Cas. 476; see also *Easton* v. *London Joint Stock Bank*, 34 Ch. D. 95; reversed 13 App. Cas. 333; explained 1892, A. C. 201.

(*u*) *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194, 196; *Edelstein* v. *Schuler*, 1902, 2 K. B. 144.

(*x*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, 1898, 2 Q. B. 658. We have seen that the above-mentioned requirements of the Finance Act, 1910, as to *contract notes on sales extend to any marketable security as thereby defined; *ante*, p. 318, and n. (*b*). As to the stamp duty on marketable securities, see stat. 54 & 55 Vict. c. 39, First Schedule, amended by 61 & 62 Vict. c. 46, s. 7 (3); 62 & 63 Vict. c. 9, s. 4; 10 Edw. VII. c. 8, s. 76; 1 & 2 Geo. V. c. 48, s. 13.

*Contract notes on sale of and stamps on marketable securities

property, or both, in favour of specified persons or of the bearer with the repayment of money borrowed by them under their statutory powers to increase their capital by borrowing money (*y*). The question whether debentures give a charge on the property of the company depends upon the expressions used and intention declared therein (*z*). Debentures frequently create what is called a floating security, giving the debenture holders an equitable charge on the assets of the company for the time being (*a*), but permitting of the free disposal of the company's property by the directors in the ordinary way of business (*b*) until the debenture holders take proceedings to realise their security by the appointment of a receiver to act on their behalf (*c*), or a winding-up of the company is commenced (*d*); in either of

Floating security.

(*y*) See *British Steam Navigation Company* v. *Commissioners of Inland Revenue*, 7 Q. B. D. 165, 168, 172; *Edmonds* v. *Blaina Furnaces Co.*, 36 Ch. D. 215; *Levy* v. *Abercorris Slate and Slab Co.*, 37 Ch. D. 260; *Re Herring*, 1898, 2 Ch. 493.

(*z*) See *Gardner* v. *London, Chatham and Dover Ry. Co.*, L. R. 2 Ch. 201; *Re Panama, &c., Royal Mail Co.*, L. R. 5 Ch. 318; *Re Florence Land, &c. Co.*, 10 Ch. D. 530.

(*a*) *Driver* v. *Broad*, 1893, 1 Q. B. 539, 744 (as to which, see now stat. 8 Edw. VII. c. 69, s. 93 (i., iv.)); *Wallace* v. *Evershed*, 1899, 1 Ch. 891.

(*b*) See *Wheatley* v. *Silkstone, &c., Co.*, 29 Ch. D. 715; *Re Horsley and Hollard*, 49 Ch. D. 736; *Cox Moore* v. *Peruvian Corporation, Ltd.*, 1908, 1 Ch. 604; *Re Ind, Coope & Co., Ltd.*, 1911, 2 Ch. 223. Such debentures sometimes prohibit the creation of any mortgage or charge in priority to the debenture-holders' security; see *Brunton* v. *Electrical Engineering Corporation*, 1892, 1 Ch. 434; *English, &c., Investment Co.* v. *Brunton*, 1892, 1 Q. B. 1, 700; *Wilson* v. *Kelland*, 1910, 2 Ch. 306. The company's execution creditors take subject to the equities of the debenture-holders under a floating security; but the security must definitely attach as a fixed charge on the company's assets before the execution is completed in order to entitle the debenture-holders to claim the property taken in execution in priority to the execution creditors; *Re Opera, Ld.*, 1891, 3 Ch. 260; *Evans* v. *Rival Granite Quarries, Ld.*, 1910, 2 K. B. 979.

(*c*) See *Government Stock, &c., Co.* v. *Manila Ry. Co.*, 1897, A. C. 81; *Edward Nelson & Co., Ld.* v. *Faber*, 1903, 2 K. B. 367. As to the debenture-holders right so to realise their security when it is in jeopardy, see *Re Victoria Steamboats, Ld.*, 1897, 1 Ch. 158; *Re London Pressed Hinge Co.*, 1905, 1 Ch. 576; cf. *Re New York Taximeter Co., Ld.*, 1913, 1 Ch. 1.

(*d*) *Re Florence Land, &c., Co.*, 10 Ch. D. 530, 541; *Re Colonial Trusts Corporation*, 15 Ch. D. 472.

Debenture stock.

which events the floating security becomes a fixed charge on the company's assets, or (as the term is) "crystallizes" (*e*). Debenture stock is a kind of funded debt of a company secured upon the company's assets (*f*). Debentures or debenture stock cannot be made the subject of a charging order (*g*).

Patents.

The prerogative of the Crown, which, as we have seen, was formerly exercised in the grant of letters patent for the incorporation of companies, is also used for conferring on private individuals certain exclusive rights and privileges. These rights, called *patents* from the letters patent which confer them, will be considered in the next chapter.

Registration required of mortgages to secure debentures or being floating charges.

(*e*) *Evans* v. *Rival Granite Quarries, Ltd.*, 1910, 2 K. B. 979, 997, 999. Since the Companies Act, 1900, now replaced by the Companies (Consolidation) Act, 1908, every mortgage or charge created by a company registered in England or Ireland, and being either for the purpose of securing any issue of debentures or a floating charge on the undertaking or property of the company, has been required to be registered at the office of the Registrar of Companies within twenty-one days after the date of its creation; otherwise it is made void, so far as any security on the company's property or undertaking is thereby conferred, as against the liquidator and any creditor of the company, but without prejudice, as regards such charges created on or after the 1st of July, 1908, to any contract or obligation for repayment of the money thereby secured; stat. 8 Edw. VII. c. 69, s. 93, replacing 7 Edw. VII. c. 50, s. 10 and 63 & 64 Vict. c. 48, s. 11; see *Illingworth* v. *Houldsworth*, 1904, A. C. 355. A floating charge created within three months of the commencement of the winding-up of the company is invalid, unless it is proved that the company immediately after the creation of the charge was solvent; except to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge, with interest thereon at £5 per cent. per annum; stat. 8 Edw. VII., c. 69, s. 212; see *Re Columbian Fire Proofing Co., Ld.*, 1910, 2 Ch. 120; *Re Orleans Motor Co., Ld.*, 1910, 2 Ch. 11.

(*f*) *Re Badman*, 1891, 3 Ch. 135; *Re Herring*, 1908, 2 Ch. 193.

(*g*) *Sellar* v. *Charles Bright & Co., Ld.*, 1904, 2 K. B. 116; *ante*, pp. 321, 322.

CHAPTER VII.

OF PATENTS AND COPYRIGHTS.

§ 1. *Of Patents.*

A PATENT is the name usually given to a grant from the Crown, by letters-patent, of the exclusive privilege of making, using, exercising, and vending some new invention. The granting of such letters-patent is an ancient prerogative of the Crown, a prerogative which remains unaffected by the Patents Act of 1907 (*a*). In the reign of Queen Elizabeth this prerogative was stretched far beyond its due limits, so as to extend to the exclusive buying and selling of ordinary commodities, and the monopolies thus created formed one of the grievances which King James, her successor, was at last obliged to remedy. Accordingly, by the first section of a statute passed in the twenty-first year of his reign, and commonly called the Statute of Monopolies (*b*), it was declared and enacted that all such monopolies were altogether contrary to the laws of this realm, and so were, and should be, utterly void and of none effect. In this statute, however, there are certain exceptions, and particularly one on which the modern law with respect to patents may be said to be founded. This exception is contained in the sixth section, which runs as follows: —

A patent.

Statute of Monopolies.

"Provided also that any declaration before mentioned shall not extend to any letters-patent and grants of privilege

Proviso.

(*a*) Stat. 7 Edw. VII. c. 29, s. 16, s. 97, replacing 16 & 17 Vict. c. 57, s. 116; 15 & 16 Vict. c. 83, s. 41.

(*b*) Stat. 21 Jac. I. c. 3.

for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters-patent and grants shall not use, so as also they be not contrary to the law nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent or grant of such privilege hereafter to be made: but that the same shall be of such force as they should be if this Act had never been made, and of none other."

It will be seen that the granting of letters-patent is not expressly warranted by this statute; but that it merely reserves to such letters-patent as fall within the terms of the exception such force as they should have had if the Act had never been made, and none other force. Since, however, all grants of exclusive privilege by letters-patent not falling within this and certain other exceptions of little importance (*c*), are now rendered void by the statute, the construction of this exception has become a matter of great practical importance. And it is declared in the Patents Act of 1907 (*d*), by which the law relating to the grant of letters-patent for an invention is now regulated, that, in that Act, "invention" means any manner of new manufacture the subject of letters-patent and grant of privilege within section 6 of the Statute of Monopolies (*e*), and includes an alleged invention.

Invention.

Term of patent fourteen years.

And, first, the term must be *fourteen* years from the date of the letters-patent, or under; and the full term of fourteen years has been usually granted. By the Patents Act of 1907 (*f*), the term limited in

(*c*) Stat. 21 Jac. I. c. 3, ss. 7, 9.
(*d*) Stat. 7 Edw. VII. c. 29, s. 93. Procedure under the Act is now governed by the Patents Rules, 1908; Stat. R. & O. 1907, p. 779.
(*e*) Stat. 21 Jac. I. c. 3.
(*f*) Stat. 7 Edw. VII. c. 29, s. 17, sub-s. 1.

every patent for the duration thereof must, save as otherwise expressly provided by the Act, be fourteen years from its date; but every patent shall, notwithstanding anything therein or in the Act, cease if the patentee fails to pay the prescribed fees within the prescribed times (*g*). But the Comptroller, upon the application of the patentee, must, on receipt of the prescribed additional fee, not exceeding 10*l*., enlarge the time to such an extent not exceeding three months as may be applied for (*h*). And after the lapse of the patent for failure to pay the fees, the Comptroller can, on the patentee's application, if the omission was unintentional, and no undue delay has occurred in making the application, restore the patent; if he dismisses the application, an appeal lies to the Court (*i*). The fees now payable in respect of letters-patent, are prescribed by the Patents Rules, 1908 (*k*), and the principal payments thereby required to be made are stated in the note (*l*). A patent of addition may be granted in respect of an improvement in or modification of the original

Restoration of patent.

Patent of addition.

(*g*) Stat. 7 Edw. VII. c. 29, s. 17, sub-s. 2.
(*h*) Sect. 17, sub-s. 2.
(*i*) Stat. 7 Edw. VII. c. 29, s. 20; *Re Land's Patent*, 1910, 2 Ch. 236.
(*k*) Rules 4, 55, and First Schedule; see stat. 7 Edw. VII. c. 29, s. 65.

	£	*s.*	*d.*	£	*s.*	*d.*
(*l*) On application accompanied by provisional specification	1	0	0			
On filing complete specification thereafter	3	0	0			
				4	0	0
Or, On application accompanied by complete specification				4	0	0
On certificate of renewal:—						
Before the expiration of the 4th year from the date of the patent .				5	0	0
5th " " " . .				6	0	0
6th " " " . .				7	0	0
7th " " " . .				8	0	0
8th " " " . .				9	0	0
9th " " " . .				10	0	0
10th " " " . .				11	0	0
11th " " " .				12	0	0
12th " " . . .				13	0	0
13th " " " . .				14	0	0

invention, and the term may be limited to the unexpired residue of the original patent (*m*).

Extension of term of patent.

By the Patents Act of 1907, the person for the time being entitled to the benefit of a patent (*n*), is enabled to apply for an extension of the term of his patent by petition to the High Court (*o*), to be presented at least six months before the time limited for the expiration of the patent (*p*). The Court must have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case (*q*). If it appears to the Court that the patentee (*r*) has been inadequately remunerated by his patent, the Court may extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years; or may order the grant of a new patent for such term as may be specified in the order, and containing

On enlargement of time for payment of renewal fees:—	£	*s.*	*d.*
not exceeding one month . .	1	0	0
,, two months . . .	3	0	0
,, three months . .	5	0	0
On application for the restoration of a lapsed patent	20	0	0

(*m*) Stat. 7 Edw. VII. c. 29, s. 19.

(*n*) Stat. 7 Edw. VII. c. 29, s. 93.

(*o*) See sect. 92, sub-s. 1.

(*p*) Sect. 18, sub-s. 1. The High Court was substituted for the Judicial Committee of the Privy Council by the Patents and Designs Act, 1907, s. 18. The procedure on applications for extension is now governed by R.S.C., Ord. 53A, r. 3; see *Re Johnson's Patent*, 1908, 2 Ch. 487.

(*q*) Stat. 7 Edw. VII. c. 29, s. 18, sub-s. 4; see *Re Johnson's Patent* (*No.* 2), 1909, 1 Ch. 111. The applicant must furnish complete accounts showing the remuneration which he has received: *Re Yates and Kellett's Patent*, 1887, 12 App. Cas. 147; *Re Wabrick's Patent*, 1903, A. C. 206; including profits from foreign patents; *Re Newton's Patents*, 1884, 9 App. Cas. 592; *Re Johnson's Patent*, (*No.* 2) *supra*. As to the effect of the lapse of foreign patents on the application for extension, see *Re Semet and Solvay's Patent*, 1895, A. C. 78.

(*r*) Where the application is made by an assignee of the patent, it must be shown that the original inventor has been inadequately remunerated; *Re Hopkinson's Patent*, 1897, A. C. 249; *Re Henderson's Patent*, 1901, A. C. 616; *Re Peach's Patent*, 1902, A. C. 414; and see *Re Van Gelder's Patents*, 1907, A. C. 174.

any restriction, conditions and provisions that the Court may think fit (*s*).

Novelty and utility.

Secondly, the patent must be for "the working or making of new manufactures within this realm, which others at the time of making such letters-patent and grants shall not use." The invention must have the merit both of novelty and utility (*t*).

No patent for a principle.

A patent cannot be granted for a mere principle not carried out in some actual manufacture (*u*), nor for the better working of a manufacturing process already in use (*x*); but it may be granted for an improved combination of old inventions (*y*).

Combinations.

Publication.

The *use* mentioned in the Statute of Monopolies has been held to mean a use in public; if therefore the invention, for which the patent is sought to be obtained, has been previously used in public within the realm, the patent will be void (*z*). And, if the invention should have been previously known to the public within the realm, although not used,

(*s*) Stat. 7 Edw. VII. c. 29, s. 18, sub-s. 5. The patent can be extended as to one or more of its claiming clauses without extending it as to all; *Re Lodge's Patent*, 1911, 2 Ch. 46; but only one extension can be granted; *Re Thompson's Patent*, 1909, 2 Ch. 447.

(*t*) See *R.* v. *Wheeler*, 2 B. & Ald. 345, 349; *Morgan* v. *Seaward*, 2 M. & W. 544; *Plimpton* v. *Malcolmson*, 3 Ch. D. 531; *Young* v. *Rosenthal*, 1 R. P. C. 29, 31; *Badische &c., Fabrik* v. *Levinstein*, 12 App. Cas. 710; though a small amount of utility is sufficient; *Plimpton* v. *Malcolmson*, 3 Ch. D. 582.

(*u*) *Hornblower* v. *Boulton*, 8 T. R. 95; *Lane Fox* v. *Kensington, &c., Co.*, 1892, 3 Ch. 424.

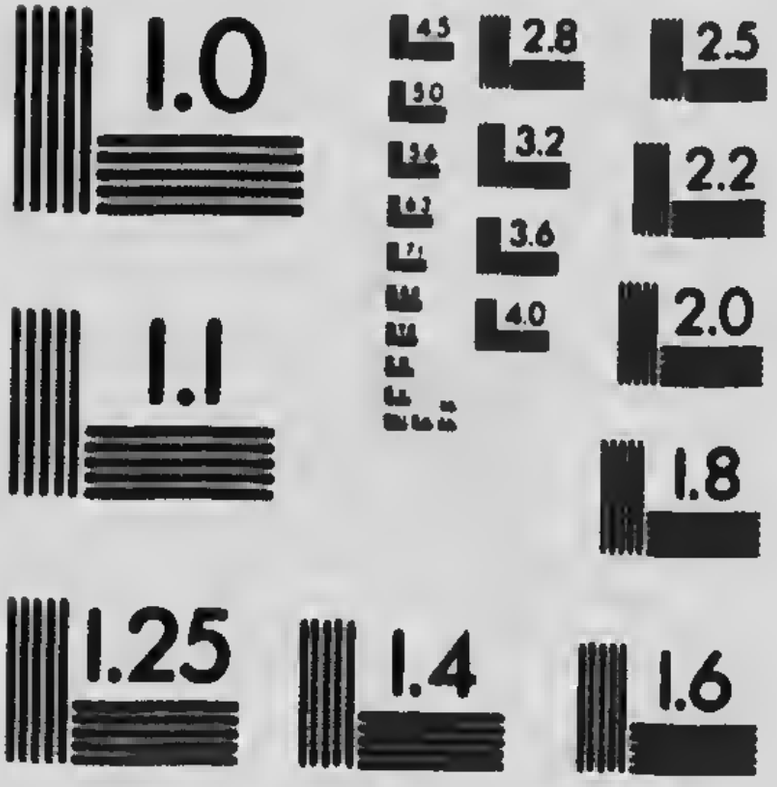
(*x*) *Patterson* v. *Gaslight and Coke Co.*, 2 Ch. D. 812; 3 App. Cas. 239.

(*y*) *Lister* v. *Leather*, 8 E. & B. 1004; *Cannington* v. *Nuttall*, L. R. 5 H. L. 205; and patents may be granted separately in respect of improvements in the component parts of a machine and in the resulting machine as a whole; *Clark* v. *Adie*, L. R. 10 Ch. 667; 2 App. Cas. 315. And see *Consolidated Car Heating Co.* v. *Carne*, 1903, A. C. 509; *Dunlop, &c., Co.* v. *David Moseley & Sons, Ld.*, 1904, 1 Ch. 164, 612; *Sirdar Rubber Co.* v. *Wallington*, 1905, 1 Ch. 451; *Marconi* v. *British Radio, &c., Co.*, 28 R. P. C. 181.

(*z*) *Lewis* v. *Marling*, 10 B. & C. 22; *Carpenter* v. *Smith*, 9 M. & W. 300; *Re Newall*, 4 C. B. N. S. 269; *Betts* v. *Menzies*, 10 H. L. C. 117; *Harwood* v. *Great Northern Ry. Co.*, 2 B. & S. 194; 11 H. L. C. 654; *Young* v. *Fernie*, 4 Giff. 577.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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that is sufficient to avoid the patent (*a*). The *realm* in this statute has been determined to mean the United Kingdom of Great Britain and Ireland; so that when separate letters-patent were granted for England and Scotland, if any invention had been publicly known or practised in England, a patent for Scotland was void (*b*). But, under the Patents Act of 1907, an invention is not to be deemed to have been anticipated by reason only of its publication in a specification more than fifty years old, or in a provisional specification of any date not followed by a complete specification; and prior publication does not invalidate a patent if the patentee proves to the satisfaction of the Court that the publication was without his knowledge and consent, and that the matter published was derived or obtained from him, and, if he learnt of the publication before his application for the patent, that he applied for and obtained protection for his invention with all reasonable diligence (*c*).

Exhibition of an invention.

And the exhibition of an invention at certain industrial and international exhibitions does not prejudice the right of the inventor to apply for and obtain provisional protection and a patent in respect of the invention, or the validity of any patent granted on the application; provided that the exhibitor, before exhibiting the invention, gives the Comptroller the prescribed notice of his intention to do so, and that the application for a patent is made before or within six months from the date of the opening of the exhibition (*d*).

True and first inventor.

Thirdly, according to the Statute of Monopolies (*e*),

(*a*) *Plimpton* v. *Spiller*, 6 Ch. D. 412; *Patterson* v. *Gaslight and Coke Co.*, 3 App. Cas. 239, 244, 245; *United Telephone Co.* v. *Harrison & Co.*, 21 Ch. D. 720, 730, 731; *Harris* v. *Rothwell*, 35 Ch. D. 416.

(*b*) *Brown* v. *Annandale*, 8 Cl. & Fin. 214; see *Re Robinson's Patent*, 5 Moo. P. C. 65; *Rolls* v. *Isaacs*, 19 Ch. D. 268.

(*c*) Stat. 7 Edw. VII. c. 29, s. 41.

(*d*) Stat. 7 Edw. VII. c. 29, s. 45.

(*e*) *Ante*, p. 347.

a patent must be granted "to the true and first inventor and inventors." And under the Patents Act of 1907 an application for a patent may be made by any person who claims to be the true and first inventor, whether he is a British subject or not, and whether alone or jointly with any other person; and, in the case of a joint application, the patent may be granted to the applicants jointly (*f*). If therefore the original inventor should sell his secret to another person, such person cannot obtain letters-patent for the invention in his own name alone; but the original inventor must obtain the letters-patent, and then assign them to the other; or else the patent must be granted to them jointly. If two persons should both make the same discovery, he who first publishes it by obtaining a patent for it, will be the true and first inventor within the meaning of the statute, although he may not actually have been the first to make the discovery (*g*). But a person cannot obtain a patent for an invention which has been communicated to him by another within the realm (*h*). If, however, a person should be in possession of an invention communicated to him from abroad, such person, if he be the first introducer of the invention into this country, is regarded by the law as the true and first inventor thereof within the meaning of the statute of James (*i*); and it is no objection that the patent is taken out in trust merely for the foreign inventor (*k*). Before the year 1884 letters-patent

Foreign inventions.

(*f*) Stat. 7 Edw. VII. c. 29, ss. 1, 12.

(*g*) *Boulton* v. *Bull*, 2 H. Bl. 463, 487; 3 R. R. 439.

(*h*) *Hill* v. *Thompson*, 8 Taunt. 375, 395; 20 R. R. 488; *Marsden* v. *Saville, &c. Co.*, 3 Ex. D. 203.

(*i*) *Edgeberry* v. *Stephens*, 2 Salk. 447; *Plimpton* v. *Malcolmson*, M. R. 3 Ch. D. 531, 555, see also *Marsden* v. *Saville, &c. Co.*, 3 Ex. D. 203, 205–207.

(*k*) *Beard* v. *Egerton*, 3 C. B. 97, 129. Under the Patents Act of 1852 (15 & 16 Vict. c. 83), s. 25, letters patent in the United Kingdom for an invention already patented in a foreign country expired with the foreign patent, and in such a case an extension of the patent could not be

for an invention could not lawfully be granted to any person upon an application made after the death of the true and first inventor within the meaning of the Statute of Monopolies (*l*). But under the Patents Act of 1907 (*m*), if a person claiming to be inventor of an invention dies without making an application for a patent for the invention, application for a patent may be made by, and a patent for the invention granted to, his legal personal representative. The remaining restrictions imposed by the Act of James I. require no comment.

Legal personal representative of an inventor.

Grant of letters-patent.

The granting of letters-patent is, as has been observed, a prerogative of the Crown; and although a patent may now be always obtained for any new invention, yet the grant is still a matter of favour and not of right. And nothing contained in the Patents Act of 1907 (*n*) is to take away, abridge or prejudicially affect the prerogative of the Crown in relation to the granting of any letters-patent or to the withholding of a grant thereof. Before the year 1884, the exclusive privileges granted by letters-patent were granted as against the subjects of the Crown, and not as against the Crown itself (*o*).

Rights reserved to Crown.

granted; but where the British patent was taken out first, the expiry of the foreign patent did not preclude an extension of the British patent, though it was a circumstance to be taken into consideration on an application for an extension; see *Re Johnson's Patent*, L. R. 4 P. C. 75; *Re Winan's Patent*, L. R. 4 P. C. 93; *Re Blake's Patent*, L. R. 4 P. C. 535; *Re Jablochkoff's Patent*, 1891, A. C. 293. This provision was not reproduced in the Patents Acts of 1883 and 1907 (46 & 47 Vict. c. 57; 7 Edw. VII. c. 29), and there is jurisdiction to grant an extension of the British patent where the foreign patent has expired, whether the foreign patent was prior in date or not; but the lapse or expiry of the foreign patent remains one of the circumstances to be considered; *Re Semet and Solvay's Patent*, 1895, A. C. 78, 82.

(*l*) *Marsden* v. *Saville, &c. Co.*, 3 Ex. D. 203.

(*m*) Stat. 7 Edw. VII. c. 29, s. 43, continuing the corresponding provision of stat. 46 & 47 Vict. c. 57, s. 34, but without the limitation of time to six months after the inventor's death.

(*n*) Stat. 7 Edw. VII. c. 29, s. 97.

(*o*) *Feather* v. *The Queen*, 6 B. & S. 257; *Dixon* v. *London Small Arms Co.*, 1 App. Cas. 632.

Now, under the Patents Act of 1907 (*p*), replacing the Act of 1883 (*q*), a patent has to all intents the like effect as against the Crown as it has against a subject; but any Government department may by themselves, their agents, contractors or others, at any time after the application, use the invention for the services of the Crown on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or in default of such agreement, as may be settled by the Treasury after hearing all parties interested (*r*).

Application for letters-patent for an invention (*s*) is made at an office called the Patent Office (*t*), maintained under the Patents and Designs Act, 1907, and placed under the control of an officer, called the Comptroller-general of Patents, Designs and Trade Marks, who acts under the superintendence and direction of the Board of Trade (*u*). The application must be accompanied by either a provisional or complete specification (*x*). A provisional specification must describe the nature of the invention (*y*). A complete specification must particularly describe and ascertain the nature of the invention, and the manner in which the same is to be performed (*z*). And in the case of any provisional or

Application for patent.

Patent Office.

Comptroller.

Specification.

(*p*) Stat. 7 Edw. VII. c. 29, s. 29.

(*q*) Stat. 46 & 47 Vict. c. 57, s. 27, sub-s. 1.

(*r*) Stat. 7 Edw. VII. c. 29, s. 29. See the form of grant of letters-patent set out in Appendix B., in which compliance with these provisions is made a condition of the continuance of the letters-patent and the privileges thereby conferred.

(*s*) See *ante*, p. 348.

(*t*) Stat. 7 Edw. VII. c. 29, s. 1, sub-s. 2.

(*u*) Stat. 7 Edw. VII. c. 29, ss. 62, 63. Jurisdiction to decide various questions is conferred on the Comptroller. Evidence may be given before him by statutory declaration or orally (sect. 77), and in proceedings relating to opposition to a patent, or amendment of a specification, or the revocation of a patent, he has power to award costs (sect. 39).

(*x*) Sect. 1, sub-s. 3.

(*y*) Sect. 2, sub-s. 1.

(*z*) Sect. 2, sub-s. 2; see sub-s. 4.

complete specification, the Comptroller may require suitable drawings to be supplied with the specification, or at any time before acceptance of the same, and the drawings then form a part of the specification (*a*). The invention described in the provisional and the complete specification must be the same (*b*); but a patent is not to be held invalid on the ground that the complete specification claims a further or different invention to that in the provisional, if the invention, so far as not contained in the provisional specification, was novel at the date of the complete specification, and the applicant was the true and first inventor (*c*). A complete specification, if not left with the application, must be left within six months from the date of the application, or within such further time, not exceeding one month, as the Comptroller on payment of the prescribed fee may allow (*d*); otherwise the application will be deemed to be abandoned (*e*). The application, together with the specifications, is referred to an examiner for report (*f*), and the Comptroller can either decline to accept the application, or require an amendment, or he may refuse to accept the complete specification, subject in all cases to an

Reference to examiner.

(*a*) Stat. 7 Edw. VII. c. 29, s. 5, sub-s. 3. In the case of a chemical invention, the Comptroller may require typical samples and specimens to be furnished (sect. 5, sub-s. 5).

(*b*) *Vickers & Co.* v. *Siddell*, 15 App. Cas. 496; *Nuttall* v. *Hargreaves*, 1892, 1 Ch. 23; *Lane Fox* v. *Kensington & Co.*, 1892, 3 Ch. 424; sect. 6.

(*c*) Sect. 42. The complete specification must end with a distinct statement of the invention claimed (sect. 2, sub-s. 4); but this provision is directory only: *Vickers & Co.* v. *Siddell*, 15 App. Cas. 496.

(*d*) Sect. 5, sub-s. 1. Where two or more provisional specifications have been put in for cognate inventions, and the Comptroller considers that the whole constitute a single invention, he can accept one complete specification in respect of all the applications and grant a single patent thereon: sect. 16, sub-s. 1; and see sub-s. 2 as to the date of the patent in such a case.

(*e*) Sect. 5, sub-s. 2. See sect. 6, sub-s. 5, as to the time within which a complete specification must be accepted.

(*f*) The examiner's report is in general not open to inspection (sect. 68).

appeal to the law officer (*g*). Provision is also made, in cases where a complete specification has been left, for an investigation by the examiner of specifications published within fifty years before the date of the application, and also of specifications subsequent to the application deposited pursuant to prior applications; and if the invention has been already claimed, wholly or in part, the applicant is afforded the chance of amending his specification (*h*).

Investigation of previous specifications.

On the acceptance of the complete specification the Comptroller advertises the acceptance; and the application and specifications with the drawings (if any) are open to public inspection (*i*). Any person may at any time within two months from the date of such advertisement oppose the grant of the patent (*k*), but only on the grounds specified in the Patent Act (*l*). If there is no opposition, or, in the case of opposition, if the determination is in favour of the grant of a patent, a patent is, on payment of the prescribed fee, granted to the applicant, or in the case of a joint application to the

Proceedings after acceptance of complete specification.

Opposition to grant of patent.

Grant of patent.

(*g*) Stat. 7 Edw. VII. c. 29, ss. 3, 6; as to "law officer," see s. 93.

(*h*) Sects. 7, 8.

(*i*) Stat. 7 Edw. VII. c. 29, s. 9. Otherwise if the application is abandoned or becomes void (sect. 69).

(*k*) Sect. 11, sub-s. 1.

(*l*) These are:—(i.) that the applicant obtained the invention from the opponent, or from a person of whom the opponent is the legal representative; (ii.) that the invention has been claimed in any complete specification for a British patent, which is, or will be, of prior date to the patent, the grant of which is opposed, other than a specification more than fifty years old (see *R. v. Comptroller-General of Patents*, 1899, 1 Q. B. 909); (iii.) that the nature of the invention or the manner in which it is to be performed, is not sufficiently or fairly stated in the complete specification; and (iv.) that the complete specification describes or claims an invention other than that described in the provisional specification, and that such other invention forms the subject of an application made by the opponent in the interval between the leaving of the provisional specification and the leaving of the complete specification (sect. 11, sub-s. 1). The question, whether the patent should be granted, is decided by the Comptroller, subject to an appeal to the law officer: sect. 11, sub-ss. 2, 3. As to procedure on appeal to the law officer, see sect. 40.

applicants jointly, and the Comptroller causes the patent to be sealed with the seal of the Patent Office (*m*). A patent so sealed has the same effect as if it were sealed with the great seal of the United Kingdom (*n*). Every patent must be dated and sealed as of the day of application: but no proceedings can be taken in respect of an infringement committed before the publication of the complete specification (*o*). A patent may be in the prescribed form (*p*), and must be granted for one invention only, but the specification may contain more than one claim; and it is not competent for any person in an action or other proceeding to take any objection to a patent on the ground that it comprises more than one invention (*q*). The patent has effect throughout the United Kingdom and the Isle of Man (*r*).

Provisional protection.

Where an application for a patent has been accepted, the invention may be used and published between the date of the application and the date of sealing the patent without prejudice to the patent to be granted for the same; and such protection from the consequences of use and publication is in the Act referred to as provisional protection (*s*).

Effect of acceptance of complete specification.

After the acceptance of a complete specification, and until the date of sealing a patent in respect thereof, or the expiration of the time for sealing,

(*m*) Stat. 7 Edw. VII. c. 29, s. 12, sub-s. 1.

(*n*) Sect. 14, sub-s. 1. See sect. 12, sub-s. 2, as to the time within which a patent must be sealed, and as to the grant when the applicant has died.

(*o*) Sect. 13.

(*p*) Sect. 14, sub-s. 2; Patent Rules, 1908, r. 49, Sched. III. The form is set out in Appendix (B.)

(*q*) Sect. 14, sub-s. 2.

(*r*) Sect. 14, sub-s. 1. But as to assignment of a patent for a limited district, see p. 374, *post*. This extension was introduced by the Patent Act of 1852 (stat. 15 & 16 Vict. c. 83, s. 18, repealed by stat. 46 & 47 Vict. c. 57, s. 113). Before that Act, letters patent obtained in England did not extend to Scotland or Ireland. As to the Colonies and India, see Stat. 7 Edw. VII. c. 29, s. 91, sub-s. 5, p. 366, *post*.

(*s*) Sect. 4.

the applicant has the like privileges and rights as if a patent for the invention had been sealed on the date of the acceptance of the complete specification: but an applicant is not entitled to institute any proceeding for infringement until a patent for the invention has been granted to him (*t*). A patent granted to the true and first inventor is not invalidated by an application in fraud of him, or by provisional protection obtained thereon, or by any use or publication of the invention subsequent to that fraudulent application during the period of provisional protection (*u*). Fraudulent application.

The preparation and deposit of a proper specification has long been the most important condition attached to the grant of letters-patent. The object of requiring a specification is to secure to the public the benefit of the knowledge of the invention after the term granted by the patent shall have expired. Specification

Under the Patents Act of 1907 (*x*), an applicant or the person for the time being entitled to the benefit of a patent (*y*) may at any time seek leave of the Comptroller (*z*) to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation (*a*): but no amendment can be allowed that would make the specification, as amended, claim an invention substantially larger than, or substantially different from the invention claimed by the specification as it stood before amendment (*b*). When an action for infringement or proceeding for revocation of a patent is Amendment of specification. Disclaimer during action.

(*t*) Stat. 7 Edw. VII. c. 29, s. 10.

(*u*) Sect. 15, sub-s. 1.

(*x*) Stat. 7 Edw. VII. c. 29. As to disclaimer, see *The Queen* v. *Mill*, 10 C. B. 379; *Seed* v. *Higgins*, 8 H. L. C. 550; *Ralston* v. *Smith*, 11 H. L. C. 223; as to correction or explanation, see *Kelly* v. *Heathman*, 45 Ch. D. 256; and see *Stepney, &c. Co.* v. *Hall*, 1911, 1 Ch. 514; affirmed 28 R. P. C. 381.

(*y*) See stat. 7 Edw. VII. c. 29, s. 93.

(*z*) Whose decision is subject to an appeal to the law officer: sect. 21, sub-s. 5.

(*a*) Sect. 21, sub-ss. 1–4, 7.

(*b*) Sect. 21, sub-s. 6.

pending, this provision for amendment does not apply (*c*), but the Court may allow the patentee to amend his specification by way of disclaimer in such manner, and subject to such terms as to costs, advertisement and otherwise as the Court may think fit, but the amendment must not substantially alter the invention first claimed (*d*). Where an amendment of a specification by way of disclaimer, correction or explanation, has been allowed, no damages are to be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith, and with reasonable skill and knowledge (*e*). Every amendment of a specification is required to be advertised in the prescribed manner (*f*).

Damages after amendment.

A condition formerly inserted in letters-patent rendered them void, in case the letters-patent, or the liberty and privileges thereby granted, should become vested in or in trust for more than the number of twelve persons, or their representatives, at any one time, as partners, dividing or entitled to divide the benefit or profit obtained by reason thereof. But this restriction was removed by the Patent Act of 1852 (*g*). And under the Patents Act of 1907 (*h*), two or more persons may make a joint application for a patent, and a patent may be granted to them jointly. For the purpose of the

Vesting in more than twelve persons.

(*c*) Stat. 7 Edw. VII. c. 29, s. 24, sub-s. 8.

(*d*) Sect. 22; *Re Hall*, 21 Q. B. D. 137; *Re Owen's Patent*, 1899, 1 Ch. 157; *Woolfe* v. *Automatic, &c. Co., Ld.*, 1903, 1 Ch. 18; *J. B. Brooks & Co.* v. *Lycett's, &c. Co.*, 1904, 1 Ch. 512; *Re Klaber and Steinberg's Patent*, 1908, 1 Ch. 847. As to the practice under this section, see *Re Alsop's Patent*, 1906, 1 Ch. 85.

(*e*) Sect. 23. See *Gillette Safety Razor Co.* v. *Luna Safety Razor Co.*, 1910, 2 Ch. 373.

(*f*) Sect. 24, sub-s. 7.

(*g*) Stat. 15 & 16 Vict. c. 83, s. 36, repealed by 46 & 47 Vict. c. 57, s. 113.

(*h*) Stat. 7 Edw. VII. c. 29, ss. 1, 12; see *National Society, &c.* v. *Gibbs*, 1900, 2 Ch. 280.

devolution of the legal estate in the patent they are treated as joint tenants; but, subject to any contract to the contrary, each can use the invention for his own profit without accounting to the others, but cannot grant a licence without their consent, and on the death of one the beneficial interest devolves on his personal representatives (*i*).

Infringement of patent.

In letters-patent a clause is usually contained forbidding all persons to use the invention within the realm (*k*), without the consent, licence or agreement of the inventor, his executors, administrators or assigns, in writing, under his or their hands and seals, first had and obtained in that behalf (*l*). The duty so imposed is correlative to the right granted to the patentee; and any violation of this duty constitutes an infringement of the patent (*m*).

Licence to use patent.

The granting of licences to use a patent is one of the most profitable ways of turning it to account. The grant of an exclusive licence does not, however, enable the licensee to sue in his own name for infringement of the patent (*n*).

Compulsory licences.

In certain circumstances, the person for the time being entitled to the benefit of a patent may be compelled to grant licences for the use of the invention. For under the Patents Act of 1907 (*o*), if, on a petition presented by any person interested to the Board of Trade and referred by the Board to the Court, it is proved to the satisfaction of the Court that the reasonable requirements of the

(*i*) Stat. 7 Edw. VII. c. 29, s. 37.

(*k*) As to contracts made in the United Kingdom and completed abroad, see *Badische Anilin, &c. v. Basle Chemical Works*, 1898, A. C. 200; *Badische Anilin, &c. v. Hickson*, 1906, A. C. 419.

(*l*) See the form of letters-patent in Appendix (B.).

(*m*) See *ante*, p. 43, and n. (*f*); *British Motor Syndicate v. Taylor* 1901, 1 Ch. 122. See Stat. 7 Edw. VII. c. 29, s. 48, as to the exception in favour of foreign vessels using patented inventions in British waters.

(*n*) *Heap v. Hartley*, 42 Ch. D. 461. There is an implied covenant by the licensor to pay the renewal fees; *Cummings v. Stewart*, 1913, 1 I. R. 95.

(*o*) Stat. 7 Edw. VII. c. 29, s. 24.

public with reference to a patented invention have not been satisfied, the patentee may be ordered by the Court to grant licences on such terms as the Court may think just, or if the Court is of opinion that the reasonable requirements of the public will not be satisfied by the grant of licences (*p*), the patent may be revoked by order of the Court; but no order of revocation can be made before the expiration of three years from the date of the patent, or if the patentee gives satisfactory reasons for his default (*q*).

Prohibition of restrictive conditions.

Formerly, upon the sale of patented articles or a licence to use a patented process, conditions were sometimes inserted extending the rights of the patentee and restricting the liberty of the purchaser or licensee in respect of articles outside the patent (*r*). But it is now provided (*s*) that, upon such a sale or licence, it is not lawful to insert a condition the effect of which will be to prohibit or restrict the purchaser or licensee from using any articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller or licensor; or to require the purchaser or licensee to acquire from the seller or licensor or his nominees any articles not protected by the patent; and any such condition is null and void as being in restraint of trade and contrary to public policy. But this provision does not apply if, at the time of the contract, the purchaser or licensee had the option of purchasing the article or obtaining the licence on reasonable

(*p*) As to when the reasonable requirements of the public will not be deemed to have been satisfied, see Stat. 7 Edw. VII. c. 29, s. 24, sub-s. 5.

(*q*) The order of the Court directing the grant of a licence operates as the grant of a licence by deed; sect. 24, sub-s. 6.

(*r*) Such as, on the sale of incandescent mantles, a condition to obtain accessory parts from the vendor.

(*s*) Stat. 7 Edw. VII. c. 29, s. 38, sub-s. 1. The insertion of such a condition affords a defence to an action for infringement of the patent; sect. 38, sub-s. 4.

terms without such conditions; or if the contract entitles him to determine the condition on three months' notice and on making such payment as may be fixed by an arbitrator appointed by the Board of Trade (*t*). And, after the lapse of a patent, contracts relating to a licence to use the patented article or process may be determined on three months' notice, and, in the case of contracts made before August 28th, 1907, on payment of compensation, to be fixed, in default of agreement, by an arbitrator appointed by the Board of Trade (*u*).

Assignment of letters-patent.

Letters-patent and the privileges thereby granted are freely assignable from one person to another, and the assignee by such assignment is placed in the same position as his assignor previously stood. The assignee may consequently bring in his own name the same actions both at law and in equity against those who have infringed the patent as the patentee himself might have done (*x*). The privileges granted by letters-patent are, therefore, an instance of an incorporeal kind of personal property, different in its nature from those *choses in action*, which formerly were not assignable at law (*y*). It has been held that a deed is necessary for the valid legal assignment of letters-patent (*z*); but a valid equitable assignment of a patent may be made without deed: and such an assignment may be

As to the necessity of a deed.

(*t*) Stat. 7 Edw. VII. c. 29, s. 38, subs. 1, proviso.

(*u*) Sect. 38, subs. 2. But the patentee can impose restrictions on the use of the patented article itself; see *Badische Anilin, &c., Fabrik* v. *Isler*, 1906, 1 Ch. 665; affirmed, 1906, 2 Ch. 443.

(*x*) Edmunds on Patents, 2nd ed., pp. 360 *sq.*; *Walton* v. *Lavater*, 8 C. B. N. S. 162.

(*y*) *Ante*, pp. 29, 30, 43.

(*z*) *Re Casey's Patents*, 1892, 1 Ch. 104, 110, 113. A licence is also usually granted by deed; *ibid.* at p. 113; but where the licensee takes the benefit of a licence not under seal, he cannot refuse to pay the royalty or other consideration on the ground that it is invalid; *Chanter* v. *Dewhurst*, 12 M. & W. 823; *Crossley* v. *Dixon*, 10 H. L. C. 293; *Post Card Automatic Supply Co.* v. *Samuel*, 8 R. P. C. 550, 562; and see *Copper* v. *Lloyd*, 15 R. P. C. 373.

entered on the register (*a*). A patentee may assign his patent for any place in or part of the United Kingdom or Isle of Man, as effectually as if the patent were originally granted to extend to that place or part only (*b*). All assignments of letters-patent are required, by the Patents Act of 1907, to be registered (*c*).

Register of patents.

Under the Patents Act of 1907, there is kept at the Patent Office a book called the Register of Patents, wherein must be entered the names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions, and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed (*d*); the register of patents is *primâ facie* evidence of any matters by the Act directed or authorised to be inserted therein (*e*); and copies of deeds, licences, and any other documents affecting the proprietorship in any letters-patent, or in any licence thereunder, must be supplied to the Comptroller in the prescribed manner for filing in the Patent Office (*f*).

Registered proprietor of patent.

Where a person becomes entitled by assignment, transmission or other operation of law to a patent, the Comptroller must on request, and on proof of title to his satisfaction, register him as proprietor of the patent (*g*). No notice of trust, expressed, implied or constructive, can be entered on the register (*h*), but the Comptroller must enter notice of the interests of persons becoming entitled as

(*a*) *Re Casey's Patents*, 1892, 1 Ch. 104.
(*b*) Stat. 7 Edw. VII. c. 29. s. 14, sub-s. 1.
(*c*) Sect. 28.
(*d*) Sect. 28, sub-s. 1.
(*e*) Sect. 28, sub-s. 3.
(*f*) Sect. 28, sub-s. 4. See Patents Rules, 1908, rr. 82–94.
(*g*) Sect. 71, sub-s. 1.
(*h*) Sect. 66.

mortgagees, licensees, or otherwise (*i*). The person registered as the proprietor of a patent, has power, subject to the provisions of the Act and to any rights appearing from the register to be vested in any other person, absolutely to assign, grant licences as to, or otherwise deal with the same, and to give effectual receipts for any consideration for such assignment, licence or dealing; but any equities in respect of the patent may be enforced in like manner as in respect of any other personal property (*k*); and an assignee or licensee of a patent, who has notice of a prior unregistered assignment, does not obtain priority of interest by priority of registration (*l*). The register of patents is open to the inspection of the public; and certified copies of any entry in such register may be obtained (*m*).

Improvements in instruments or munitions of war.

Special provision is made in the Patents Act of 1907 (*n*) with regard to the assignment to the Secretary of State for War or the Admiralty, on behalf of the Crown, of the benefit of any improvement in instruments or munitions of war and of any patent for the same; and for keeping secret the particulars of any such invention, if the Secretary of State or the Admiralty should certify that secrecy is desirable in the interest of the public service.

International protection of inventions.

The same Act provides (*o*) that, if any arrangement shall be made with the government of any foreign state for mutual protection of inventions, then any person, who has applied for protection for any invention in any such state, shall be entitled

(*i*) Stat. 7 Edw. VII. c. 29, s. 71, sub-s. 2.
(*k*) Sect. 71, sub-s. 3.
(*l*) *New Ixion, &c. Co.* v. *Spilsbury*, 1898, 2 Ch. 484.
(*m*) Sect. 67. See Patents Rules, 1908, r. 94.
(*n*) Sect. 30.
(*o*) Sect. 91.

to a patent for his invention under the Act, in priority to other applicants. This enactment applies only in the case of foreign states to which it is made applicable by order in council (*p*). The Crown may also, by order in council, apply the provisions of this enactment to any British possession (*q*), the legislature of which has made satisfactory provision for the protection of inventions patented in this country (*r*).

Colonies and India.

Infringement of patent.

The remedy of a patentee for an infringement of his patent is to bring an action against the wrong-doer, claiming an injunction to restrain him from further infringement, and damages (*s*). Such actions are generally (but not necessarily) commenced in the Chancery Division (*t*). If the patentee establishes his claim, he may elect whether he will have a decree for an inquiry as to the damage which he has sustained and payment of the amount so assessed, or a decree for an account and payment of the profits made out of the infringement of his patent (*u*). On the other hand, not only may the fact of infringement be denied, as a defence to such an action, but the validity of the patent may be impugned as

Damages.

Account of profits.

(*p*) Orders in Council under the Act take effect as if contained in the Act; sect. 88.

(*q*) Stat. 7 Edw. VII. c. 29, s. 91, sub-s. 4.

(*r*) Sect. 91, sub-ss. 5, 93. For international and colonial arrangements made under sect. 91 of the Act of 1907, or the corresponding sections (sects. 103, 104) of the Act of 1883, see Statutory Rules and Orders in force 31st Dec., 1903, and subsequent annual volumes, tit. Patent.

(*s*) See Rules of the Supreme Court, 1883, Appendix A., Part III., sect. 4; Appendix C., sect. 6, No. 6. But a defendant who proves that at the date of the infringement he was not aware, nor had reasonable means of making himself aware of the existence of the patent, is not liable in damages, though he is liable to an injunction. The marking of an article as patented is not notice of the patent unless the year and number of the patent are given as well; sect. 33.

(*t*) See *ante*, pp. 159, 160.

(*u*) *Neilson* v. *Betts*, L. R. 5 H. L. 1, 22; *De Vitre* v. *Betts*, L. R. 6 H. L. 319. As to assessment of damages, see *Meters, Ld.* v. *Metropolitan Gas Meters*, 28 R. P. C. 157; *Watson Laidlaw & Co.* v. *Pott*, 30 R. P. C. 285.

well (*x*). Actions for the infringement of a patent are now subject to the special regulations contained in the Patents Act of 1907 (*y*). By the same Act, where any person claiming to be the patentee of an invention, by circulars, advertisements or otherwise, threatens any other person with any legal proceedings or liability in respect of any alleged infringement of the patent, any person aggrieved thereby may bring an action against him, and may obtain an injunction against the continuance of such threats, and may recover such damage (if any) as he has sustained thereby, if the alleged infringement to which the threats related was not in fact an infringement of any legal rights of the person making such threats: but these provisions are not to apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent (*z*).

Remedy in case of groundless threats of legal proceedings.

Revocation of a patent may be obtained under the Patents Act of 1907 (*a*), on petition presented to the Court (*b*) by (1) the Attorney-General or

Revocation of patent.

(*x*) See Edmunds on Patents, 387, 389—392, 2nd ed. A defendant who could petition for revocation (see below), can apply for revocation by counterclaim; sect. 32.

(*y*) Stat. 7 Edw. VII. c. 29, ss. 31, 34, 35; as to proceedings in Scotland, Ireland, and the Isle of Man, see sects. 94—96.

(*z*) Sect 36; *Skinner & Co.* v. *Shew & Co.*, 1893, 1 Ch. 413; *Metropolitan Gas Meters* v. *British, &c. Co.* 1913, 1 Ch. 150.

(*a*) Sect. 25; where a patent is revoked on the ground of fraud, a patent bearing the date of the revoked patent may be granted to the true inventor; sect. 15, subs. 2.

Where fraud is alleged as the ground of revocation, the circumstances must show moral turpitude; *Re Avery's Patent*, 36 Ch. D. 307; *Re Ralston's Patent*, 100 L. T. 386.

(*b*) That is, in England, the High Court of Justice; sect. 92; as to Scotland and Ireland, see sects. 94, 95. In the case where an application for revocation of a patent is made by a person who would have been entitled to oppose the grant of the patent, jurisdiction to order revocation on one or more of the grounds on which the grant might have been opposed is vested in the Comptroller, subject to appeal to the Court; sect 26; in general, the decision of the Court on appeal from the Comptroller is final, but not in this case; see sect. 92, subs. 2.

any person authorised by him, or (2) any person alleging (i.) that the patent was obtained in fraud of his rights, or of the rights of his predecessor in title; or (ii.) that he, or any person under or through whom he claims, was the true inventor of any invention included in the claim of the patentee; or (iii.) that he, or his predecessor in title to any trade, business, or manufacture, had publicly manufactured, used, or sold, within this realm, before the date of the patent, anything claimed by the patentee as his invention. Any ground which before 1884 would have justified the repeal of the patent by *scire facias*—that is, any ground showing that the grant was improper—is a ground for revocation, and is also available by way of defence to an action for infringement (*c*); and a patent may also be revoked in the circumstances above mentioned in connection with compulsory licences (*d*). And jurisdiction to order revocation is also conferred on the Comptroller, subject to appeal to the Court, where four years have elapsed since the date of the patent and the patented article or process is manufactured or carried on exclusively or mainly outside the United Kingdom. The order may be either for revocation forthwith, or after a reasonable interval unless in the meantime the ground of complaint has been removed (*e*).

§ 2. *Of Copyright.*

Copyright.

CLOSELY connected with the subject of patents is that of copyright, or the exclusive right of multi-

(*c*) Stat. 7 Edw. VII. c. 29, s. 25, sub-s. 2; such, for instance, as disagreement between the provisional and complete specification; *Vickers & Co.* v. *Siddell*, 15 App. Cas. 496, 499; *Nuttall* v. *Hargreaves*, 1892, 1 Ch. 23.

(*d*) See p. 361, *ante*.

(*e*) Sect. 27. As to the circumstances under which revocation will be ordered, see *Re Hatschek's Patents*, 1909, 2 Ch. 68; *Re Bremer's Patent*, 1909, 2 Ch. 217; *Re Fiat Motors, Ld.*, 1911, 1 Ch. 69; *Re Green's Application*, 1911, 1 Ch. 754; *Re Taylor's Patent*, 1912, 1 Ch. 635.

plying copies of an original work or composition (*f*). From the nature of this right it must almost necessarily have had its origin at a period subsequent to the invention of the art of printing. And it appears that originally the copyright in a published book was practically secured to the author or his assigns in perpetuity, rather in consequence of the restriction placed on unlicensed printing and of the privileges and customs of the Stationers' Company, than of any express legal recognition (*g*). In 1710 copyright in books was limited by statute (*h*) to fourteen years from publication, with a reversionary like further term to the author, if still living, and it was held that this statutory right excluded any common law right which had previously existed to the exclusive production of copies of published works (*i*), though the author retained the sole right of producing unpublished works (*k*). The Statute of Anne was repealed by the Copyright Act, 1842 (*l*), commonly known as Talfourd's Act, which extended copyright in books to the lifetime of the author and seven years from his death; but if the seven years expired within forty-two years from publication, then the copyright lasted forty-two years (*m*); and there were other statutes defining the term of copyright in dramatic works and musical compositions, in sculpture, and in paintings, engravings, and photographs, and providing for colonial and international copyright; and also for preventing the importation of foreign reprints (*n*). All these statutes have been

Statute of Anne.

Copyright Act, 1842.

Present statute.

(*f*) *Chappell* v. *Purday*, 14 M. & W. 303, 316; *Warne & Co.* v. *Seebohm*, 39 Ch. D. 73.

(*g*) See *Millar* v. *Taylor*, 4 Burr. 2,303, 2,396—2,398; Scrutton on Copyright, Ch. 1.

(*h*) 8 Anne, c. 19, sects. 1, 11.

(*i*) *Donaldson* v. *Beckett*, 4 Burr. 2408; 2 Bro. P. C. 129; *Jefferys* v. *Boosey*, 4 H. L. C. 815.

(*k*) *Macklin* v. *Richardson*, Amb. 694; *Southey* v. *Sherwood*, 2 Mer. 435; *Caird* v. *Sime*, 12 App. Cas. 326; *Exchange Telegraph Co.* v. *Gregory*, 1896, 1 Q. B. 147; and as to unpublished pictures, see *Mansell* v. *Valley Printing Co.*, 1908, 2 Ch. 441; *Bowden Brothers* v. *Amalgamated Pictorials*, 1911, 1 Ch. 386.

(*l*) Stat. 5 & 6 Vict. c. 45.

(*m*) Sect. 3.

(*n*) The chief of these statutes were the Engraving Copyright

repealed (*o*), and any remaining common law rights abrogated, by the Copyright Act, 1911 (*p*), which now confers and regulates copyright in works of all kinds, whether published or unpublished.

Copyright Act, 1911.

The Copyright Act, 1911, defines (1) the subject matter of copyright, (2) the area over which copyright subsists, (3) the facts which confer copyright, and (4) the nature of the right :—

Subject matter of copyright

1. The subject matter of copyright (*r*) comprises literary (*s*), dramatic (*t*), musical, and artistic

Acts, 1734 (8 Geo. II. c. 13), and 1767 (7 Geo. III. c. 38), and Prints Copyright Act, 1777 (17 Geo. III. c. 57), under which the term of copyright in prints and engravings was at first fourteen years (Act of 1734) and then twenty-eight years (Act of 1767) from publication ; the Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), under which the term of copyright in works of sculpture was fourteen years from publication, and a further fourteen years if the proprietor was then living and had not parted with the copyright ; the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 25), which protected performing rights in plays for twenty-eight years and the residue of the author's life ; by the Copyright Act, 1842 (5 & 6 Vict. c. 45), the protection of the Dramatic Copyright Act, 1833, was extended to the performance of musical compositions, and the term of copyright in the performance both of dramatic pieces and of musical compositions was made the same as for books ; the Fine Art Copyright Act, 1862 (25 & 26 Vict. c. 68), under which the term of copyright in paintings, drawings, and photographs was the life of the author and seven years after his death (confined to the United Kingdom ; *Graves & Co.* v. *Gorrie*, 1903, A. C. 496) ; the Copyright (Musical Compositions) Act, 1882 (45 & 46 Vict. c. 40), under which notice of the reservation of the performing right had to be placed on the title page of every published copy of the music ; the Colonial Copyright Act, 1847 (10 & 11 Vict. c. 95) ; the International Copyright Acts, 1844 and 1886 (7 & 8 Vict. c. 12 ; 49 & 50 Vict. c. 33) ; and as to the prohibition of foreign reprints, the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36).

(*o*) With the exception of certain statutory provisions as to summary remedies for infringement of musical copyright ; see stat. 1 & 2 Geo. V. c. 46, s. 31 (4) ; *post*, p. 377, n. (*e*).

(*p*) Stat. 1 & 2 Geo. V. c. 46, ss. 24, 31, 36, Sched. I. & II. Sect. 31, which abrogates common law rights, saves the equitable jurisdiction to restrain a breach of trust. There is also a saving of university copyright ; sect. 33.

(*r*) Sect. 1, sub-s. 1.

(*s*) A copy of every book published in the United Kingdom must be delivered by the publisher to the British Museum, and, on written demand, to certain university and other libraries ; sect. 15.

(*t*) As to dramatic works, cf. *Reichardt* v. *Saple*, 1893, 2 Q. B. 308.

works (*u*), and for this purpose "literary work" includes maps, charts, plans, tables and compilations; "dramatic work" includes choreographic and pantomimic work, and cinematograph productions of an original character; and "artistic" work includes works of painting, drawing, sculpture and architecture, and also engravings, prints and photographs (*x*).

Area of copyright.

2. The area of copyright covers all British dominions, save that self-governing dominions (*y*) are not included unless the Act is adopted, whether with or without modification, by the legislature of the dominion, or the dominion gives equivalent statutory rights (*a*).

Investitive facts.

3. The facts which confer copyright (*b*) are: (1) the work must be original; (2) in the case of a published work, it must be first published within the area of copyright; and in the case of an unpublished work, the author must at the time

(*u*) As to the merit required in an artistic work, see *Kenrick & Co.* v. *Lawrence & Co.*, 25 Q. B. D. 99; and as to drawings, see *Millar and Lang, Ld.* v. *Polak*, 1908, 1 Ch. 433.

(*x*) 1 & 2 Geo. V. c. 46, s. 35.

(*y*) That is, Canada, Australia, New Zealand, South Africa, and Newfoundland; sect. 35.

(*a*) Sects. 1, sub-s. 1, 25; and as to the legislative powers of self-governing dominions in regard to copyright, see sect. 26, sub-s. 1. Where the law of a self-governing dominion to which the Act does not extend, gives sufficient protection to British subjects elsewhere, the Act may be extended by Order in Council so as to protect within the area of copyright the works of authors resident within that dominion; sect. 25, sub-s. 3.

(*b*) Formerly a register of copyright was kept at Stationers' Hall, and no action for infringement could be maintained until the work had been registered, though omission to register did not affect the copyright itself; and registration was not necessary in respect of foreign protected works; *Hanfstaengl, &c. Co.* v. *Holloway*, 1893, 2 Q. B. 1; *Hanfstaengl* v. *American Tobacco Co.*, 1895, 1 Q. B. 347. But by the present Act registration is abolished; and the requirements under the Engraving Copyright Act, 1734 (8 Geo. II. c. 13), and the Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), that the protected work should bear the date of publication and the proprietor's name, have also been abolished.

of making the work, be a British subject or resident within the area of copyright (*c*).

Copyright.

4. For the purposes of the statute, copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever (*d*); to perform (*e*), or in the case of a lecture (*f*) to deliver the work or any substantial part thereof in public; and if the work is unpublished, to publish the work or any substantial part thereof; and it includes the sole right of translation, of turning a dramatic work into a novel, or *vice versâ*, and of making mechanical records of literary, dramatic or musical works; and of authorising any of these acts (*g*). "Publication" means the issue of copies of the work to the public, but it does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the

Publication.

(*c*) 1 & 2 Geo. V. c. 46, s. 1, sub-s. 1. As to "residence," see sect. 35, sub-ss. 4, 5. As to first publication, see sect. 35, sub-s. 3. A foreign author whose work is first published in the British dominions is *primâ facie* entitled to copyright; but he may lose the benefit of publication within the area of copyright, if his own country does not give reciprocal protection; sect. 23. As to the position of foreigners under the previous statutes, see *Jefferys* v. *Boosey*, 4 H. L. C. 815; *Low* v. *Routledge*, L. R. 3 H. L. 100.

(*d*) As to "substantial part," see *Hanfstaengl* v. *W. H. Smith & Sons*, 1905, 1 Ch. 519. Apparently this prevents the reproduction of a picture as a *tableau vivant*; cf. before the Act, *Hanfstaengl* v. *Empire Palace*, 1894, 2 Ch. 1; on appeal, *Hanfstaengl* v. *Baines & Co.*, 1895, A. C. 20. As to dramatic pieces, see *Tate* v. *Fulbrook*, 1908, 1 K. B. 821.

(*e*) Formerly, in the case of musical compositions, notice on every published copy was necessary in order to reserve the right of public performance; Copyright (Musical Compositions) Act, 1882 (45 & 46 Vict. c. 40), p. 370, note (*n*), *ante*; see *Fuller* v. *Blackpool, &c. Co.*, 1895, 2 Q. B. 429; *Sarpy* v. *Holland*, 1908, 1 Ch. 443; 2 Ch. 198. This requirement is now abolished.

(*f*) "Lecture" includes address, speech, and sermon; stat. 1 & 2 Geo. V. c. 46, s. 35.

(*g*) Sect. 1, sub-s. 2. The publication of a dramatic work or musical composition in a book does not deprive the author or composer of the exclusive right of performance; see *Chappell* v. *Boosey*, 21 Ch. D. 232. By the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 25, it was expressly provided that copyright should be personal property. This provision is unnecessary and is not repeated in the present Act.

construction of an architectural work of art; and the issue of photographs and engravings of works of sculpture and architectural works of art is not publication (*h*). For the purposes of the Act (other than those relating to infringement of copyright) a work is not deemed to be published, if published without the consent of the author or his assigns (*i*).

Term of copyright.

The term of copyright, except as otherwise provided, is the life of the author and a period of fifty years after his death; but this is subject, as regards published works, to the restriction that, at any time after the expiration of twenty-five years, or, in the case of copyright subsisting on December 16th, 1911, thirty years, from the death of the author, any person may reproduce the work on giving notice in writing of his intention to do so, and on paying to the owner of the copyright royalties in respect of all copies sold by him at the rate of 10 per cent. on the published price (*k*). After the death of the author of a literary, dramatic or musical work which has been published or performed in public, if the owner of the copyright refuses to republish or allow the republication of the work, or the performance of it in public, a compulsory licence for reproduction of the work or the performance of the work in public may be obtained from the Judicial Committee of the Privy Council on complaint setting forth the refusal and that by reason thereof the work is withheld from the public. The licence will be granted on such terms and subject to such conditions as the Judicial Committee may think fit (*l*). In the case of joint authorship the term of copyright is the

Compulsory licence.

Joint authorship.

(*h*) Stat. 1 & 2 Geo. V. c. 46, s. 1, sub-s. 3. This alters the previous law under which the first performance of a dramatic piece or musical composition was equivalent to publication; *Boucicault* v. *Delafield*, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 5 Ch. D. 267.

(*i*) Sect. 37, sub-s. 2.

(*k*) Sect. 3.

(*l*) Sect. 4.

life of the author who first dies and fifty years after his death, or the life of the author who dies last, whichever period is the longer (*m*). Where a work is still unpublished at the death of the author, copyright subsists till publication and for fifty years thereafter (*n*). The copyright in works prepared or published by or under the direction of the Crown or a Government department continues for fifty years from first publication (*o*). In the case of musical records the term of copyright is fifty years from the making of the original plate from which the record was directly or indirectly derived (*p*). The term of copyright in photographs is fifty years from the making of the original negative (*q*).

Publication after author's death.

Crown works.

Musical records.

Photographs.

Ownership of copyright.

Subject to the provisions of the Act, the author (*r*) of a work is the first owner of the copyright therein; but in the case of an engraving, photograph, or portrait, the person who orders and pays for the plate or other original is, in the absence of agreement to the contrary, the first owner of the copyright; and where the work is made by an employee in the course of his employment, the employer is, in the absence of agreement to the contrary, the first owner of the copyright (*s*).

Assignment.

The owner of the copyright can assign it either

(*m*) 1 & 2 Geo. V. c. 46, s. 16.

(*n*) Sect. 17, sub-s. 1. Ownership of the manuscript under a testamentary disposition by the author is *prima facie* proof of the copyright being with the owner of the manuscript; sect. 17, sub-s. 2. This cannot, it seems, apply to letters unpublished in the writer's lifetime, since they are not the writer's property, and apparently the copyright vests in his personal representatives; cf. as to the former law; *Macmillan & Co.* v. *Dent*, 1907, 1 Ch. 107.

(*o*) Sect. 18.

(*p*) Sect. 19.

(*q*) Sect. 21.

(*r*) As to "author," see *Nottage* v. *Jackson*, 11 Q. B. D. 627; *Melville* v. *Mirror of Life Co.*, 1895, 2 Ch. 531, 635 (photograph); *Walter* v. *Lane*, 1900, A. C. 539 (reports of speeches); *Nisbet & Co.* v. *Golf Agency*, 23 T. L. R. 370 (newspaper paragraph); *Tate* v. *Fulbrook*, 1908, 1 K. B. 821 (play). Special provision is made as to the authorship of musical records; sect. 19, sub-s. 1.

(*s*) Sect. 5, sub-s. 1. But where the work is a contribution to a periodical, then, in the absence of agreement to the contrary, the author has the

wholly or partially, and may grant any interest in it by licence, but any such assignment or licence must be in writing signed by the owner of the copyright or by his duly authorised agent (*t*). Where, however, the author of the work is the first owner of the copyright, no assignment of the copyright or grant of an interest therein is operative beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period will, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and he is incapacitated from entering into any agreement as to the disposition of this reversionary interest; but this provision restricting the effect of an assignment does not apply to the assignment of the copyright in a collective work (*u*). In the case of a partial assignment, the assignee and the assignor are treated as the owner of the copyright in respect of the rights assigned or retained respectively (*x*).

Reversionary interest in author's representatives.

right to restrain separate publication; *ibid.*, and see *Johnson* v. *Newnes*, 1894, 3 Ch. 663. For definition of "plate," see sect. 35; and as to the ownership of a photograph under the corresponding provision of the Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1, see *Boucas* v. *Cooke*, 1903, 2 K. B. 227; *Stackemann* v. *Paton*, 1906, 1 Ch. 774; and cf. *Pollard* v *Photographic Co.*, 40 Ch. D. 345; and see the special provision as to photographs, in stat. 1 & 2 Geo V. c. 46, s. 21.

(*t*) Sect. 5, sub-s. 2. Under the Copyright Act, 1842 (5 & 6 Vict. c. 45, s. 13), an assignment might be made by entry in the register. But the register is now abolished; see p. 371, note (*b*), *ante*.

(*u*) Sect. 5, sub [illegible] term "collective work" [illegible] encyclopædia, dictionary, book, and a newspaper, review, or magazine. Under the Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 18, copyright in such a work might belong to the publisher on payment for the articles; *Richardson* v. *Gilbert*, 1857, 1 Sim. N. S. 336; and see *Lawrence & Bullen* v. *Aflalo*, 1904, A. C. 17; *Ward, Lock & Co.* v. *Long*, 1906, 2 Ch. 550, 561. Under the present law the copyright vests in the author, unless he does the work under a contract of service, and it only passes to the publisher by assignment. As to equitable assignment, see *Ward, Lock & Co.* v. *Long*, *supra*.

(*x*) Sect. 5, sub-s. 3,

Action for infringement.

Where copyright in any work has been infringed (*y*), the owner of the copyright is, except as otherwise provided by the Copyright Act, 1911, entitled to all such remedies by way of injunction, damages, accounts, and otherwise, as are conferred by law for the infringement of a right (*z*), and the costs of all parties are in the absolute discretion of the Court (*a*). But an injunction is the only remedy against a defendant alleging in his defence that he was not aware of the existence of the copyright, and proving that at the date of the infringement he was not aware and had no reasonable

Innocent infringement.

(*y*) Copyright is infringed when a person, without the consent of the owner of the copyright, does anything the sole right to do which is by the Copyright Act, 1911, conferred on the owner of the copyright; except that the following acts do not constitute infringement:—(i.) Any fair dealing with a work for the purposes of private study, research, criticism, review, or newspaper summary; (ii.) where the author of an artistic work has disposed of the copyright, the use by him of moulds, sketches, models, or studies, provided he does not repeat the main design; (iii.) the making or publishing ... drawings, engravings, or photographs of works of sculpture or artistic craftsmanship permanently situate in a public place or building, or of any architectural work of art; (iv.) the publication in schoolbooks, under certain restrictions, of short passages from published literary works; (v.) the publication of newspaper reports of public lectures, unless the report is prohibited by notice affixed at the place of delivery of the lecture (but such prohibition does not preclude a newspaper summary under (i.)); (vi.) the public reading or recitation of any reasonable extract; or (vii.) the publication of newspaper reports of political speeches delivered at public meetings. Copyright is also infringed by trading in or importing for sale or hire any work which, to the knowledge of the person so acting, infringes copyright; and by permitting for private profit, the use of a theatre or other place of entertainment for the public performance of the work without the consent of the owner of the copyright, unless the person so infringing was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright. See stat. 1 & 2 Geo. V. c. 46, ss. 2, 20, 35. As to when musical copyright is not infringed by the making of records, see sect. 19 (2). Works lawfully printed in a foreign country must not be imported in breach of the English copyright; *Pitts* v. *George*, 1896, 2 Ch. 866; *Millar & Lang, Ld.* v. *Polak*, 1908, 1 Ch. 433. As to permitting the use of a theatre, &c., see *Duck* v. *Bates*, 13 Q. B. D. 843; cf. *Glenville* v. *Selig Polyscope Co.*, 27 T. L. R. 554.

(*z*) Sect. 6, sub-s. 1. The assignee of the copyright can clearly sue, and this has always been so; *Thompson* v. *Symonds*, 5 Term Rep. 41.

(*a*) Sect. 6, sub-s. 2. The infringing copies become the property of the owner of the copyright; sect. 7. This does not apply to architecture; sect. 9, sub-s. 2.

ground for suspecting that copyright existed in the work (*b*). And in the case of architecture, an injunction cannot be granted to restrain the construction of an infringing building which has been already commenced (*c*). The period of limitation in respect of an action for infringement of copyright is three years (*d*). The Act also imposes fines on summary conviction for the offences therein specified against the Act (*e*), and prohibits the importation of infringing copies made out of the United Kingdom, if the owner of the copyright gives notice to the Customs Commissioners of his desire to prevent such importation (*f*).

Architecture.

Limitation on action.

With respect to all works, other than dramatic or musical works, in which any copyright (*g*), or any interest therein, was existing at the commencement of the Copyright Act, 1911, that Act substitutes therefor copyright as defined by that Act (*h*), or the same interest therein, for the term given by that Act (*i*), commencing from the date when the work was made. Provided that if before the commencement of the Act the author had assigned the copyright, or granted any interest therein for the whole term thereof, then at the date when the original copyright would have expired, the substituted copyright is, in the absence of express agreement, to pass to the author, and any interest therein created before the commencement of the Act is to determine: but the person, who immediately before the date when the original copyright would have expired

Copyrights existing at the commencement of the Copyright Act, 1911.

(*b*) Stat. 1 & 2 Geo. V. c. 46, s. 8.

(*c*) Sect. 9.

(*d*) Sect. 10.

(*e*) Sects. 11—13; see sect. 9. As regards musical compositions, stats. 2 Edw. VII. c. 15 (authorising pirated copies of music to be seized) and 6 Edw. VII. c. 36, remain in force.

(*f*) Stat. 1 & 2 Geo. V. c. 46, s. 14.

(*g*) Here including the right at common law (if any) to restrain publication of or other dealing with an unpublished work; stat. 1 & 2 Geo. V. c. 46, First Sched.; see *ante*, p. 369 and n. (*k*).

(*h*) *ante*, p. 372.

(*i*) *ante*, p. 373.

was the owner of the copyright or the interest therein, is entitled at his option either (i.) on giving not less than six months nor more than one year before that date the notice required by the Act, to an assignment of the copyright, or the grant of a similar interest therein, for the remainder of the term of the copyright for such consideration as, failing agreement, may be determined by arbitration; or (ii.) without any such assignment or grant, to continue to reproduce the work in like manner as theretofore subject to the payment to the author, if demanded by him within three years after the date when the original copyright would have expired, of such royalties as, failing agreement, may be determined by arbitration, or where the work is incorporated in a collective work (*k*), and the owner of the copyright or interest is the proprietor of that collective work, without any such payment (*l*).

In the case of musical and dramatic works, where any person was at the commencement of the Copyright Act, 1911, entitled to both copyright (*m*) and performing right (*n*), copyright as defined by that Act is substituted in exactly the same way therefor: where any person was so entitled to copyright, but not performing right, copyright as defined by that Act is so substituted, except the sole right to perform the work or any substantial part thereof in public; and where any person was so entitled to performing right but not copyright, there is substituted therefor the sole right to perform the work in public, but none of the other rights comprised in copyright as defined by that Act (*o*).

(*k*) *Ante*, p. 375 and n. (*u*).

(*l*) Stat. 1 & 2 Geo. V. c. 46, s. 24, sub-s. 1, and First Schedule. By sub-s. 2, for the purposes of this section, "author" includes the legal personal representatives of a deceased author.

(*m*) See n. (*g*), above.

(*n*) Here including the right at common law (if any) to restrain the performance of a work not performed in public before the commencement of the Act; see *ante*, p. 369 and n. (*k*).

(*o*) Stat. 1 & 2 Geo. V. c. 46, s. 24, and First Schedule.

Works published abroad or by aliens or residents abroad.

The Copyright Act, 1911 (*p*), may be applied by Order in Council: (a) to works first published in a foreign country as though they were first published within this country; (b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were, at the time of making the work, subjects of a foreign country, in like manner as if they were British subjects; and (c) in respect of residence in a foreign country in like manner as if such residence were residence in this country. The effect of the order as regards any country to which it extends is, in the case of a published work, to make first publication in that country equivalent to first publication here, and, in the case of an unpublished work, to give the author who is a subject of or resident in that country, the same rights as if he were a British subject or resident in this country. An Order in Council can comprise several countries, but it cannot be made in respect of any country unless there is either a Copyright Convention subsisting with that country, or that country has made satisfactory reciprocal provision (*q*). Similar

(*p*) Stat. 1 & 2 Geo. V. c. 46.

(*q*) Sect. 29. The original Copyright Convention was the Berne Convention, 1886, and this was amended by the Additional Act of Paris, 1896. There is also a Copyright Treaty with Austria-Hungary made in 1893. The Revised Berne Convention, which was signed at Berlin in 1908, has for most purposes superseded both the Berne Convention, 1886, and the Additional Act of Paris. The countries which signed the Berne Convention, 1886, and which formed the Copyright Union were Great Britain, France, Germany, Italy, Belgium, Spain, Portugal, Switzerland, Tunis, Hayti, Luxembourg, Monaco, Norway, Japan, Denmark, Sweden, and Liberia. Effect was given throughout the British dominions to the Berne Convention, 1886, and the Additional Act of Paris by Orders in Council made 28th November, 1887, and 7th March, 1898, under the International Copyright Act, 1886 (49 & 50 Vict. c. 33). All the foregoing countries, with the exception of Italy and Sweden, have adopted the Revised Convention, and Holland is on the point of doing so. Great Britain did so on the 14th June, 1912, subject to certain reservations as to the retrospective effect of the Copyright Act, 1911 (1 & 2 Geo. V. c. 46). See Oldfield's Law of Copyright, 2nd ed., pp. 170 *sq.* In applying the provisions of the Act to existing works, the Order in Council may make such modifications as appear necessary. This replaces the saving

orders may be made by the self-governing dominions (*r*).

§ 3. *Of Copyright in Designs.*

Copyright in designs.

Under the Patents and Designs Act, 1907 (*s*), application may be made to the Comptroller-General of Patents, Designs and Trade Marks at the Patent Office (*t*) for the registration of any new or original (*u*) design (*v*) not previously published (*w*) in the United Kingdom. The question, whether registration is to be permitted, is to be decided by the Comptroller, subject to an appeal to the Board of Trade (*x*), and the registration, if effected, dates from the date of application (*y*). A certificate of registration is to be granted to the proprietor of a design when registered (*z*). And when a design is

for existing rights in the International Copyright Act, 1886 (49 & 50 Vict. c. 33), s. 6; see *Moul* v. *Groenings*, 1891, 2 Q. B. 443; *Lauri* v. *Renad*, 1892, 3 Ch. 402; *Schauer* v. *Field*, 1893, 1 Ch. 35; *Hanfstaengl Art Publishing Co.* v. *Holloway*, 1893, 2 Q. B. 1.

(*r*) Stat. 1 & 2 Geo. V. c. 46, s. 30.

(*s*) Stat. 7 Edw. VII. c. 29, s. 49; see Designs Rules, 1908, Stat. R. & O., 1907, tit. Designs.

(*t*) See *ante*, p. 355.

(*u*) See *Saunders* v. *Wiel*, 1893, 1 Q. B. 470; *John Harper & Co.* v. *Wright & Butler*, 1896, 1 Ch. 142; *Re Clarke's Design*, 1896, 2 Ch. 38; *Dover, Ld.* v. *Nürnberger, &c. Wolff*, 1910, 2 Ch. 25; *Gramophone Co.* v. *Magazine Holder Co.*, 28 R. P. C. 221; *Pugh* v. *Riley Cycle Co.*, 1912, 1 Ch. 613. As to the co-existence of a patent in respect of a new article and a copyright in a registered design; see *Werner Motors, Ld.* v. *A. W. Gamage, Ld.* 1904, 2 Ch. 580.

(*v*) By stat. 7 Edw. VII. c. 29, s. 93, "design" in the Act means any design, not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814 (54 Geo. III. c. 56, repealed by the Copyright Act, 1911 (1 & 2 Geo. V. c. 46), see p. 570, n. (*n*), *ante*), applicable to any article, whether the design is applicable for the pattern, or for the shape or contiguration, or for the ornament thereof, or for any two or more such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical or chemical, separate or combined; and "article" means any article of manufacture and any substance artificial or natural, or partly artificial and partly natural.

(*w*) See *Blank* v. *Footman*, 39 Ch. D. 678. Prior confidential disclosure is not publication; sect. 55; nor is exhibition at certain exhibitions; sect. 59.

(*x*) See stat. 7 Edw. VII. c. 29, s. 49, sub-s. 3.

(*y*) Sect. 49, sub-s. 5.

(*z*) Sect. 51. As to who is the

registered, the registered proprietor of the design has, subject to the provisions of the Act (*a*), "copyright" in the design during five years from the date of registration, with the right of renewal for a second, and at the discretion of the Comptroller, for a third like term (*b*). Copyright *in* the Act means the exclusive right to apply a design to any article in any class in which the design is registered (*c*). In the event of breach of this right the proprietor can recover a penalty not exceeding 50*l*., or sue for damages and an injunction (*d*). For the purposes of the registration of designs, goods are classified as appears in the Designs Rules, 1908 (*e*). The same design may be registered in more than one class of goods (*f*).

Register of designs.

A Register of Designs is required to be kept at the Patent Office (*g*); and exactly similar provisions are made, with respect to entries of the proprietorship of registered designs and the powers of the registered proprietor of copyright in a design, to those enacted in the case of the register of patents (*h*).

International and colonial protection of designs.

The Act contains provisions under which a person who has applied for protection for any design in a foreign state or British possession, may be entitled to registration of his design here in priority to other applicants. The requirements of the Act in this respect are the same as in the case of similar applications for a patent (*i*). The registration may be

"proprietor of a new and original design," see sect. 93.

(*a*) See stat. 7 Edw. VII. c. 29, s. 54–58.

(*b*) Sect. 53.

(*c*) Sect. 93.

(*d*) Sect. 60; *Woolley* v. *Broad*, 1892, 1 Q. B. 906; *Haddon* v. *Bamberman & Son*, 1912, 2 Ch. 602.

(*e*) Rule 6, Stat. R. & O., 1907, tit. Design.

(*f*) Sect. 49, sub-s. 2; and see sect. 50.

(*g*) Sects. 52, 67. A registered design is not open to inspection during the existence of copyright, except under the authority of the proprietor, or of the Comptroller or the Court; sect. 56. But the Comptroller must give information as to registration; sect. 57.

(*h*) See stat. 7 Edw. VII. c. 29, Part III.; *ante*, p. 364.

(*i*) Sect. 91; see Stat. R. & O. 1907, tit. Design.

cancelled if the design is used for manufacture exclusively or mainly outside the United Kingdom (*k*).

§ 4. *Of Trade Marks.*

Trade marks.

Particular marks or devices are often used by manufacturers to designate goods made by them. These are called trade marks. In certain circumstances, a right may be acquired to the exclusive use of a trade mark. Since the year 1875 the acquisition and enjoyment of such a right have been regulated by statute. Before the Trade Marks Registration Act, 1875 (*l*), took effect, if a trade mark came by use to be recognised in trade as the mark of the goods of a particular manufacturer, he acquired an exclusive right to use the trade mark in connection with goods of the same kind for the purpose of indicating their manufacture or place of manufacture (*m*). Since that Act took effect, registration of a trade mark has been essential to the acquisition and enjoyment of an exclusive right to use it (*n*), but the nature of the right remains the same as before (*o*). The foundation of the right is the rule, that no man is entitled to represent his goods as being the goods of another man. Accordingly, a trader, who has acquired a right to the exclusive use of a trade mark, may obtain an injunction to restrain any other person from passing off his own goods as those made by the complainant by the use of the complainant's trade mark, or from using such an imitation of the complainant's trade mark as is likely to induce people

Injunction

(*k*) Stat. 7 Edw. VII. c. 29, s. 58.

(*l*) Stat. 38 & 39 Vict. c. 91; see stat. 39 & 40 Vict. c. 33.

(*m*) *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523; *Orr Ewing* v. *Johnston*, 3 App. Cas. 219; *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15; *Somerville* v. *Schembri*, 12 App. Cas. 453.

(*n*) See pp. 386, 387, *post*.

(*o*) See *Edwards* v. *Dennis*, 30 Ch. D. 454; *Jay* v. *Ladler*, 40 Ch. D. 649.

to believe that the goods marked therewith were made by the complainant (*p*). And in order to obtain such an injunction, it is not necessary for the complainant to prove that the use made of his trade mark was *fraudulent*, or that anybody has been actually deceived thereby (*q*). But those who themselves deceive the public cannot prevent others from using their marks (*r*). A trade mark may belong to particular works as well as to particular persons (*s*). If a trade mark comes to be generally known as designating goods of some particular manufacture, which have acquired a high reputation in the market, the exclusive right to use it may be a very important privilege, and it has been held to be assignable or transmissible together with the business in connection with which it has been acquired or exercised (*t*). Hence it has been said that, in a certain sense, there may be property in a trade mark (*u*). It must, however, be borne in

Assignment.

(*p*) See the cases cited in note (*m*) above. As to what fraudulent use of trade marks is now a criminal offence, see Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28).

(*q*) *Millington* v. *Fox*, 3 My. & Cr. 338; *Singer, &c. Manufacturers* v. *Wilson*, 3 App. Cas. 376; *Johnston* v. *Orr Ewing*, 7 App. Cas. 219; *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15; *Upmann* v. *Forester*, 24 Ch. D. 231; *Wittman* v. *Oppenheim*, 27 Ch. D. 260, 268; *Bourne* v. *Swan and Edgar, Ld.*, 1903, 1 Ch. 211, 223. But innocent infringement does not render the infringer liable to account for profits or to damages; *Slazenger & Sons* v. *Spalding*, 1910, 1 Ch. 257. An injunction can be obtained against the unauthorised use of the royal arms at the suit of any person authorised to use them; Trade Marks Act, 1905, (5 Edw. VII. c. 15), s. 68; *Royal Warrant Holders Association* v. *Dean*, 1912, 1 Ch. 30.

(*r*) *Pidding* v. *How*, 8 Sim. 477; *Perry* v. *Truefitt*, 6 Beav. 66; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523, 542 – 545; *Chearin* v. *Walker*, 5 Ch. D. 850; *Re Wood's Trade Mark*, 32 Ch. D. 247, 263; *Re Faente's Trade Marks*, 1891, 2 Ch. 166.

(*s*) *Motley* v. *Downman*, 3 My. & Cr. 1.

(*t*) See *Millington* v. *Fox*, 3 My. & Cr. 338; *Edelsten* v. *Vick*, 11 Hare, 78, *Hall* v. *Barrows*, 4 De G. J. & S. 150; *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. of L. Cas. 523; *Singer Manufacturing Co.* v. *Wilson*, 3 App. Cas. 376; *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15; *Pinto* v. *Badman*, 7 Times L. R. 337; and it may have to be valued as an asset on the purchase of a business; *Hall* v. *Barrows*, *supra*.

(*u*) *Hall* v. *Barrows*, 4 De G., J. & S. 150, 158; *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15, 33.

mind that a trade mark cannot be said to be the subject of property in the same way that a bale of goods is said to be the subject of the right of property or ownership. The right given by law in respect of a trade mark is the exclusive right to use it in connection with some particular kind of goods for the purpose of indicating their manufacturer or place of manufacture (*x*).

Registration of trade marks.

In the year 1875, an Act was passed to establish a register of trade marks (*y*). This Act, however, with the statutes amending it, was repealed by the Patents, Designs, and Trade Marks Act, 1883 (*z*); and the provisions of the Act of 1883 with respect to trade marks have been in their turn repealed by the Trade Marks Act, 1905 (*a*). Under the last-mentioned Act (*b*), a register of trade marks, open to public inspection, is required to be kept at the Patent Office under the control of the Comptroller-General of Patents, Designs and Trade Marks (*c*); all registered trade marks, with the names and addresses of their proprietors, notifications of assignments and transmissions, and other matters are required to be entered therein (*d*). Application for the registration (*e*) of

(*x*) See *per* Lord Cranworth, *Leather Cloth Co.* v. *American Leather Cloth Co.*, 11 H. L. C. 523, 533; and see *The Collins Co.* v. *Brown*, 3 K. & J. 423. The exclusive right to the use of a trade mark has been often compared to, and sometimes confused with, copyright; see *Dicks* v. *Yates*, 18 Ch. D. 76. The point of resemblance between them appears to be that each is among the rights which avail against all the world, and which have no particular object over which they may be exercised.

(*y*) The Trade Marks Registration Act, 1875, stat. 38 & 39 Vict. c. 91, passed 13th Aug., 1875, and amended by 39 & 40 Vict. c. 33, and 40 & 41 Vict. c. 37.

(*z*) Stat. 46 & 47 Vict. c. 57, s. 113.

(*a*) Stat. 5 Edw. VII. c. 15, ss. 73, 74.

(*b*) Sects. 4—7.

(*c*) As to the powers and duties of the Comptroller, see sects. 53—57, and of the Board of Trade, sects. 58—60. As to evidence in proceedings under the Act, see sects. 49—52; as to fees, sect. 61; as to offences in respect of registration, see sects. 66, 67.

(*d*) But registration does not operate as notice to all the world; *Slazenger & Sons* v. *Spalding*, 1910, 1 Ch. 257. As to correction and rectification of the register, see sects. 32—37, 47.

(*e*) Sect. 12; see Trade Marks Rules, 1906; W. N. 31st March

a trade mark (*f*) must be made to the Comptroller-General in writing in the prescribed manner. The Comptroller is empowered to decide whether such

Application for registration of trade mark.

1906. By sects. 63 and 64, special provisions are made for the registration by the Cutlers' Company at Sheffield of trade marks used in respect of metal goods, and for the registration at the Manchester Branch of the Trade Marks Registry of trade marks for cotton goods.

(*f*) For the definition of "mark" and "trade mark," see sect. 3; *Major* v. *Franklin*, 1908, 1 K. B. 712. By sect. 9, a registrable trade mark must contain or consist of at least one of the following essential particulars (see *Re Carter Medicine Co.'s Trade Mark*, 1892, 3 Ch. 472):—

(1) The name of a company, individual, or firm represented in a special or particular manner;

(2) The signature of the applicant for registration or some predecessor in his business;

(3) An invented word or invented words (see *Eastman, &c., Co.* v. *Comptroller of Patents*, 1898, A. C. 571; *Re Linotype Co.'s Trade Mark*, 1900, 2 Ch. 238; *Phillipport* v. *William Whiteley, Ld.*, 1908, 2 Ch. 275);

(4) A word or words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or a surname; *Re Compagnie Industrielle des Pétroles*, 1907, 2 Ch. 435 ("motorine" allowed for petrol); see *Re Colgate & Co.'s Mark*, 29 T. L. R. 326;

(5) Any other distinctive mark: but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1, 2, 3, and 4) shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark.

For the purposes of the section "distinctive" means adapted to distinguish the goods of the proprietor of the trade mark from those of other persons; and see the proviso as to use before 13th Aug., 1875. By sect. 10, a trade mark may be limited in whole or in part to one or more specified colours.

The name of the article cannot be registered, even though it has become by user distinctive of the applicant's goods; *Re Gramophone Co.*, 1910, 2 Ch. 423; see *Re Gestetner's Trade Mark*, 1908, 1 Ch. 513; and as to distinctive marks where registration has been allowed, see *Re "Apollinaris" Trade Mark*, 1907, 2 Ch. 178; *Re National Starch Co.*, 1908, 2 Ch. 698 ("Oswego"); *Re Whitfield's Bedsteads*, 1909, 2 Ch. 373 ("Lawson Tait"); *Re Aktiebolaget B. A. F. Hjorth & Co.*, 1910, 2 Ch. 64 ("Primus" for stoves); and where it has been refused, *Re Joseph Crosfield & Sons*, 1910, 1 Ch. 130 ("Perfection" soap); *Re California Fig Syrup Co.*, *ibid.* ("California Syrup of Figs"); *Re H. N. Brock & Co., Ld.*, *ibid.* ("Orlwoola"); *Re Leopold Cassella & Co.*, 1910, 2 Ch. 240 ("Diamine" for dyes); and as to initials see *Re W. & G. Du Cros, Ld.*, 57 Sol. Journ. 728. A surname, if in fact adapted to distinguish goods to which it is applied, can be registered; *Re Trofani's Trade Mark*, 57 Sol. Journ. 686; overruling *Re Pope's Electric Lamp Co.*, 1911, 2 Ch. 382; see *Re Benz & Co.'s Application*, 30 R. P. C. 177; *Re R. J. Lea's Application*, 1913, 1 Ch. 446. As to the procedure under paragraph 5, see *Re Aktiebolaget B. A. F. Hjorth & Co.*, 1910, 2 Ch. 64.

application shall be accepted, subject to an appeal to the Board of Trade or the Court (*g*). A trade mark must be registered in respect of particular goods or classes of goods (*h*). Registration is for the period of fourteen years, but may be renewed from time to time as provided in the Act (*i*). Subject to any limitations and conditions entered upon the register, the registration of a person as proprietor of a trade mark, if valid (*k*), gives to him the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered (*l*). But the proprietor of a registered trade mark may not interfere with or restrain the user by any person of a similar trade mark upon or in connection with goods, as to which such trade mark has been continuously used by such person or his predecessors in business from a date anterior

Effect of registration.

Anterior use of similar mark.

(*g*) Stat. 5 Edw. VII. c. 15, s. 12, sub-ss. 2, 3; *Re Teofani's Trade Mark*, 29 T. L. R. 591. As to advertisement of the application and as to opposition, see sects. 13, 14. The proprietor of a trade mark may be required to disclaim part of it containing matters common to the trade, or non-distinctive; sect. 15; see *Re Albert Baker & Co.*, 1908, 2 Ch. 86. A trade mark which is calculated to deceive cannot be registered; sect. 11; *Re Compagnie Industrielle des Pétroles*, 1907, 2 Ch. 435 ("motricine" for petrol where "motorine" already registered); *Re Albert Baker & Co., supra*; *Re Gutta Percha, &c., Co. of Toronto*, 1909, 2 Ch. 10; *Re Van Der Leeuw's Trade Mark*, 28 R. P. C. 708; *Coleman* v. *Smith*, 1911, 2 Ch. 572; *Re British Drug Houses' Trade Mark*, 30 R. P. C. 73. Registration, if ultimately allowed, dates from the date of application; sect. 16; and a certificate of registration is issued; sect. 17.

(*h*) Sect. 8. See sects. 24—27 as to the registration of associated trade marks; *i.e.*, trade marks of the same proprietor closely resembling each other; see *Re Birmingham Small Arms Co.*, 1907, 2 Ch. 396; and of a series of trade marks; and sect. 62, as to trade marks denoting that goods have been examined and their quality certified by some association or person undertaking this function.

(*i*) Sect. 28; see sects. 29—31.

(*k*) Registration is *primâ facie* evidence of the validity of the registration and subsequent assignments; sect. 40; and after seven years it is conclusive, unless obtained by fraud or unless it was unlawful under sect. 11 (sect. 41). Where a certificate of validity is given as the result of an action, the proprietor, if the validity is again unsuccessfully attacked, gets solicitor and client costs (sect. 46).

(*l*) Sect. 39; but see the proviso to this section. As to the evidence in an action for infringement, see sect. 43.

to the user of the registered trade mark (*m*). And registration under the Act does not interfere with any *bonâ fide* use by a person of his own name or place of business, or that of any of his predecessors in business, or the use by any person of any *bonâ fide* description of the character or quality of his goods (*n*). On the other hand, proceedings cannot be instituted to prevent, or to recover damages for, the infringement of an unregistered trade mark, unless such trade mark was in use before the 13th of August, 1875 (*o*), and has been refused registration under the Act (*p*). And the Act does not affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof (*q*).

Non-user of trade mark.

A registered trade mark may, on the application to the Court of any person aggrieved, be taken off the register in respect of any of the goods for which it is registered, on the ground that it was registered by the proprietor or a predecessor in title without any *bonâ fide* intention to use the same in connection with such goods, and there has in fact been no *bonâ fide* user of the same in connection therewith; or on the ground that there has been no *bonâ fide* user of such trade mark in connection with such goods during the five years immediately preceding the application; unless in either case such non-user is shown to be due to special circumstances in the trade, and not to any intention not to use or to abandon such trade mark in respect of such goods (*r*).

(*m*) Stat. 5 Edw. VII. c. 15, s. 41. And in cases of honest concurrent user, two persons may be registered as proprietors of the same or similar trade marks, though in general this is not allowed; sects. 19—21; *Re Albert Baker & Co.*, 1910, 2 Ch. 86.

(*n*) Sect. 44.

(*o*) The date of the passing of the Act of 1875; see *ante*, p. 384, n. (*y*).

(*p*) 5 Edw. VII. c. 15, s. 42.

(*q*) Sect. 45; see *ante*, p. 382.

(*r*) Sect. 37.

Assignment of trade marks.

A trade mark when registered can be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered, and it is determinable with that goodwill (*s*); but this does not affect the right of the proprietor of a registered trade mark to assign the right to use the same in any British possession or protectorate or foreign country in connection with any goods for which it is registered, together with the goodwill of the business therein in such goods (*t*). Subject to the provisions of the Act, the person for the time being entered in the register as proprietor of a trade mark has, subject to any rights appearing from the register to be vested in any other person, power to assign the same, and to give effectual receipts for any consideration for such assignment; and, although notice of trusts cannot be entered on the register (*u*), yet any equities in respect of a trade mark may be enforced in like manner as in respect of any other personal property (*x*). Where a person becomes entitled to a registered trade mark by assignment, transmission, or other operation of law, he is to be entered on the register as proprietor of the trade mark (*y*).

International and colonial protection of trade marks.

The Patents Act of 1907 contains provisions under which a person, who has applied for protection for any trade mark in any foreign State or British possession, may be entitled to registration of his trade mark in priority to other applicants. The requirements of the Act in this respect are the same as in the case of similar applications for a patent (*z*).

(*s*) Stat. 5 Edw. VII. c. 15, s. 22; see *Pinto* v. *Badman*, 7 T. L. R. 317. Under sect. 23, where from any cause a person ceases to carry on business, and his goodwill does not pass to any one successor, but is divided, his registered trade marks may be apportioned among the persons in fact continuing the business.

(*t*) Sect. 22.

(*u*) Sect. 5.

(*x*) Sect. 38.

(*y*) Sect. 33.

(*z*) Stat. 7 Edw. VII. c. 29, s. 91; see Trade Marks Act, 1905 (5 Edw. VII. c. 15), s. 65, *ante*, p. 365; Stat. R. & O., revised to 31st Dec., 1903, tit. Trade Mark.

§ 5. *Of Trade Names.*

Trade names.

We have seen (*a*) that the name of an individual or firm may be used and registered as a trade mark. The goods of a particular trader may, however, come to be known in the market by or in connection with his name, or the name of his works, or of the place where his works are situated, although the name in question has not been used as a trade mark properly so called (*b*). For example, bitters made by a particular manufacturer at Angostura may come to be known as "Angostura Bitters" (*c*); food for cattle made by one Thorley may come to be known as "Thorley's Food for Cattle" (*d*); and sewing machines made by one Singer may come to be known as "Singer Machines" (*e*). When a name used in this way has become known in the market as denoting the goods of a particular manufacturer, he acquires a right to prevent any other person from using the same name in connection with the same kind of goods for trade purposes, in such a way as is likely to induce people to believe that the goods offered for sale by the latter trader are goods manufactured by the former (*f*). A name so used and known is called a trade name. The right thus given by law to the exclusive use of a trade

(*a*) *Ante*, p. 385, n. (*f*).

(*b*) See *per* Lord Blackburn, *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15, 32.

(*c*) See *Siegert* v. *Findlater*, 7 Ch. D. 801, 802, 809.

(*d*) See *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748, 755, 760, 761.

(*e*) See *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15, 32, 33, 38.

(*f*) See the cases cited in the three preceding notes, and *Goodfellow* v. *Prince*, 35 Ch. D. 9; *Montgomery* v. *Thompson*, 1891, A. C. 217; *Reddaway* v. *Banham*, 1896, A. C. 199; *Cellular Clothing Co.* v. *Maxton*, 1899, A. C. 326; *Yeatman* v. *Homberger*, 29 R. P. C. 645. The right is enforceable in what is called a "passing-off" action; see *Hunt, &c., & Co.* v. *Ehrmann Brothers*, 1910, 2 Ch. 198. As to a foreign manufacturing name, see *Le couturier* v. *Rey*, 1910, A. C. 262; and as to an imitative "get up" of an article, see *William Edge & Sons* v. *William Niccoll & Sons*, 1911, A. C. 693. As to what fraudulent use of a false trade description is a criminal offence, see Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28); *Stone* v. *Burn*, 1911, 1 K. B. 927.

name is assignable or transmissible together with the business in connection with which it has been acquired or exercised (*g*). Sometimes the goods of a particular manufacturer come to be known in the market by or in connection with a name which he uses as his trade mark. In such a case, his right to the exclusive use of the name, as a trade name, appears to be distinct from his right to the exclusive use of the same name as a trade mark (*h*). The right given by law to the exclusive use of a trade name is founded upon and limited by the rule, that no man is entitled to represent his goods as being the goods of another man (*i*). But a manufacturer, who has acquired such a right, cannot prevent other traders from using his trade name in such a way as is *not* likely to induce people to believe that the goods offered for sale by such other traders are goods manufactured by him (*k*); and a rival manufacturer of the same name is entitled to use his own name unless he does it in such a way as to mislead the public (*l*).

§ 6. *Of Goodwill.*

Goodwill.

Connected with the subject of trade marks is that of goodwill. The goodwill of a trade or business is

(*g*) See the cases cited above; *Thorneloe* v. *Hill*, 1894, 1 Ch. 569.

(*h*) See *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, 523; *Singer, &c., Manufacturers* v. *Wilson*, 3 App. Cas. 376, 401; *Singer Manufacturing Co.* v. *Loog*, 8 App. Cas. 15; *Powell* v. *Birmingham, &c., Co.*, 1897, A. C. 710; *ante*, p. 387.

(*i*) Cf. *ante*, p. 382.

(*k*) See *Burgess* v. *Burgess*, 3 De G., M. & G. 896, 904, 905; *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748, 752, 763; *Singer Manufacturing Co.* v. *Loog*, 18 Ch. D. 395, 412, 417, 424; 8 App. Cas. 15, 26, 29—39; *Pinet* v. *Pinet, Ld.*, 1898, 1 Ch. 179.

(*l*) *Burgess* v. *Burgess*, *supra*; *Turton* v. *Turton*, 42 Ch. D. 128; *Re Louis Tussaud, Ld.*, 44 Ch. D. 678; *Saunders* v. *Sun Life, &c., Co.*, 1894, 1 Ch. 537; see *Fine Cotton, &c., Association* v. *Harwood, Cash & Co.*, 1907, 2 Ch. 184; *Kingston, Miller & Co.* v. *Thomas Kingston & Co.*, 1912, 1 Ch. 575; *Brinsmead & Sons* v. *Brinsmead*, 57 Sol. Journ. 716. The adoption by a manufacturer of a rival manufacturer's name will be presumed to be fraudulent; *Burgess* v. *Burgess*, *supra*; *Ash* v. *Invicta Manufacturing Co.*, 28 R. P. C. 252; reversed on facts on appeal, *ibid.* 597; and see *ibid.* 607.

often of great value. It comprises every advantage which has been acquired by carrying on the business, whether connected with the premises in which the business has been carried on, or with the name of the firm by whom it has been conducted (*m*). And the sale of a business carries the right to use the firm's name, provided the vendors are not thereby exposed to liability (*n*). On the dissolution of a partnership and division of the assets, each partner has a right, in the absence of any stipulation to the contrary, to use the name of the old firm (*o*); but if there be a stipulation that, in case of the retirement or decease of one partner, the other shall take the stock or capital at a valuation, the goodwill must be included in such valuation (*p*). The sale of the goodwill of a business will not prevent the vendor from setting up a similar business on his own account, even in immediate proximity to the premises on which the old business has been carried on (*q*): but, in such a case, the vendor is not entitled to represent that the new business, which he has set up, is the same as, or is carried on in continuation of, the business of which he has sold the goodwill (*r*). And it is now settled, after considerable conflict of opinion, that the vendor of a business with the goodwill thereof, who has subsequently set up in the same business for himself, will be restrained from soliciting the customers of the old business not to deal

(*m*) *Churton* v. *Douglas*, Johns. 174.

(*n*) *Levy* v. *Walker*, 10 Ch. D. 436, 448; *Thynne* v. *Shove*, 45 Ch. D. 577; *Re David and Matthews*, 1899, 1 Ch. 378; *Townsend* v. *Jarman*, 1900, 2 Ch. 698.

(*o*) *Banks* v. *Gibson*, 34 Beav. 566; *Levy* v. *Walker*, 10 Ch. D. 436, 445; provided the other partner is not exposed to liability; *Burchell* v. *Wilde*, 1900, 1 Ch. 551; and see *Gray* v. *Smith*, 43 Ch. D. 208.

(*p*) *Hall* v. *Barrows*, 4 De G., J. & S. 150; *Re David and Matthews*, 1899, 1 Ch. 378; *Hill* v. *Fearis*, 1905, 1 Ch. 466.

(*q*) *Cruttwell* v. *Lye*, 17 Ves. 335; 11 R. R. 98; *Hall* v. *Barrows*, 4 De G., J. & S. 150, 159; *Churton* v. *Douglas*, Johns. 174; *Labouchere* v. *Dawson*, L. R. 13 Eq. 322, 324; *Re David and Matthews*, 1899, 1 Ch. 378.

(*r*) *Churton* v. *Douglas*, Johns. 174.

with the purchaser, and to give their custom to himself (*s*). Upon the sale of a business with the goodwill, the purchaser should always insist on a covenant being entered into by the vendor not to carry on the business within so many miles of the old premises; which covenant, as we have seen (*t*), is valid.

Alienation for debt.

There does not appear to be any direct process of execution available against patents, copyrights, or the other rights of which we have treated in this chapter (*u*). But the benefit of a bankrupt's letters-patent for an invention (*x*), or copyright passes to the trustee in his bankruptcy along with his other property. Such rights would appear to be things in action (*y*), so as to be excluded from the operation of the reputed ownership clauses of the bankruptcy law (*z*). A trustee in bankruptcy is expressly authorised to sell the goodwill of the bankrupt's business as part of his property (*a*); and is enabled to dispose, in connection with such goodwill, of all the advantages enjoyed by reason of the bankrupt's exclusive right to use any trade marks or trade name (*b*).

(*s*) *Trego* v. *Hunt*, 1896, A. C. 7, overruling the law laid down in *Pearson* v. *Pearson*, 27 Ch. D. 145, and approving *Labouchere* v. *Dawson*, L. R. 13 Eq. 322; *Gillingham* v. *Beddow*, 1900, 2 Ch. 242; *Curl* v. *Webster*, 1904, 1 Ch. 685. As to the sale of the business of a bankrupt by his trustee, see *Walker* v. *Mottram*, 19 Ch. D. 355. As to the case of the expulsion of a partner from a business, see *Dawson* v. *Beeson*, 22 Ch. D. 504.

(*t*) *Ante*, p. 194.

(*u*) It seems, however, that such property might be seized and sold under process of sequestration where this can be resorted to; see *Hillock* v. *Terrell*, 3 Ex. D. 323; 1 Seton on Judgments, 446, 7th ed.; or a receiver may be appointed by way of equitable execution, but this cannot be done if the property is producing no income; *Edwards & Co.* v. *Picard*, 1909, 2 K. B. 903.

(*x*) *Hesse* v. *Stevenson*, 3 B. & P. 565; *Bloxam* v. *Elsee*, 6 B. & C. 169; 30 R. R. 275.

(*y*) See *ante*, p. 43.

(*z*) See *Colonial Bank* v. *Whinney*, 11 App. Cas. 426, 438—440; Robson on Bankruptcy, 531, 532, 7th ed.; L. Q. R. xi., 232 *sq.*

(*a*) Stat. 46 & 47 Vict. c. 52, s. 56, *ante*, p. 284.

(*b*) See *ante*, pp. 383, 387, 389, 390; Robson on Bankruptcy, 598, 599, 7th ed.

PART III.

OF PERSONAL ESTATE GENERALLY.

CHAPTER I.

OF SETTLEMENTS OF PERSONAL PROPERTY.

No estate for life.

PERSONAL property is capable of being settled, but not in the same manner as land. Land being held by estates, is settled by means of life estates being given to some persons with estates in remainder in tail and in fee simple to others. But personal property, as we have already observed (*a*), is essentially the subject of absolute ownership. The settlement of such property, by the creation of estates in it, cannot therefore be accomplished. And there is a striking difference in many cases between the effect of the same limitation, according as it may be applied to real or to personal property.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property in the strict meaning of the phrase. Thus, if any chattel, whether real or personal, be assigned to A. for his life, A. will at once become entitled in law to the whole (*b*). By the assignment the property in the chattel passes to him, and the law knows nothing of a reversion in such chattel remaining in the assignor. And this

(*a*) *Ante*, p. 46.
(*b*) *Hill* v. *Hill*, 1897, 1 Q. B. 483, 492; and see *Re Tritton*, 61 L. T. 301; *Re Thynne*, 1911, 1 Ch. 282.

is the case even though the chattel be a term of years of such length (for instance, 1,000 years) that A. could not possibly live so long (*c*). The term is considered in law as an indivisible chattel, and consequently incapable of any such modification of ownership as is contained in a life estate (*d*).

Bequest of a term for life.

An apparent exception to the above rule has long been established in the case of a bequest by will of a term of years to a person for his life: in this case the intention of the testator is carried into effect by the application of a doctrine similar to that of executory devises of real estates (*e*). The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by deed; but on his decease the term is held to shift away from him, and to vest, by way of *executory bequest*, in the person to be next entitled (*f*). Accordingly, if a term of years be bequeathed to A. for his life, and after his decease to B., A. will have during his life the whole term vested in him, and B. will have no vested estate, but a mere *possibility*, as it is termed (*g*), until after the decease of A.: and this possibility, like the possibility of obtaining a real estate, was formerly inalienable at law unless by will (*h*), though capable of assignment in equity (*i*). But by the Real Property Act, 1845 (*k*), an executory and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure may be disposed of by deed. B. may, therefore, during the life of A., assign his expectancy by deed; and such assignment will entitle the

Executory bequests.

Possibility.

Now alienable.

(*c*) 2 Prest. Abs. 5.

(*d*) But see the views maintained in Gray, Rule against Perpetuities, Appendix F., 2nd ed.; and in L. Q. R. xxiv. 431.

(*e*) See Williams, R. P. 398, 21st ed.

(*f*) *Matthew Manning's case*, 8 Rep. 95; *Lampert's case*, 10 Rep. 47.

(*g*) See Williams, R. P. 367, 21st ed.

(*h*) Shep. Touch. 230.

(*i*) Fearne, Cont. Rem. 518.

(*k*) Stat. 8 & 9 Vict. c. 106, s. 6, replacing 7 & 8 Vict. c. 76, s. 5.

assignee to the whole term on A.'s decease. If, however, no such assignment should have been made, B. will become on the decease of A., possessed of the whole term, which will then shift to B. by virtue of the executory bequest in his favour. The mere circumstance, indeed, of the term being bequeathed to A. for his life only, will operate to shift away the term on his decease (*l*), independently of the bequest to B.; so that, if there had been no bequest over to B., the interest of A. would continue only during his life, and the residue of the term would then remain part of the undisposed-of property of the testator. It may, however, be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real (*m*).

Life interests in equity.

The strict and ancient doctrine of the indivisibility of a chattel, though retained by the Courts of law, had no place in the modern Court of Chancery, which, in administering equity, carried out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B., A. was merely entitled to a life interest, and B. had, during the life of A., a vested interest in remainder, of which he might dispose at his pleasure, and the Court of Chancery would compel the person to whom the Courts of law might have awarded the legal interest to make good the disposition. Accordingly, if the personal property so given should have consisted of moveable goods, equity would have compelled A., the owner for life, to furnish and sign an inventory of the goods, and an undertaking to take

(*l*) *Eyres* v. *Faulkland*, 1 Salk. 231; *Ker* v. *Lord Dungannon*, 1 Dru. & War. 509, 528. See, however, 2 Jarm. Wills, 1454, 6th ed.; *Hoare* v. *Parker*, 2 T. R. 376; 1 R. R. 566.

(*m*) Fearne, Cont. Rem. 413.

Ancient distinction between a gift of goods and a gift for the use of goods.

proper care of them (*n*). This doctrine, however, was comparatively of modern date; for formerly the Court of Chancery followed the rules of law in the construction of such gifts; and if a gift of moveable goods had been made to A. for his life, and after his decease to B., they would not have afforded to B. any assistance after A.'s decease (*o*). But if the gift had been of the *use or enjoyment* of the goods only to A. for his life, and after his decease to B., the Court would then have assisted B. by declaring A.'s representatives after his decease to be trustees only for the benefit of B. (*p*). But this distinction is now exploded; and the only case in which the tenant for life is now entitled absolutely to things given to him for life is, that of articles *quæ ipso usu consumuntur*, as wines, &c., a gift of which to a person for his life vests in him the absolute ownership (*q*). In all other cases, as we have said, modern equity will assist the donee in remainder, to whom any gift of personal estate may have been made after the decease of another, who was to have them only for his life (*r*). As we have seen (*s*), by the Judicature Acts of 1873 to 1875 (*t*), the Court of Chancery was abolished and its jurisdiction transferred to and vested in the High Court of Justice; but no change was made by these Acts in the nature of legal or equitable rights or remedies. When, therefore, it is wished to make a settlement of any kind of personal property, the doctrine of equity is at once resorted to. The property is assigned to trustees, *in trust* for A. for his life, and after his decease *in trust* for B., &c. This assignment to the

Articles quæ ipso usu consumuntur.

Settlement of personal property by means of trusts.

(*n*) Fearne, Cont. Rem. 407; *Conduitt* v. *Soame*, 1 Coll. 285.

(*o*) Fearne, Cont. Rem. 402.

(*p*) *Ibid.*, 401.

(*q*) *Randall* v. *Russell*, 3 Meriv. 190; 17 R. R. 58; *Andrew* v. *Andrew*, 1 Coll. 690.

(*r*) Fearne, Cont. Rem. 406. See *Re Tritton*, 5 Times L. R. 687, 61 L. T. 301; *Re Thynne*, 1911, 1 Ch. 282.

(*s*) *Ante*, pp. 28, 160, 161.

(*t*) Stats. 36 & 37 Vict. c. 66, s. 16; 37 & 38 Vict. c. 83; 38 & 39 Vict. c. 77.

trustees vests in them the whole legal interest in the property; and at law they are held to be absolutely entitled to it; for the Statute of Uses (*u*) has no application to any kind of personal estate. But in equity the trustees are compellable to pay the entire income to A. for his life, and after his decease to B., and so on according to the trusts of the settlement; and if B. should alien his interest during the life of A., the trustees will be bound, on having notice of the disposition, to stand possessed of the property, after A.'s decease, in trust for the alienee (*x*).

(*u*) 27 Hen. VIII. c. 10; Williams, R. P. 173, 21st ed.

(*x*) A form of marriage settlement of stock and other personal estate upon the usual trusts will be found in Appendix (C). By the Stamp Act, 1891, any instrument, whether voluntary or upon valuable other than pecuniary consideration, whereby any definite and principal sum of money (whether of British or any foreign or colonial currency, and whether charged or chargeable on or to be laid out in the purchase of lands or other hereditaments or not), or any definite and certain amount of stock (including shares, &c., as above mentioned, *ante*, p. 318, n. (*h*)), or any security, is settled or agreed to be settled in any manner whatsoever, was charged with an *ad valorem* stamp duty of 5*s.* for every 100*l.* or fractional part of 100*l.* of the amount or value of the property settled or agreed to be settled; see stat. 54 & 55 Vict. c. 39, ss. 1, 104—106, 122, and First Schedule, replacing 33 & 34 Vict. c. 97, ss. 2, 3. The duty on the settlement of any money to become payable upon any policy of life assurance, or upon any security not being a marketable security (see *ante*, p. 318, n. (*h*)), is charged on the amount so secured: but in the case of a policy, if no provision is made for keeping up the policy, the *ad valorem* duty is charged only on the value of the policy at the date of the settlement; stat. 54 & 55 Vict. c. 39, s. 104, replacing 33 & 34 Vict. c. 97, s. 124. The duty on settlements of reversionary interests, whether vested or contingent, in any such amount of money, stock or shares as above mentioned, is charged on the amount of the money or on the value at the date of the settlement of the amount of the stock or shares; *Onslow* v. *Inland Revenue Commissioners*, 1891, 1 Q. B. 239. These enactments still apply to settlements made on marriage or otherwise for valuable (other than pecuniary) consideration. But any conveyance or transfer operating as a voluntary disposition *inter vivos*, and executed on or after the 10th April, 1910, is chargeable under sect. 74 of the Finance Act, 1910, with the like stamp duty as if it were a conveyance or transfer on sale; and the stamp must be adjudicated; stat. 10 Edw. VII. c. 8, s. 74, sub-ss. 1, 2; *ante*, p. 75, n. (*c*). And where any instrument is chargeable with duty both as a conveyance or transfer under this section, and as a settlement under the Stamp Act, 1891, it is to be charged with duty as a conveyance or transfer under this section, and not as a settlement under that Act; sect. 74, sub-s. 4. Any conveyance or transfer (not being a disposition made in favour of a purchaser or incum-

Stamps on settlements of money, stock or shares.

Stamps on voluntary settlements.

Bonus.

When shares in joint stock companies are settled in the manner above mentioned, it sometimes becomes a question whether any extraordinary benefit which may be divided amongst the shareholders by way of bonus should be considered as capital or as interest. The general principle upon which such questions will be determined has been thus stated by the Court of Appeal (*y*) :—

"Where a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company, which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital."

broancer or other person in good faith and for valuable consideration) shall, for the purposes of this section, be deemed to be a conveyance or transfer operating as a voluntary disposition *inter vivos*, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Commissioners are of opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred; sect. 74, sub-s. 5. A conveyance or transfer made for nominal consideration for the purpose of securing the repayment of an advance or loan, or made for effectuating the appointment of a new trustee, or the retirement of a trustee, whether the trust is expressed or implied, or under which no beneficial interest passes in the property conveyed or transferred, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust, whether expressed or implied, or a disentailing assurance not limiting any new estate other than an estate in fee simple in the person disentailing the property, shall not be charged with duty under this section, and this sub-section shall have effect notwithstanding that the circumstances exempting the conveyance or transfer from charge under this section are not set forth in the conveyance or transfer; sect. 74, sub-s. 6.

(*y*) *Re Bouch, Sproule* v. *Bouch*, 29 Ch. D. 635, 653, approved 12 App. Cas. 385, 397. And see the cases there cited; and Juridical Review, xv. 1.

A bonus paid as dividend belongs to the tenant for life. But if appropriated or paid as capital, the bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life (*z*).

Apportionment of income.

Formerly no apportionment was made of annuities, or of the dividends of stocks settled in trust for one person for life, with remainder to another; but the remainderman was entitled to the whole of the annuity or dividend which fell due next after the decease of the person entitled for life (*a*). If, however, an annuity were given for the maintenance of an infant (*b*), or of a married woman living separate from her husband (*c*), the necessity of the case was considered a ground for presuming that an apportionment was intended. The interest of money lent was also always apportioned; for though the payment of such interest be made half-yearly, yet it becomes due *de die in diem*, so long as the principal remains unpaid (*d*). But the Apportionment Act, 1834 (*e*), provided for the apportionment of all annuities, dividends, and other payments made payable or coming due at fixed periods (*f*) under any

Annuity given for maintenance.

Interest was always apportioned.

(*z*) *Re Alsbury*, 45 Ch. D. 237; *Re Armitage*, 1893, 3 Ch. 337; *Re Malam*, 1894, 3 Ch. 578; *Re Percy*, 1907, 1 Ch. 289.

(*a*) *Pearly* v. *Smith*, 3 Atk. 260; *Sherrard* v. *Sherrard*, 3 Atk. 502; *Hardcastle* v. *Ashburner*, 2 De G. & Sm. 366; *The Queen* v. *The Lords of the Treasury*, 16 Q. B. 357; see *Paton* v. *Sheppard*, 10 Sim. 186.

(*b*) *Hay* v. *Palmer*, 2 P. Wms. 501; 1 Swanst. 349, note.

(*c*) *Howell* v. *Hanforth*, 2 W. Black. 1016.

(*d*) *Edwards* v. *Countess of Warwick*, 2 P. Wms. 176; *Bancer* v. *Lowe*, 13 Ves. 135; *Re Rogers's Trusts*, 1 D. & S. 339.

(*e*) Stat. 4 & 5 Will. IV. c. 22, passed 16th June, 1834. By s. 3, the provisions of this Act do not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description. The Act also provided for the apportionment of rents service and other rents; see Williams, R. P. 131 and notes (*c*), (*f*), 21st ed.; but made no apportionment of rent as between the heir or devisee and the executor of a tenant in fee simple; *Browne* v. *Amyot*, 3 Hare, 173; *Beer* v. *Beer*, 12 C. B. 60; *Re Clalow's Trusts*, 3 K. & J. 689.

(*f*) See *Re Maxwell's Trusts*, 1 H. & M. 610.

instrument executed or will coming into operation after the passing of the Act (*g*) on the death or determination by any other means of the interest of a person entitled for a life or other limited interest therein (*h*). Now, by the Apportionment Act, 1870 (*i*), all rents, annuities, dividends (*k*), and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. The apportioned part of any such rent, annuity, dividend or other payment shall be payable or recoverable, in the case of a continuing rent, annuity, or other such payment, when the entire portion, of which such apportioned part shall form part, shall become due and payable, and not before; and in the case of a rent, annuity or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable, if the same had not so determined, and not before (*l*). The same remedies are given for recovering the apportioned parts as

The Apportionment Act, 1870.

(*g*) See *Michell* v. *Michell*, 4 Beav. 549; *Knight* v. *Boughton*, 12 Beav. 312; *Wardroper* v. *Cutfield*, 10 Jur. N. S. 194.

(*h*) See *Browne* v. *Ampot*, 3 Hare, 173, 182, 183; *Re Chalow's Trusts*, 3 K. & J. 689; *Carter* v. *Taggart*, 16 Sim. 447; *Trimmer* v. *Danby*, 23 L. J. Ch. 979; *Sutton* v. *Ennis*, 18 W. R. 882.

(*i*) Stat. 33 & 34 Vict. c. 35 s. 2, passed 1st Aug., 1870; *Re Cline's Estate*, L. R. 18 Eq. 213; *Lawrence* v. *Lawrence*, 26 Ch. D. 795.

(*k*) By sect. 5, the word "dividends" includes, besides dividends strictly so called, all payments made by the name of dividends, bonus or otherwise, out of the revenue of trading or other public companies (see *ante*, p. 343 and n. (*l*)), divisible between all or any of the members of such respective companies, whether such payments shall be usually made, or declared at any fixed time or otherwise; and all such divisible revenue shall, for the purposes of the Act, be deemed to have accrued, by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made; see *Re Oppenheimer*, 1907, 1 Ch. 399. But the word "dividend" does not include payments in the nature of a return of reimbursement of capital; see *Jones* v. *Ogle*, L. R. 8 Ch. 192; *Re Griffith*, 12 Ch. D. 655.

(*l*) Sect. 3.

might have been used for recovering the entire portions (*m*). The Act does not render apportionable any annual sums made payable in policies of assurance of any description (*n*), or extend to any case in which it is expressly stipulated that no apportionment shall take place (*o*). But this Act extends the rule of apportionment to the case of a deceased person absolutely entitled to property, giving to his executors or administrators a right, as against his heir or devisee (*p*) or specific legatee (*q*), to an apportioned part of the income up to the time of his decease.

No estate tail in personal property.

An estate tail, such as that created by a gift of lands to a man and the heirs of his body (*r*), has nothing analogous to it in personal property. An estate tail cannot be held in such property at law, neither does equity admit of any similar interest. A gift of personal property of any kind to A. and the heirs of his body will simply vest in him the property given (*s*). And in the construction of wills, where many informal expressions are allowed to vest an estate tail in lands, the general rule is that expressions, which if applied to real estate would confer an estate tail, shall, when applied to personal property, simply give the absolute interest (*t*).

(*m*) Sect. 4 provides that in the case of an entire or continuing rent reserved out of or charged on lands or hereditaments of any tenure, the persons liable to pay the rent and the lands or hereditaments shall not be resorted to for the recovery of any apportioned part of the rent, but the whole rent shall be paid to the person who would have been entitled to receive the same, if not apportionable, and the apportioned part shall be recovered from him.

(*n*) Stat. 33 & 34 Vict. c. 35, s. 6.

(*o*) Sect. 7; see *Re Oppenheimer*, 1907, 1 Ch. 399.

(*p*) *Capron* v. *Capron*, L. R. 17 Eq. 288; *Hasluck* v. *Pedley*, L. R. 19 Eq. 271; *Constable* v. *Constable*, 11 Ch. D. 681.

(*q*) *Pollock* v. *Pollock*, L. R. 18 Eq. 329; *Re Griffith*, 12 Ch. D. 655; *Re Oppenheimer*, 1907, 1 Ch. 399.

(*r*) See Williams, R. P. 90, 21st ed.

(*s*) Fearne, Cont. Rem. 461, 463; *Doncaster* v. *Doncaster*, 3 Kay & J. 26.

(*t*) 2 Jarm. Wills, p. 1193, 6th ed.; *Re Lowman*, 1895, 2 Ch. 348.

Word "heirs" inapplicable to personal estate.

The same effect will be produced by a gift of such property to a man and his heirs. The words "heirs," and "heirs of his body," are quite inapplicable to personal estate; the heir, as heir, has nothing to do with the personal property of his ancestor. Such property has nothing hereditary in its nature, but simply belongs to its owner for the time being. Hence, a gift of personal property to A. simply, without more, is sufficient to vest in him the absolute interest (*u*). Whilst, under the very same words, he would acquire a life interest only in real estate (*x*), he will become absolutely entitled to personal property. Thus a gift of lands to A. for life, and after his decease to B., gives to B. a mere life interest in remainder expectant on the decease of A. (*y*); unless indeed the gift be made by will subsequently to the Wills Act (*z*). But a gift of personal property to A. for life, and after his decease to B., gives to B. a vested equitable interest in the corpus or body of the fund, to which he becomes absolutely entitled, subject only to A.'s life interest; and the circumstances of B.'s dying in the lifetime of A. would be immaterial (*a*).

A simple gift sufficient.

Example.

Use of the words "executors, administrators, and assigns."

It is true that in deeds and other legal instruments it is usual to transfer personal estate absolutely by the use of the words "executors, administrators and assigns." As real estate is conveyed to a man, his heirs and assigns (*b*), so personal property is assigned to him, his executors, administrators and assigns. The executor or administrator is, as we shall see, the person who becomes legally entitled

(*u*) *Byng* v. *Lord Strafford*, 5 Beav. 558; affirmed, *nom. Hoare* v. *Byng*, 10 Cl. & Fin. 508; *Re Percy*, 24 Ch. D. 616; see also *Re Johnston, Cockerell* v. *Earl of Essex*, 26 Ch. D. 538.

(*x*) Williams, R. P. 112, 148, 207, 21st ed.

(*y*) *Goodtitle* d. *Richards* v. *Edmonds*, 7 T. R. 635.

(*z*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 28; see Williams, R. P. 113, 114, 21st ed.

(*a*) *Benyon* v. *Maddison*, 2 Bro. C. C. 75.

(*b*) See Williams, R. P. 149, 207, 21st ed.

to a man's personal estate after his decease; in the same manner that a man's heir or assign becomes entitled to his real property. But the analogy extends no further. There is no necessity for the use of these terms (*c*) as there is for the employment of the word "heirs" (*d*). These terms, however, are constantly employed in conveyancing as words of limitation of an absolute interest; and a rule has sprung up with respect to their construction similar to the rule in Shelley's case, by which the word "heirs," when following a life estate given to the ancestor, is merely a word of limitation, giving to such ancestor an estate in fee (*e*). Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators and assigns, A. will be simply entitled absolutely (*f*); in the same manner as the gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple. But as the rule, so far as it applies to personal property, is not founded on the same strict principle as the rule in Shelley's case, a gift of such property to the executors or administrators (not adding assigns) of a person who has taken a previous life interest is sometimes construed as giving him no further interest in such property (*g*); whilst, under the same circumstances, the word "heirs" in a gift of real estate would have given him the fee simple.

Rule in Shelley's case.

As no estates can subsist in personal property, it follows that the rules, on which contingent remain-

Rules as to contingent remainders do

(*c*) *Elliott* v. *Davenport*, 1 P. Wms. 84. See *Earl of Lonsdale* v. *Countess of Berchtoldt*, Kay, 646.

(*d*) *Ante*, n. (*b*).

(*e*) See Williams, R. P. 346 *sq.*, 21st ed.

(*f*) Co. Litt. 54 b; *Hames* v. *Hames*, 2 Keen, 646; *Grafftey* v. *Humpage*, 1 Beav. 46; *Howell* v. *Gayler*, 5 Beav. 157; *Meryon* v. *Collett*, 8 Beav. 386; *Morris* v. *Howes*, 4 Hare, 599; *Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559; *Webb* v. *Sadler*, L. R. 8 Ch. 419.

(*g*) *Wallis* v. *Taylor* 8 Sim., 241; see 1 Beav. 52; *Daniel* v. *Dudley*, 1 Ph. 1; *Attorney-General* v. *Malkin*, 2 Ph. 64; *Alger* v. *Parrott*, L. R. 3 Eq. 328.

not apply to contingent dispositions of personal property.

ders in freehold lands depend for their existence, have never had any application to contingent dispositions of personal property (*h*). Such dispositions partake rather of the indestructible nature of executory devises and shifting uses. Thus a gift of lands to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years, creates a contingent remainder, which, before the passing of the Contingent Remainders Act, 1877 (*i*), would have failed in the event of no son of A. having attained the prescribed age at the time of his decease (*j*). The reason of this failure depended on the ancient rule, that there must always be some defined owner of the feudal possession; and, consequently, between the time of the death of A. and the time of his son's attaining the age of twenty-one years, some owner of the freehold ought to have been appointed, in whom the feudal possession might continue (*k*). Personal property, however, has evidently nothing to do with these feudal rules relating to possession. If, therefore, a gift be made of personal property to trustees, in trust for A. for his life, and after his decease, in trust for such son of A. as shall first attain the age of twenty-one years; or if a term of years be bequeathed to A. for his life, and after his decease to such son of A. as shall first attain the age of twenty-one years; it will be immaterial whether or not the son attain the age of twenty-one years in the lifetime of his father. On his attaining that age he will become entitled quite independently of his father's interest. His ownership will spring, as it were, on the given event of his attaining the age. But as the indestructible

Limit to future dispositions.

(*h*) *Re Boudes* [illegible] 653, deciding [illegible] *Whitby* v. *Mitchell* [illegible] 85, has no [illegible] ments of personal property [illegible] Williams, R. P. [illegible] 21st ed.

(*i*) Stat. 40 & 41 Vict. c. 33; Williams, R. P. 364, 410, 21st ed.

(*j*) *Festing* v. *Allen*, 12 M. & W. 279; 5 Hare, 573; *Holmes* v. *Prescott*, 10 Jur. N. S. 507; 12 W. R. 636.

(*k*) *Ante*, n. (*i*).

nature of these future dispositions of personal estate might lead to trusts of indefinite duration, the rule against perpetuities, which confines executory interests within a life or lives in being, and twenty-one years afterwards, with a further allowance for the time of gestation, should it exist (*l*), applies equally to personal as to real estate. And the further restrictions on the accumulation of income imposed by the Thellusson Act (*m*), and the Accumulations Act, 1892 (*n*), apply to trusts for the accumulation of the income of personal estate as well as real.

Restraint on accumulation.

Equitable interests in personal property of a future kind may be created through the instrumentality of powers, in a similar manner, and to the same extent, as future estates in land (*o*). Thus stock in the funds may be vested in trustees upon such trusts as B. shall by any deed or by his will appoint, and in default of and until any such appointment, in trust for C., or upon any other trusts. Here C. will have a vested interest in the stock, subject to be divested or destroyed by B.'s exercising his power of appointment; and B., though not owner of the stock, has power to dispose of it by deed or will, and may if he please appoint to himself; in which case the trustees will be bound to transfer it to him. If the powers should not be exercised by B., C. will then be entitled absolutely; and will not, as was formerly the case with respect to landed property, be subject to judgment debts incurred by B. (*p*), or to any other of his debts. But if B. should exercise his power by deed without valuable consideration, or by will, in favour of a third person, the stock so appointed will be con-

Powers.

If power is exercised without valuable con-

(*l*) Williams, R. P., 405—407, 21st ed.

(*m*) Stat. 39 & 40 Geo. III. c. 98.

(*n*) Stat. 55 & 56 Vict. c. 58; Williams, R. P. 408, 409, 21st ed.

(*o*) See Williams, R. P. 381, 21st ed.

(*p*) See Williams, R. P. 381, 382, and n. (*q*), 21st ed.

sideration, the property appointed is subject to debts of appointor.

sidered in equity as part of the assets of B. the appointor, and would be subject to the demands of his creditors in preference to the claim of the appointee (*q*). B.'s own property must, however, be first exhausted in satisfying his liabilities (*r*).

Bankruptcy.

In case of bankruptcy, as we have seen, the trustee in bankruptcy is enabled to exercise for the benefit of the creditors all such powers in, over, or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy, or before his discharge, except the right of nomination to a vacant ecclesiastical benefice (*s*).

Rules respecting powers over real estate apply to powers over personal property.

The rules respecting the necessity of a compliance with the terms and formalities of the power (*t*), and the relief afforded by the Court on the defective exercise of a power (*u*), apply as well to personal as to real property. Powers over personal estate may also be exercised by women, without their husbands' consent, and also in favour of their husbands, in the same manner as powers over land (*x*), independently of the provisions of the Married Women's Property Act, 1882 (*y*); and the provision of the Wills Act, which requires wills made in exercise of powers to be executed and attested like all other wills (*z*),

(*q*) *Lassells* v. *Cornwallis*, 2 Vern. 465; *Bainton* v. *Ward*, 2 Atk. 172; *Beyfus* v. *Lawley*, 1903, A. C. 411; *Re Guedalla*, 1905, 2 Ch. 331. The doctrine applies also to appointments of real estate; Williams, R. P. 382, 21st ed.

(*r*) *Fleming* v. *Buchanan*, 3 De G., M. & G. 976, 979; 2 Jarm. Wills, 2028, 6th ed.; see *Williams* v. *Williams*, 1900, 1 Ch. 152.

(*s*) *Ante*, pp. 280, 284. Stats. 32 & 33 Vict. c. 71, ss. 15 (4), 25 (5); 12 & 13 Vict. c. 106, s. 147; and 6 Geo. IV. c. 16, s. 77, had a similar effect.

(*t*) See Williams, R. P. 384, 21st ed.

(*u*) *Ibid.*, 386.

(*x*) *Ibid.*, 387, 388.

(*y*) Stat. 45 & 46 Vict. c. 75, s. 1 (1). See Williams' Conveyancing Statutes, 373, 383—386.

(*z*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 10; see Williams, R. P. 387, 21st ed.; and as to wills exercising powers over personalty of persons domiciled out of England, 2 Wms. V. & P. 294, and n. (*d*), 2nd ed.

applies equally to powers over personal estate. A general bequest of personal estate will also now include any personal estate which the testator may have only a *power* to appoint as he may think fit, in the same manner as a general devise of real estate will comprise real estate subject to any such power (*a*).

Appointment of children's portions.

A frequent instance of the employment of a power over personalty occurs in the case of children's portions, which are usually settled on all the children equally, subject to a power given to the parents to appoint the shares in a different manner (*b*). When such a power is exercised, the shares previously vested in the children are divested from them, and new shares are vested in them by the operation of the power. Formerly, if such a power were so worded as not to authorise an exclusive appointment to some or one of the children, it was held by the Court of Chancery, as a rule of equity, that each child ought to have a substantial share; and an appointment to any child of a very small share was called an *illusory appointment*, and was held void (*c*).

Illusory appointments.

But this doctrine having given rise to difficulties and family disputes, from the uncertainty of the question what was too small or what a sufficient share, the meddlesome doctrine of equity on this point was abolished by the Illusory Appointments Act, 1830 (*d*); and now the appointment of any share, however small, cannot be set aside on the ground of its being illusory. The Act extends, as did the doctrine, to real estate as well as personal; but landed property is, from its nature, seldom cut up into little portions.

The doctrine of equity now abolished.

(*a*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 27; see Williams, R. P. 389, 21st ed.; *Phillips* v. *Cayley*, 43 Ch. D. 222; *Re Jacob*, 1907, 1 Ch. 445; *Re Seabrook*, 1911, 1 Ch. 151.

(*b*) See form of settlement in Appendix C, *post*.

(*c*) 1 Sugd. Pow. 568 *sq.*; 449, 8th ed.; Chance on Powers, 396 *sq.*

(*d*) Stat. 11 Geo. IV. & 1 Will. IV. c. 46, 16th July, 1830.

Exclusive appointment, when void.

Although no appointment was, since this Act, void for being illusory, yet where an exclusive appointment was not authorised, any appointment, by which any object of the power would be entirely excluded, was until the year 1874 still void. Thus, if 1,000*l.* were given to A., B., and C. in such shares as their father should appoint, and in default of appointment to them equally, an appointment of 900*l.* to A. would have been good, as 100*l.* would remain to be equally divided between the three (*e*), of which B. and C. would get each one-third (*f*). But a subsequent appointment of the remaining 100*l.* to B. would have been void, as altogether excluding C., who was equally an object of the power (*g*). Now, by the Powers of Appointment Act, 1874 (*h*), no appointment which shall thereafter be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded; but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to such power (*i*). It is customary, however, in modern settlements to give to parents an express power of appointment in favour of any one or more of the children exclusively of the others. And in order that those, to whom appointments

New enactment.

(*e*) *Young* v. *Waterpark*, 13 Sim. 202.

(*f*) *Wilson* v. *Piggott*, 2 Ves. jun. 351; 2 R. R. 246; *Wombwell* v. *Hanrott*, 14 Beav. 143. See *Foster* v. *Cautley*, 6 De Gex, M. & G. 55; *Bultcel* v. *Plummer*, L. R. 6 Ch. 160.

(*g*) 2 Ves. jun. 355.

(*h*) Stat. 37 & 38 Vict. c. 37, s. 1, passed 30th July, 1874.

(*i*) By sect. 2 it is provided that nothing in the Act contained shall prejudice or affect any provision in any deed, will or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.

have been made, shall not obtain more than may have been intended for them, it is generally provided that no child taking any share of the fund under any appointment shall be entitled to any share in the part unappointed without bringing his or her share into *hotchpot*, and accounting for the same accordingly (*k*). Under such a provision, A., in the instance above given, would not be entitled to any share in the 100*l*. unappointed, without also agreeing to a like division of his 900*l*. amongst himself and the others. The clause of hotchpot operates favourably to the representatives of those children who may happen to die before any appointment shall have been made to them. For when a power is given to appoint amongst children, no appointment can be made to the executors or administrators of those who may have died (*l*); so that such executors or administrators cannot possibly take more than the aliquot part given to the deceased child in default of any appointment; whilst they may be partially or totally excluded even from that by a partial or complete exercise of the power of appointment in favour of the surviving children, or even of a single survivor. When the appointment is partial only, the executors or administrators of a deceased child will, under the hotchpot clause, divide the fund unappointed with the other children, to whom no appointment may have been made; whereas, without such a clause, the children to whom appointments had been made would be equally entitled to participate in the part unappointed (*m*).

Hotchpot.

No appointment can be made to executors or administrators of deceased objects.

When a power is given to appoint property amongst a particular class, no portion of the fund

Appointment amongst a class.

(*k*) See form of settlement in Appendix C., *post*.

(*l*) *Boyle* v. *The Bishop of Peterborough*, 1 Ves. jun. 299; 2 R. R. 108; *Ricketts* v. *Loftus*, 4 You. & Coll. 519.

(*m*) *Wilson* v. *Piggott*, 2 Ves. jun. 351; 2 R. R. 246; *Wombwell* v. *Hanrott*, 14 Beav. 143; *Walmsley* v. *Vaughan*, 1 De G. & J. 114.

Children.

can be appointed in favour of any person who is not a member of that class; and any appointment to such person will accordingly be void. Thus, if the power be to appoint the property to all or any of the *children* of the appointor in such manner as he may think fit, no interest in the property can be appointed to any *grandchild* of the appointor; for a grandchild is not an object of the power (*n*).

Nephews.

So if the power be to appoint amongst nephews or grandnephews, those only can take any shares who answer that description (*o*).

Younger children.

Again, if the power be to appoint portions amongst younger children, nothing can be taken by a younger son who afterwards becomes the eldest by the decease of his elder brother (*p*); although if he should have actually received any share in the money whilst a younger son, he will not be obliged to refund it on becoming the eldest (*q*). The word "younger," however, is taken in parental provisions (*r*), not literally, but as meaning any child who may not be entitled to the family estate. Therefore a daughter, who may be the eldest child, would be considered as a proper object of a power to appoint amongst the younger children, whilst her younger brother, being the eldest son entitled to the family estate, would not be allowed to participate (*s*). And in the same manner a second son becoming the eldest, but not obtaining the family estate, would be allowed a share (*t*).

Child *en ventre sa mère.*

A power to appoint amongst children living at their

(*n*) *Alexander* v. *Alexander*, 2 Ves. sen. 640; *Bristow* v. *Warde*, 2 Ves. jun. 336; 2 R. R. 235.

(*o*) *Falkner* v. *Butler*, Amb. 514; *Waring* v. *Lee*, 8 Beav. 247.

(*p*) *Chadwick* v. *Doleman*, Vern. 528; *Lord Teynham* v. *Webb*, 2 Ves. sen. 198; *Gray* v. *Earl of Limerick*, 2 De G. & S. 370. See *Sanderman* v. *Mackenzie*, 1 J. & H. 613.

(*q*) 2 Sugd. Pow. 293; 680, 8th ed.

(*r*) *Hall* v. *Hewer*, Amb. 203; *Lyddon* v. *Ellison*, 19 Beav. 565.

(*s*) *Pierson* v. *Garnet*, 2 Bro. C. C. 38; *Hennage* v. *Hunloke*, 2 Atk. 456; *Beale* v. *Beale*, 1 P. Wms. 244.

(*t*) *Spencer* v. *Spencer*, 8 Sim. 87; *Macaubrey* v. *Jones*, 2 Kay & J. 684; *Sing* v. *Leslie*, 2 H. & M. 68.

father's decease includes a child *en ventre sa mère* (*u*).

When an appointment to the issue of a child is good.

In some cases where the power only authorises an appointment amongst children, an appointment in favour of the issue of a child may be sustained as being, in effect, first an appointment to the child, and then an assignment by such child in favour of his issue (*x*). But this, of course, can only be done when the child is of age, and is a party to and executes the deed by which the appointment is made. And the more regular plan in such cases is, for the father first to make the appointment in favour of the child, and then for the child to make an assignment of the fund appointed to trustees in trust for his children in the manner intended. It is now usual, however, to insert in settlements of personalty made on marriage or by will a power to appoint the settled trust funds amongst the *issue*, whether children or more remote, of the marriage or of the particular person intended to be benefited (*y*); and under a power of this kind an appointment to a grandchild or more remote descendant will be perfectly valid, provided that the interest so appointed must necessarily vest (if at all) within the period allowed by the rule against perpetuities (*z*).

Appointment by a father must not be for his own benefit.

An appointment by a father in favour of his child, in exercise of a power for that purpose, ought to be made for the benefit of the child who is the object of the provision, and not indirectly for the benefit of the father who makes the appointment, or of any other person. Accordingly, any exercise

Fraud on the power.

(*u*) *Beale* v. *Beale*, 1 P. Wms. 244.

(*x*) *Routledge* v. *Dorril*, 2 Ves. jun. 357; 2 R. R. 250; *West* v. *Berney*, 1 Russ. & My. 431, 439; 32 R. R. 237; *Goldsmid* v. *Goldsmid*, 2 Hare, 187; *Limbard* v. *Grate*, 1 My. & K. 1.

(*y*) See the form of marriage settlement in Appendix C., *post*.

(*z*) *Ante*, p. 405; see *post*, pp. 412–414; Williams, R. P. 417, and n. (*l*), 21st ed.; *Re Bowles*, 1902, 2 Ch. 650; *Re Thompson*, 1906, 2 Ch. 199.

of the power under a bargain for or even with a view to the benefit of the appointor, or of any other person than one of the objects of the power, will be considered as, in technical phrase, a fraud on the power, and will be void (*a*). But when there is no evidence that the appointment is made under a bargain for the benefit of the father, although there may be strong suspicion that such is the case, the appointment cannot be set aside (*b*). Powers of appointment amongst children usually enable the parent to fix the age or time at which the fund appointed shall vest in any child. But, on the principle just stated, a father will not be allowed to make an immediate appointment to an infant child, for the sake of becoming himself entitled to the fund appointed, as the child's personal representative, in the event of its decease (*c*). An appointment to an infant is not, however, necessarily void on account of the circumstance that the father who has made the appointment, will become entitled to the property appointed in the event of the child's decease (*d*).

Perpetuity to be avoided in the exercise of powers.

In the exercise of powers of appointment amongst children or issue, care must be taken not to postpone the vesting of their shares to a period which may exceed the limits allowed by the law of perpetuity (*e*). When the power of appointment is a general power, enabling the appointor to make a disposition in favour of any object he may please, the property

(*a*) *Daubeney* v. *Cockburn*, 1 Mer. 626; *Palmer* v. *Wheeler*, 2 Ball & B. 18; *Jackson* v. *Jackson*, 1 Dru. 91; *Thompson* v. *Simpson*, 2 Jo. & Lat. 110; *Topham* v. *Duke of Portland*, 1 De G., J. & S. 517; 11 H. L. C. 32; *Pryor* v. *Pryor*, 2 De G., J. & S. 205.

(*b*) *M'Queen* v. *Farquhar*, 11 Ves. 467; 8 R. R. 212; *Hamilton* v. *Kirwan*, 2 Jo. & Lat. 393; *Campbell* v. *Home*, 1 You. & Coll. N. C. 664.

(*c*) *Cunynghame* v. *Thurlow*, 1 Russ. & M. 436; 32 R. R. 242; *Lord Sandwich's case*, cited 11 Ves. 479; *Gee* v. *Gurney*, 2 Coll. 486.

(*d*) *Butcher* v. *Jackson*, 14 Sim. 444; *Fearon* v. *Desbrisay*, 14 Beav. 635; *Heney* v. *Wrey*, 21 Ch. D. 332.

(*e*) See *ante*, p. 405.

is evidently not tied up so long as such a power exists over it; and neither the reason nor the rule which forbids a perpetuity has any application till some settlement is made in exercise of such a power. In such a case, therefore, the limits of perpetuity commence from the time of the appointment (*f*). But where the power of appointment is to be exercised only in favour of a particular class of objects, the property subject to the power is evidently already tied up in favour of that class. The limits of perpetuity are therefore in this case to be reckoned, not from the time of the exercise of the power, but from the date of its creation. The interests given by the power must, for this purpose, be regarded as if they had been inserted in the settlement by which the power was created; and if such interests would have been too remote, if inserted in the original settlement, they will be too remote when given in exercise of the power (*g*). Thus a person having a general power of appointment by will over a fund, may by his will appoint a share of it in favour of any unborn child of his own, to be vested in such child on his attaining the age of twenty-three years. The limit of perpetuities is reckoned from the time of the appointment, which in this case is the death of the appointor, when his will begins to take effect. The child must necessarily then be born, or *en ventre sa mère*, and the child's life is accordingly the life then in being within which the share must necessarily vest. But if by a marriage settlement a fund be settled in trust for the father for his life, and after his decease in trust for the children, in such shares as he shall

(*f*) 1 Sugd. Pow. 240, 405; 395, 8th ed.; *Rous* v. *Jackson*, 29 Ch. D. 521; *Re Flower*, 55 L. J. Ch. 200; *Stuart* v. *Babington*, 27 L. R. Ir. Ch. 551. Cf. Gray, Rule against Perpetuities, sects. 526—526c, 2nd ed.

(*g*) Co. Litt. 271 b, n. (1), vii., 2; 1 Sugd. Pow. 498; 396, 8th ed.; *Routledge* v. *Dorril*, 2 Ves. jun. 357; 2 R. R. 250.

appoint by his will, he cannot make an appointment in favour of any unborn child, to be vested on his attaining the age of twenty-three years. For in this case the limit of perpetuities counts from the date of the settlement, when the property was first tied up for the benefit of the children; and this limit would be exceeded if the child should not attain the given age within twenty-one years after the decease of the father, who was the life in being at the date of the settlement. And the rule is, that every limitation which *may* exceed in duration a life or lives in being, and twenty-one years afterwards (allowing for the period of actual gestation), is void as tending to a perpetuity (*h*).

The Courts lean to vested interests.

When personal property is directed to be paid to any persons at a future time, the leaning of the Court is always in favour of vested interests; that is to say, the Court leans to that construction which will give to the parties a present assignable and transmissible right to that which is not payable till a future time. Thus if a legacy be given to a person to be payable when he attains the age of twenty-one years, the legacy is considered to be immediately vested, and will accordingly be payable to the administrator of the legatee in case he should die under age (*i*). So if personal estate be settled in trust for A. for life, and after his decease for all his children in equal shares, each of his children will be entitled to a share, whether such child survive his parent or not, and although such child should die in infancy (*k*). If, however, the property should consist of money charged on land or other real estate, such as the portions of younger children when the family estate is entailed on the eldest

Vesting of portions charged on land.

(*h*) See Williams, R. P. 406, 407, 21st ed.

(*i*) Black. Comm. 153; Co. Litt. 237 a, note (1).

(*k*) *Skey* v. *Barnes*, 3 Mer. 335; 17 R. R. 91; *Templeton* v. *Warrington*, 13 Sim. 267. See *Sewallow* v. *Binns*, 1 K. & J. 417.

son, the rule is different; and if any of the children should die before the time when his or her portion becomes payable, it will, in the absence of special provision to the contrary, sink into the land for the benefit of the estate (*l*).

Vesting of interests given to children.

In the settlement of personal property upon children the plan now usually adopted is to vest the interests given in those only who, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry under it (*m*). In this method of settlement, no interest either in the income or in the principal of the settled property is given to the children during minority, or, in the case of daughters, until marriage under age. And there was formerly no provision, in the absence of express directions, for the application of the income, after the parents' death, toward the children's maintenance and education during their minority. Such directions, therefore, were always inserted, with a provision for the accumulation of the surplus income by way of increase of the principal. If, however, the provision were made by a parent, or by a person *in loco parentis* (*n*), or if the whole property were ultimately to go amongst the children (*o*), or if the persons entitled, in the event of the children not living to attain vested interests, should agree (*p*), the Court would direct the income to be applied for the children's maintenance in the absence of sufficient provision for that purpose, and even in the face of an express direction to accumulate the income (*q*). The Conveyancing Act, 1881,

Maintenance and education.

Statutory power as to maintenance.

(*l*) Co. Litt. 237 a, n. (1). See *Evans* v. *Scott*, 1 H. L. C. 43, 57.

(*m*) See Williams on Settlements, 160, 162; Davidson, Prec. Conv. iii. 106, 3rd ed.; Appendix C., *post*.

(*n*) *Chambers* v. *Goldwin*, 11 Ves. 1; 8 R. R. 61; *Martin* v. *Martin*, L. R. 1 Eq. 369.

(*o*) *Haley* v. *Bannister*, 4 Mad. 275; 20 R. R. 299; *Errat* v. *Barlow*, 14 Ves. 202; 9 R. R. 273.

(*p*) *Turner* v. *Turner*, 4 Sim. 430; *Cannings* v. *Flower*, 7 Sim. 523.

(*q*) *Greenwell* v. *Greenwell*, 5 Ves. 194.

contains provisions (*r*) purporting to authorise trustees holding any property in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, to apply the income of that property, or any part thereof, for or towards the infant's maintenance, education or benefit. In consequence of the construction now placed upon these provisions (*s*), it appears sufficient to rely upon them in drafting instruments intended to carry out the mode of settlement above referred to, or in any case in which a gift of property is made in trust for an infant or a class of infants contingently, in such a way that upon the happening of the contingency the intermediate income, from the date of the gift until the happening of the contingency, will go to the donee or donees as well as the principal. But if the gift of the principal be so made as not to carry with it the intermediate income, such income cannot be applied under the Act for infants' maintenance (*t*). In marriage settlements a life interest is usually and properly given to the father and mother (*u*); so that no provision is required for the maintenance of the children until after the decease of the survivor.

(*r*) Stat. 44 & 45 Vict. c. 41, s. 43, which applies to instruments coming into operation before or after the commencement of the Act, but only if and as far as a contrary intention is not expressed in such instruments, and subject to the provisions thereof; see *Re Thatcher's Trusts*, 26 Ch. D. 426; *Re Cooper*, 1913, 1 Ch. 350. Somewhat similar provisions with regard to maintenance were made by "Lord Cranworth's Act," stat. 23 & 24 Vict. c. 145, ss. 26, 33; but these provisions applied only to deeds executed and wills executed or confirmed or revived by codicil executed on or after the 28th Aug., 1860; and they were repealed by the Act of 1881. See *Re Cotton*, 1 Ch. D. 232; *Re George*, 5 Ch. D. 837.

(*s*) *Re Holford*, 1894, 3 Ch. 30; *Re Woodin*, 1895, 2 Ch. 309; *Re Jeffery*, ib. 577.

(*t*) *Re Judkin's Trusts*, 25 Ch. D. 743; *Re Dickson*, 29 Ch. D. 331; see *Re Clements*, 1894, 1 Ch. 665; *Re Bowlby*, 1904, 2 Ch. 685.

(*u*) See form of settlement in Appendix C., *post*.

INVESTMENTS IN WHICH TRUSTEES MAY BY L
ACT, 18

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom ;

(b) On real or heritable securities in Great Britain or Ireland ;

(c) In the stock of the Bank of England or the Bank of Ireland ;

(d) In India 3½ per cent. stock, and India 3 per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India ;

(e) In any securities the interest of which is for the time being guaranteed by Parliament ;

(f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the receiver for the Metropolitan Police district ;

(g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, 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 3 per cent. per annum on its ordinary stock ;

(h) In the 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 mentioned in sub-section (g), either alone or jointly with any other railway company ;

(i) In the 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 ;

(j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde, Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway ; also in deferred annuities comprised in the register of holders of annuity Class D, and annuities comprised in the register of annuitants Class C of the East Indian Railway Company ;

(k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed ;

(l) In the 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 5*l*. per cent. on its ordinary stock ;

(m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough, having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000, or by any county council, under the authority of any Act of Parliament or provisional order ;

(n) In nominal or inscribed stock issued or to be 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 50,000, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded 80 per cent. of the amount authorised by law to be levied ;

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court ;

(p) (By virtue of the Colonial Stock Act, 1900, 63 & 64 Vict. c. 62, s. 2.) In any Colonial Stock which is registered in the United Kingdom in accordance with the

Colonial Stock Acts, 1877, 1892 and 1900, and with respect to which there have been observed such conditions (if any) as the Treasury may by order notified in the *London Gazette* prescribe. See the *Stock Exchange* "Official Intelligence" for these stocks.

(q) (By virtue of the Metropolis Water Act, 1902, 2 Edw. VII. c. 41, s. 17 (4).) In "B" stock of the Metropolitan Water Board.

By R. S. C., Order XXII. r. 17, cash under the control of or subject to the order of the Court may be invested in the following stocks, funds, or securities, namely, 2½ per cent. Consolidated Stock; Consolidated 3*l.* per cent. Annuities; Reduced 3*l.* per cent. Annuities; 2*l.* 15*s.* per cent. Annuities; 2*l.* 10*s.* per cent. Annuities; Local Loans Stock under the National Debt and Local Loans Act, 1887; Exchequer Bills; Bank Stock; India 3½ per cent. Stock; India 3 per cent. Stock; India 2½ per cent. Stock; Indian Guaranteed Railway Stocks or Shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment; Stocks of Colonial Governments guaranteed by the Imperial Government, or in respect of which the provisions of the Colonial Stock Act, 1900, and of sect. 2, sub-s. 2, of the Trustee Act, 1893, are for the time being complied with; Mortgage of freehold and copyhold estates respectively in England and Wales; Metropolitan Consolidated Stock, 3*l.* 10*s.* per cent.; 3 per cent. Metropolitan Consolidated Stock; 2½ per cent. Metropolitan Consolidated Stock; 2½ per cent. London County Consolidated Stock; 3 per cent. London County Consolidated Stock; London County Council 3½ per cent. Stock; Inscribed 2½ per cent. Debenture Stock issued by the Corporation of London, and secured by a trust deed dated 24th June, 1897; Inscribed 3 per cent. Debenture Stock issued by the Corporation of London, and secured by supplemental trust deed dated 1st June, 1905; Debenture, preference, guaranteed, or rentcharge 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; Debenture, preference, guaranteed, or rentcharge stocks of railways in Great Britain or Ireland guaranteed by railway companies owning railways in Great Britain or Ireland, which have for ten years next before the date of investment paid a dividend on ordinary stock or shares; Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, or under the Isle of Man Loans Act, 1880, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment; Guaranteed land stock issued under the Act 54 & 55 Vict. c. 48; Guaranteed 2¾ per cent. stock issued under the Act 3 Edw. VII. c. 37; Guaranteed 3 per cent. stock issued under the Act 9 Edw. VII. c. 42.

A trustee may under the powers of the Trustee Act, 1893 (see sect. 2), invest in any of the securities mentioned or referred to in sect. 1 of that Act, notwithstanding that the same may be redeemable, and that the price exceeds the redemption value: provided that a trustee may not under these powers purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-ss. (g), (i), (k), (l) and (m) above, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in these sub-sections, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding 15 per cent. above par or such other fixed rate. And (by sect. 7, sub-s. 1) a trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the India Stock Certificate Act, 1863, the National Debt Act, 1870, the Local Loans Act, 1875, or the Colonial Stock Act, 1877.

Where capital trust money is invested in the purchase of any stock or security, on which a dividend has at the time of purchase been earned and declared, but not paid, the dividend when received must not be paid over to a tenant for life of the trust property, but should be applied as capital; *Re Sir Robert Peel's Settled Estates*, 1910, 1 Ch. 389.

[*To face p.* 417.

INVESTMENTS IN WHICH

(a) In any of the parliamentary stocks or pubave been of the United Kingdom; *London*

(b) On real or heritable securities in Great Britaocks.

(c) In the stock of the Bank of England or the I 17 (4).)

(d) In India 3½ per cent. stock, and India 3 per stock which may at any time hereafter be issued b to the of India under the authority of Act of Parliamencurities, India; nuities;

(e) In any securities the interest of which is for er cent. liament; t, 1887;

(f) In consolidated stock created by the Metrop. Stock; London County Council, or in debenture stock crevided in politan Police district; a period

(g) In the debenture or rentecharge, or guarai guaranrailway company in Great Britain or Ireland incorpColonial and having during each of the ten years last past bne being dividend at the rate of not less than 3 per cent. perEngland

(h) In the stock of ar railway or canal company Metroundertaking is leased i perpetuity or for a term c 2½ per at a fixed rental to any such railway company solidated either alone or jointly with any other railway compbenture

(i) In the debenture stock c ay railway compcd 24th is paid or guaranteed by the S tary of State in ation of

(j) In the "B" annuities of the Eastern Bengabenture, Punjaub and Delhi Railways, and any like annu Ireland, be created on the purchase of any other railway ordinary of India, and charged on the revenues of India, ancailways of Parliament to be accepted by trustees in lieu in Great purchased railway; also in deferred annuities consant paid annuity Class D, and annuities comprised in the rebenture East Indian Railway Company; t, 1880,

(k) In the stock of any railway company in Indideemed dividend in sterling is paid or guaranteed by the Seud stock or upon the capital of which the interest is so guarid under

(l) In the debenture or guaranteed or preferenthe Act Britain or Ireland, established for the supply of wa special Act of Parliament or by royal charter, and it in any last past before the date of investment paid a dividng that on its ordinary stock; e: pro-

(m) In nominal or inscribed stock issued, or to bding its municipal borough, having, according to the retmand (m) date of investment, a population exceeding 50,000be at par the authority of any Act of Parliament or provided to in

(n) In nominal or inscribed stock issued or to rate, at incorporated by Act of Parliament for the purpose sect. 7, compulsory power of levying rates over an area by for or the last census prior to the date of investment, a pop863, the that during each of the ten years last past before thet, 1877. by such commissioners shall not have exceeded 80 rity, on by law to be levied; ot paid.

(o) In any of the stocks, funds, or securities for ne trust investment of cash under the control or subject to s, 1910.

(p) (By virtue of the Colonial Stock Act, 1900, Colonial Stock which is registered in the United 417.

Investment of trust funds.

It is the duty of trustees where the purposes of their trust are of a permanent nature, as in the case of trusts for parents for their lives, and afterwards for their children, to invest the funds which are placed under their control in such manner as is specified in the instrument creating the trust, or in the absence of express directions as to investment, in securities in which trustees are by law authorised to invest trust money (*w*). Of late years it has been the practice in drawing express directions for the investment of trust funds, to allow a much wider range of investment than was formerly thought prudent (*x*). The range of investment allowed to trustees by law has also been very considerably extended, and under the Trustee Act, 1893 (*y*), a trustee may, unless expressly forbidden by the instrument (if any) creating the trust (*z*), invest any trust funds in his hands, whether at the time in a state of investment or not, in any one or more of a long list of specified securities, of which several could not previously have been selected for the investment of trust money without express authority. These securities are enumerated in the annexed Table. This Act also empowers a trustee from time to time to vary any such investment (*y*).

Consent to change of investments.

The consent of the persons for the time being entitled to the income of the property is generally required in settlements, to any change of investment which the trustees may be authorised to make; and this consent is sometimes required to be in writing, and occasionally to be testified by deed.

(*w*) See Lewin on Trusts, 270 *sq.*, 6th ed.; 343 *sq.*, 12th ed.

(*x*) See Davidson, Prec. Conv. iii. 14 *sq.*, 3rd ed.; i. 229, 5th ed.; Williams on Settlements, 170; Davidson's Concise Precedents, 475, and n. (*a*), 19th ed.; 2 Key & Elph. Prec. Conv. 525—530, 9th ed.; and Appendix C., *post*.

(*y*) Stat. 56 & 57 Vict. c. 53, s. 1, applying (by sect. 4) to trusts created before or after that Act, and replacing 52 & 53 Vict. c. 32, s. 3.

(*z*) See *Re Burke*, 1908, 2 Ch. 248.

Where consent is required, it must be given previously to or at the time of the change of investment (*b*); for, as the consent is required as a check upon the trustees, a subsequent consent, when the mischief may be done, is evidently unavailing. The person whose consent is required is not, however, the sole judge of the propriety of any change of investment; the trustee, by virtue of his office, has also a discretion; and if he should consider the investment ineligible, he may refuse to make it, although requested so to do by the person whose consent ought to be obtained (*c*). But the terms of the instrument may require the trustees to change the investments at the request of any given person; and in this case they will generally be bound to act accordingly, unless the circumstances of the case should be such as were evidently not contemplated when the settlement was made (*d*). The power of investment given by the Trustee Act, 1883 (*e*), is to be exercised according to the discretion of the trustee, but subject to any consent required by the instrument (if any) creating the trust (*f*).

Investment of settled money in the purchase of lands.

In settlements of personal property authority is sometimes given to the trustees to make investments in the purchase of landed estates. As land devolves in a different manner from personal property, it is obvious that a simple change of the property from personalty to land would in many cases materially disarrange the destination of the property. Thus if a person entitled under the settlement to a reversionary interest in the settled fund should die

(*b*) *Bateman* v. *Davies*, 3 Madd. 98; 18 R. R. 200; *Gresham* v. *Gibbeson*, 10 Hing. 363; 38 R. R. 458; *Wiles* v. *Gresham*, 2 Drew. 258.

(*c*) *Lee* v. *Young*, 2 You. & Coll. N. C. 532.

(*d*) *Boss* v. *Godsell*, 1 You. & Coll. N. C. 617; *Cadogan* v. *Earl of Essex*, 2 Drew. 227.

(*e*) Stat. 56 & 57 Vict. c. 53, s. 1; *ante*, p. 417.

(*f*) Sect. 3.

intestate, his administrator would be entitled to such interest on trust for his next of kin so long as the property continued to be personal, but, if it had been changed into real estate, the benefit of it would belong to his heir-at-law. In order to obviate this inconvenience, it is so contrived that the lands to be purchased shall, from the moment the purchase is made, be considered as personal property. To effect this object, the lands when purchased are directed to be held by the trustees upon trust to sell them, with the consent of the equitable tenants for life, during their lives, and after their decease at the discretion of the trustees (*g*). This trust for sale converts the lands into money in the contemplation of equity; for it is a rule of equity, that whatever is agreed to be done shall be considered as done already. In the words of Sir Thomas Sewell (*h*), "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 as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. The owner of the fund or the contracting parties may make land money, or money land." And if land is clearly directed to be sold, the circumstance that the consent of some person or persons is required to the sale will not prevent the immediate conversion of the land into money in the contemplation of equity, although such a circumstance may often

(*g*) See Appendix C.

(*h*) In *Fletcher* v. *Ashburner*, 1 Bro. C. C. 499, approved by Lord Alvanley in *Wheldale* v. *Partridge*, 5 Ves. 388, 397; 7 R. R. 37. See also *Griffith* v. *Ricketts*, 7 Hare, 299.

Election that lands should not be sold.

cause a long postponement of the period of its actual conversion (*i*). Notwithstanding a trust for the sale of land, if all the parties interested should be of full age (*k*), and if females unmarried (*l*), or entitled to their shares for their separate use or as their separate property (*m*), they may elect that the land shall not be sold; and after such election the land will be considered as real estate in equity as well as at law (*n*). And the election of the parties need not be expressed in so many words, but may be inferred from any acts by which their intention is clearly shown (*o*). It is now provided by the Conveyancing Act, 1911 (*p*), with respect to settlements coming into operation after that year, that where a settlement of property as personal estate contains a power to invest money in the purchase of land, such land shall, unless the settlement otherwise provides, be held by the trustees on trust for sale, with power to postpone the sale. In such settlements, therefore, it is no longer strictly necessary to declare expressly that the land to be purchased shall be held on trust for sale: but the express provisions previously in use remain as effective as before; and there is little to be gained by departing from them (*q*).

(*i*) See *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 218, 219; *Fauntleroy* v. *Beebe*, 1911, 2 Ch. 257, 262.

(*k*) *Van* v. *Barnett*, 19 Ves. 102.

(*l*) *Oldham* v. *Hughes*, 2 Atk. 452.

(*m*) *Re Davidson*, 11 Ch. D. 341.

(*n*) *Davies* v. *Ashford*, 15 Sim. 42; and see *Re Darcron*, 1893, 3 Ch. 421.

(*o*) *Lingen* v. *Sowray*, 1 P. Wms. 172; *Cookson* v. *Reay*, 5 Beav. 22; *Re Davidson*, 11 Ch. D. 341; and see *Re Darcron*, 1893, 3 Ch. 421.

(*p*) Stat. 1 & 2 Geo. V. c. 37, s. 10(1), (2), also applying in terms to settlements within the meaning of sect. 63 of the Settled Land Act, 1882; that is, to settlements of land on trust for sale and application of the proceeds of sale, or the income thereof, or the rents and profits until sale, for the benefit of any person for his life or other limited period, or otherwise in settlement as therein mentioned.

(*q*) The Act provides that the rents and profits until sale shall, after keeping down costs of repairs and insurance and other outgoings, be applied in like manner as the income of the proceeds of sale would be applicable; but it gives no such powers

Trustees' receipts.

The rule of equity, which formerly obliged persons paying money or assigning other personal property to trustees to see to the due application thereof pursuant to the trust, has been mentioned in the writer's treatise on the Law of Real Property (*r*); and so have the statutes, principally the Trustee Act, 1893 (*s*), under which such persons may now be discharged from this obligation by the receipt in writing of the trustees.

Appointment of new trustees.

When a trustee dies, or desires to be discharged or becomes incapable of acting, it is generally desirable to appoint a new trustee in his place; and the means, by which this object may be effected, in the case of trusts of personal property, are exactly the same as in the case of real estate (*t*). The jurisdiction of the High Court and of the county courts to appoint new trustees is the same in the case of trusts of chattels personal as of land (*u*). And the statutory power of appointing new trustees contained in the Trustee Act, 1893 (*x*), applies to trusts of personal as well as real property. This power, it may be observed, is discretionary; and need not be exercised so long as there remains a single trustee capable of executing the trust (*y*). The retirement of a trustee must be effected in the same way, whether the trust be of real or personal

Retirement of trustee.

of management or leasing until sale as it was previously usual to give to the trustees; see Appendix C. It is true that the tenant for life of the income of the proceeds of sale would have the powers of leasing given him by sect. 63 of the Settled Land Act, 1882; but under the Settled Land Act, 1884, he could not exercise these powers without an order of the Court; see stats. 45 & 46 Vict. c. 38, s. 63; 47 & 48 Vict. c. 18, s. 7.

(*r*) Williams, R. P. 606, 21st ed.

(*s*) Stat. 56 & 57 Vict. c. 53, s. 20, replacing 44 & 45 Vict. c. 41, s. 36.

(*t*) See Williams, R. P. 193, 197, 21st ed.

(*u*) Williams, R. P. 193, 196, 197, and n. (*u*), 21st ed.

(*x*) Stat. 56 & 57 Vict. c. 53, s. 10; see Williams, R. P. 193, 194, 21st ed.

(*y*) See *Warburton* v. *Sandys*, 14 Sim. 622; stat. 56 & 57 Vict. c. 53, s. 22, replacing 44 & 45 Vict. c. 41, s. 38; Williams' Conveyancing Statutes, 194—198, 341.

estate (*z*); and the provisions of the Trustee Act, 1893 (*a*), enabling a trustee to be discharged by deed, where more than two trustees remain to execute the trust (*z*), apply to trusts of personalty as well as realty. This is equally the case with respect to the provisions of the Judicial Trustees Act, 1896, authorising the appointment of a judicial trustee, and of the Public Trustee Act, 1906, as to the administration of trusts by the public trustee, and as to the retirement of a trustee, where the public trustee is appointed (*b*).

Judicial trustee.

Public trustee.

Vesting trust property in new and continuing trustees.

A mere appointment of a new trustee is no more sufficient to invest him with the ownership of the trust property, in the case of personalty, than to give him the legal estate in the case of realty (*c*). Personal estate, of which a new trustee has been appointed, must therefore be duly vested in the new and continuing trustees (*d*). Formerly, this was always accomplished by the ordinary modes of transfer of chattels (*e*). But now, by the Trustee Act, 1893 (*f*), where a deed by which a new trustee is appointed to perform any trust contains a declaration *by the appointor* to the effect that any estate or interest in any chattel subject to the trust, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the

(*z*) See Williams, R. P. 194, 195, 21st ed.

(*a*) Stat. 56 & 57 Vict. c. 53, s. 11.

(*b*) Stats. 59 & 60 Vict. c. 35; 6 Edw. VII. c. 55; of which the above provisions are stated in Williams, R. P. 197, 198, 21st ed.

(*c*) See Williams, R. P. 195, 21st ed.; *Warburton* v. *Sandys*, 14 Sim. 622.

(*d*) See stat. 56 & 57 Vict. c. 53, s. 10 (2 *d*).

(*e*) See Davidson, Prec. Conv. iv. 612, 619—621, 3rd ed.

(*f*) Stat. 56 & 57 Vict. c. 53, s. 12, re-enacting 44 & 45 Vict. c. 41, s. 34, and also dealing with the vesting of land; see Williams, R. P. 195, 21st ed.

purposes of the trust, that estate, interest, or right. And where a deed by which a retiring trustee is discharged under this Act contains a similar declaration *by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees,* that declaration shall have a similar effect. Such vesting declarations are now frequently employed; but they are not applicable to any share, stock, annuity, or other property transferable only in books kept by a company or other body, or in manner prescribed by or under Act of Parliament (*g*), and such property must be expressly assigned to the new and continuing trustees according to its ordinary mode of transfer (*h*).

Vesting orders as to stock, &c.

It is not always possible to obtain the concurrence of a superseded trustee in transferring stock or shares to new and continuing trustees. To meet difficulties of this kind it is provided by the Trustee Act, 1893 (*i*), replacing enactments of the Trustee Acts, 1850 and 1852 (*k*), that in any of the cases stated below (*l*), the High Court may make an order

(*g*) See *ante*, pp. 43, 315, 316, 324, 328, 329.

(*h*) A conveyance or transfer made for effectuating the appointment of a new trustee is charged with a stamp duty of 10*s.*; stat. 54 & 55 Vict. c. 39, s. 62, replacing 31 & 34 Vict. c. 97, s. 78; 10 Edw. VII. c. 8, s. 74 (6); *ante*, p. 398, n. (*x*); see *Hodgett* v. *The Commissioners of Inland Revenue*, 3 Ex. D. 46.

(*i*) Stat. 56 & 57 Vict. c. 53, s. 35; see R. S. C., Orders LIVB, LV. Rule 13A.

(*k*) Stats. 13 & 14 Vict. c. 60, ss. 22–27, 31, 35, 37; 15 & 16 Vict. c. 55, ss. 3–6.

(*l*) (i.) Where the High Court appoints or has appointed a new trustee; and

(ii.) Where a trustee entitled alone or jointly with another person to stock or a chose in action:—

(a) is an infant; or

(b) is out of the jurisdiction of the High Court; or

(c) cannot be found; or

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action according to the direction of the person absolutely entitled thereto for 28 days next after a request in writing has been made to him by the person so entitled (*Re Knox's Trusts*, 1895, 2 Ch. 483); or

(e) neglects or refuses to

vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the Court may appoint. Where, however, the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees. And where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone, or jointly with any other person whom the Court may appoint. In all cases where a vesting order can be so made, the Court may, if it is more convenient, appoint some proper person to make or join in making the transfer. And the person, in whom the right to transfer or call for the transfer of any stock is vested by an order of the Court under this Act, may transfer the stock to himself or any other person, according to the order (*m*). The above provisions of the Trustee Act, 1893 (*n*), relate to fully paid up shares as well as stock, and also to any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer, either alone or accompanied by other formalities, and any share or interest therein (*o*). Where a lunatic is entitled to any stock or chose in action upon trust, either alone or jointly with another, or as legal personal

Vesting lunatic's stock, &c.

transfer stock or receive the dividends or income thereof for 28 days next after an order of the High Court for that purpose has been served on him; or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or a chose in action is alive or dead.

In this Act the expression "trustee" appears to include a personal representative of a deceased person: see sect. 50.

(*m*) See *Re Gregson*, 1893, 3 Ch. 233.

(*n*) Stat. 56 & 57 Vict. c. 53, s. 50. These provisions also relate to shares in ships registered under the Merchant Shipping Acts (*ante*, p. 119), as if they were stock.

(*o*) See *ante*, pp. 43, 315, 316, 324, 328, 329.

representative of a deceased person, the High Court is empowered to make similar vesting orders (*p*).

Trustees' costs and responsibilities.

The office of trustee of a settlement is one involving great responsibility, and frequently much trouble, without any remuneration; for a trustee is not allowed to make a profit of his trust. And if he be a solicitor, he cannot receive payment for his professional trouble incurred in the business of the trust (*q*), unless he be authorised to receive such payment by the instrument creating the trust (*r*), or expressly stipulate before accepting the office, that he shall be permitted to charge for his services (*s*), or unless his charges be voluntarily paid by the *cestui que trust* with full knowledge that they might have been resisted (*t*). But a trustee may charge against the trust property all costs and expenses properly incurred in the conduct of the trust (*u*). And it has been held, that in the event of legal proceedings being brought against the trustees, one of the trustees, being a solicitor, may be employed by his co-trustees, and may make the usual charges against them, provided the amount of the costs be not thereby increased (*x*). And in all legal proceedings, to which a trustee, as such, is made a

Solicitor cannot charge for professional trouble.

(*p*) Stat. 1 & 2 Geo. V. c. 40, s. 1, amending 53 Vict. c. 5, s. 136 (amended by 8 Edw. VII. c. 47, s. 2), which gave these powers to the judge in lunacy; R. S. C., Order LV. r. 13B. See *Re Fuller*, 1900, 2 Ch. 551; cf. *Re Langdale*, 1901, 1 Ch. 3.

(*q*) *Moore* v. *Frowd*, 3 My. & Craig, 45; *Fraser* v. *Palmer*, 4 You. & Coll. 515; *Collins* v. *Carey*, 2 Beav. 128; *Bainbrigge* v. *Blair*, 8 Beav. 588; *Todd* v. *Wilson*, 9 Beav. 486; *Re Corsellis*, 33 Ch. D. 160; 34 Ch. D. 675; see *Ex parte Newton*, 3 De Gex & Sm. 584.

(*r*) See *Re Chapple* 27 Ch. D. 581.

(*s*) *Re Sherwood*, 3 Beav. 338; see *Moore* v. *Frowd*, 3 My. & Cr. 48.

(*t*) *Stanes* v. *Parker*, 9 Beav. 385; *Re Wyche*, 11 Beav. 209, 210. See *Gomby* v. *Wood*, 3 Jones & Lat. 678.

(*u*) See Jessel, M.R., *Turner* v. *Hancock*, 20 Ch. D. 303, 305.

(*x*) *Cradock* v. *Piper*, 1 Mac. & Gord. 664; *Clack* v. *Carlon*, 7 Jur. N. S. 441; *Re Corsellis*, 34 Ch. D. 675. See, however, *Lincoln* v. *Windsor*, 9 Hare, 158; *Lyon* v. *Baker*, 5 De Gex & Sm. 622; *Broughton* v. *Broughton*, 5 De Gex, M. & G. 160.

party, he is allowed out of the trust estate his full costs, as between solicitor and client (*y*). But his right to costs may be forfeited by his negligence or misconduct (*z*); or he may even be made to pay the costs of the other parties (*a*). As the trustee has the legal title to the property, he is often enabled, if fraudulently inclined, to sell it or spend it for his own benefit. It is, therefore, highly proper that his conduct should be narrowly scrutinized, and that he should be invariably punished for any breach of faith. But the Courts of Equity (*b*) go further than this, and punish, with almost equal severity, his neglect of duties, which in many cases he scarcely knows that he has undertaken. Thus, if a trustee, by his negligence or misplaced confidence in his co-trustee, gives him an opportunity to commit a breach of trust, of which opportunity the co-trustee avails himself, the innocent trustee will be made to replace the whole of the fund abstracted by the other (*c*). So, if the trustee should depart from the letter of his trust, as by investing the trust fund in an unauthorised manner (*d*), although with an honest desire to benefit the parties interested, he will be liable to make good, out of his own pocket, any loss which such departure may have occasioned (*e*). And if, being ignorant of law, he

(*y*) 2 Fonb. Eq. 176. See also *Turner* v. *Hancock*, 20 Ch. D. 303.

(*z*) *Campbell* v. *Campbell*, 2 My. & Craig, 25; *Howard* v. *Rhodes*, 1 Keen, 581.

(*a*) *Wilson* v. *Wilson*, 2 Keen, 249; *Willis* v. *Hiscox*, 4 My. & Craig, 197; *Firmin* v. *Pulham*, 2 De Gex & Sm. 99.

(*b*) *Ante*, pp. 26–28, 159–161; Williams, R. P. 161 *sq.*, 21st ed.

(*c*) *Lord Shipbrook* v. *Lord Hinchinbrook*, 11 Ves. 252; 8 R. R. 138; *Brice* v. *Stokes*, 11 Ves. 319; 8 R. R. 164; *Hanbury* v. *Kirkland*, 3 Sim. 265; 30 R. R. 165; *Booth* v. *Booth*, 1 Beav. 125; *Broadhurst* v. *Balguy*, 1 You. & Coll. N. C. 16; *Styles* v. *Guy*, 1 Mac. & G. 422; *Dix* v. *Burford*, 19 Beav. 109; *Lewis* v. *Nobbs*, 8 Ch. D. 591; cf. *Shepherd* v. *Harris*, 1905, 2 Ch. 310.

(*d*) See *ante*, p. 417.

(*e*) *Driver* v. *Scott*, 4 Russ. 195; *Pride* v. *Fooks*, 2 Beav. 430; *Watts* v. *Girdlestone*, 6 Beav. 188; *Knott* v. *Cottee*, 16 Beav. 77; *Robinson* v. *Robinson*, 1 De G., M. & G. 247; *Learoyd* v. *Whiteley*, 12 App. Cas. 727, 733; *Re Somerset*, 1894, 1 Ch. 231.

should give himself up entirely to his professional adviser, he may still suffer from the m. take of his solicitor or counsel (*f*); and in such a case he will scarcely, perhaps, see the justice of the remark that he might (had he known how) have chosen a wiser solicitor, or a more learned counsel (*g*). In all ordinary settlements, clauses used to be inserted for the indemnity and reimbursement of trustees, to the effect that they should not be answerable the one for the other of them, or for signing receipts for the sake of conformity, or for involuntary loss; and that they might reimburse themselves out of the trust funds all costs and expenses incurred in relation to the trust. But these clauses, though often very highly valued by trustees, really afforded them little, if any, further protection than they would have been entitled to, if left to the ordinary rules of equity (*h*). An Act of 1859 directed that these clauses should be deemed to be contained in every instrument creating a trust, either expressly or by implication (*i*); and it has since become unusual to insert them (*k*). And now the Trustee Act, 1893 (*l*), gives directly to every trustee the same indemnity and right to reimbursement as was given by implication under the Act of 1859. The hardship of the rules of equity upon trustees, who have, without any dishonest intention, committed a breach of trust, has been mitigated by the Trustee Act, 1888 (*m*), and

New enactment.

(*f*) Wallis v. *Hiscox*, 4 My. & Craig, 197; *Angier* v. *Stannard*, 3 My. & Keen, 566; *Hampshire* v. *Bradley*, 2 Coll. 34; *Boulton* v. *Beard*, 3 De Gex, M. & G. 608; Selborne, C., *Stott* v. *Milne*, 25 Ch. D. 710, 714. See, however, *Poole* v. *Pass*, 1 Beav. 600; *Holford* v. *Phipps*, 3 Beav. 434; 4 Beav. 475; *Davis* v. *Hutchings*, 1907, 1 Ch. 356; *Re Dive*, 1909, 1 Ch. 320, 342.

(*g*) 3 My. & Keen, 572.

(*h*) *Fenwick* v. *Greenwell*, 10 Beav. 412; *Brumridge* v. *Brumridge*, 27 Beav. 5. See also *Re Speight*, *Speight* v. *Gaunt*, 22 Ch. D. 727; 9 App. Cas. 1.

(*i*) Stat. 22 & 23 Vict. c. 35, s. 31.

(*k*) See Davidson, Prec. Conv. iii. 246–252, 721, 3rd ed.

(*l*) Stat. 56 & 57 Vict. c. 53, s. 24.

(*m*) Stat. 51 & 52 Vict. c. 59.

the Judicial Trustees Act, 1896 (*n*). The former Act enables (*o*) trustees to plead any statute of limitation (*p*), and where no statute of limitation is applicable, the same lapse of time as would bar a simple contract debt (*q*), as a bar to any action or proceeding against them, except where the claim is founded upon any fraud or fraudulent breach of trust, to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by him and converted to his own use (*r*). And by another provision of the same Act (*s*) [illegible] in the Trustee Act, 1893 (*t*), where [illegible] a breach of trust at the instigation or request, or with the consent in writing of a beneficiary (*x*), the Court may order all or any part of the beneficiary's interest in the trust estate to be [illegible] by way of indemnity to the trustee or his representatives (*y*). Under the Judicial Trustees Act, 1896 [illegible] the Court

(*n*) Stat. 59 & 60 Vict. c. 35, s. 3.

(*o*) Sect. 8. See *Re Bourden*, 45 Ch. D. 444; *Re Swain*, 1891, 3 Ch. 233; *Re Somerset*, 1894, 1 Ch. 231; *Thorne* v. *Heard*, 1895, A. C. 495; *How* v. *Winterton*, 1896, 2 Ch. 626; *Re Fountaine*, 1909, 2 Ch. 382.

(*p*) See stats. 21 Jac. I. c. 16; 3 & 4 Will. IV. cc. 27, 42; 37 & 38 Vict. c. 57; *post*, Part IV.; Williams, R. P. 579 *sq.*, 21st ed.

(*q*) *I.e.*, six years, as a rule; stat. 21 Jac. I. c. 16, ss. 3, 17, amended by 19 & 20 Vict. c. 97, ss. 10, 12; *post*, Part IV.; see *Re Timmis*, 1902, 1 Ch. 176. Such time runs, to bar a breach of trust, against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation (see *post*, Part III. Ch. V.), but does not begin to run against any beneficiary, unless and until his or her interest shall be an interest *in possession*; stat. 51 & 52 Vict. c. 59, s. 8 (1 *b*); *Re Dive*, 1909, 1 Ch. 328, 350.

(*r*) See *Reid Newfoundland Co.* v. *Anglo-American Telegraph Co., Ld.*, 1912, A. C. 555, 559, 560.

(*s*) Stat. 51 & 52 Vict. c. 59, s. 6.

(*t*) Stat. 56 & 57 Vict. c. 53, s. 45.

(*u*) See *Griffith* v. *Hughes*, 1892, 3 Ch. 105; *Re Somerset*, 1894, 1 Ch. 231; *Fletcher* v. *Collis*, 1905, 2 Ch. 96.

(*x*) This may be done, notwithstanding that the beneficiary be a married woman entitled for her separate use, and restrained from anticipation. See *Bolton* v. *Carre*, 1895, 1 Ch. 544; *Re Holt*, 1897, 2 Ch. 525.

(*y*) Stat. 59 & 60 Vict. c. 35, s. 3; see *Re Turner*, 1897, 1 Ch. 536; *Re Kay*, 1897, 2 Ch. 518; *Re Stuart*, ib. 583; *Re De Clifford's Estate*, 1900, 2 Ch. 707; *Chapman* v. *Browne*, 1902, 1 Ch. 785; *Dyas* v. *Hutchings*, 1907, 1 Ch. 356; *Re Dive*, 1909, 1 Ch. 328; *Shaw* v. *Cates*, ib. 389.

may relieve a trustee either wholly or partially from personal liability for any breach of trust, whether committed before or after the passing of the Act, if it appear that he has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed the same.

Application to the Court by trustee or *cestui que trust.*

If questions of doubt or difficulty arose in the execution of the trusts of a settlement, either a trustee or *cestui que trust* might institute a suit for the administration of the trust under the direction of the Court of Chancery (*z*). The same right may still be asserted by action in the Chancery Division; and the Court is now empowered to grant relief without ordering the administration of the trust (*a*). Under the present practice, moreover (*b*), any trustee or *cestui que trust* under any deed or instrument may apply by originating summons in the Chancery Division either for the administration of the trust, or (amongst other matters) for the determination, without an administration of the trust, of any question arising therein. And under the Trustee Act, 1893 (*c*), replacing in this respect the Trustee Relief Acts, 1847 and 1849 (*d*), trustees, or the majority of trustees, having in their hands or under their control money or securities (*e*) belonging to a trust, may pay the same into the High Court,

Payment into Court by trustees.

(*z*) See Lewin on Trusts, 308, 309, 6th ed.; 419 *sq.*, 12th ed.

(*a*) *Ante*, p. 161; R. S. C., 1883, Order LV. rule 10; *Campbell* v. *Gillespie*, 1900, 1 Ch. 225.

(*b*) R. S. C., 1883, Order LV. rules 3—12. And under Order LIVA, any person interested under any deed, will, or other written instrument may apply by originating summons, in any Division of the High Court, for the determination of any question of construction arising thereunder, and for a declaration of the rights of the persons interested.

(*c*) Stat. 56 & 57 Vict. c. 53, s. 42; see R. S. C., Orders LIVB, LV. rule 13A.

(*d*) Stats. 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

(*e*) Including stocks, funds and shares; see stat. 56 & 57 Vict. c. 53, s. 50.

to be dealt with according to the orders of the High Court. Upon making such payment the trustees are discharged from their trust, which is then administered by the Court (*f*).

Investigation and audit of trust accounts.

Under the Public Trustee Act, 1906 (*g*), the condition and accounts of any trust may, on the application made to the Court of any trustee or beneficiary, be investigated and audited by such solicitor or public accountant as may be agreed on by the applicant and the trustees; or, in default of agreement, by the public trustee or some person appointed by him.

Covenants for settlement of wife's future property.

In some marriage settlements, in addition to the settlement actually made, a covenant is inserted for the settlement of all such property as the intended wife shall become entitled to during the coverture or marriage; and in a marriage settlement, a covenant to settle the wife's after-acquired property will, in the absence of expressions showing a contrary intention, be construed as applying only to property acquired during the coverture, although it be not expressly so limited (*h*). A reversionary interest belonging to the wife at the time of the marriage will not generally be considered as bound

(*f*) The jurisdiction of the High Court for the execution of trusts and under the Trustee Act, 1893, is exercisable by the County Courts in all cases where the trust estate or fund does not exceed 500*l.* in amount or value; stat. 51 & 52 Vict. c. 43, s. 67; *see ante*, p. 423.

(*g*) Stat. 6 Edw. VII. c. 55, s. 13; Public Trustee Rules, 1912, Nos. 31—37; W. N. 27th April, 1912.

(*h*) *Dickinson* v. *Dillwyn*, L. R. 8 Eq. 546; *Carter* v. *Carter*, L. R. 8 Eq. 551; *In re Edwards*, L. R. 9 Ch. 97; *Re Campbell's Policies*, 6 Ch. D. 686; *Re Coghlan*, 1894, 3 Ch. 76; *Davenport* v. *Marshall*, 1902, 1 Ch. 82, 85. This construction will not be applied where the husband is the survivor; *Fisher* v. *Shirley*, 13 Ch. D. 290. As to property over which the wife has a power of appointment, see *Re O'Connell*, 1903, 2 Ch. 574; *Tremayne* v. *Rashleigh*, 1908, 1 Ch. 681; and as to her life interests, see *Re Dowding's Settlement Trusts*, 1901, 1 Ch. 441. Gifts from the husband to the wife may be bound by such a covenant; *Re Ellis's Settlement*, 1909, 1 Ch. 618; *Re Plumptre's Marriage Settlement*, 1910, 1 Ch. 609.

by a covenant to settle her *after-acquired* property (*i*), unless it should fall into possession during the coverture (*k*). Whether property, to which the wife is entitled in possession at the time of the marriage, is bound by such a covenant is a question of intention, often of some difficulty, to be determined by the language used, aided by the context (*l*). It is now usual to word an agreement to settle property of an intended wife not specifically dealt with in her marriage settlement so as to include property, to which she *is* entitled at the time for any estate or interest whatever, as well as property, to which she may *become* entitled during the intended coverture (*m*). A covenant entered into by the intended husband *alone* to settle the wife's future property would bind him to settle any property of hers, to which he might become entitled in her right under the old law of husband and wife (*n*); but it would not oblige the wife to settle any future property to which she might become entitled for her separate use (*o*). And as the Married Women's

(*i*) *In re Pedder's Settlement Trusts*, L. R. 10 Eq. 585; *In re Clinton's Trust*, L. R. 13 Eq. 295; *In re Jones's Will*, 2 Ch. D. 362; *Re Michell's Trusts*, 9 Ch. D. 5; *Re Bland's Settlement*, 1905, 1 Ch. 4; cf. *Lloyd* v. *Prichard*, 1908, 1 Ch. 265.

(*k*) *Blythe* v. *Granville*, 13 Sim. 190; *Ex parte Blake*, 16 Beav. 463; *Archer* v. *Kelly*, 1 Dr. & S. 300; *Re Clinton's Trust*, L. R. 13 Eq. 295; *Re Williams's Settlement*, 1911, 1 Ch. 441; see *Re Bland's Settlement*, *ubi sup.*

(*l*) See *Grafftey* v. *Humpage*, 1 Beav. 46; *James* v. *Durant*, 2 Beav. 177; *Hoare* v. *Hornby*, 2 You. & Coll. N. C. 121; *Otter* v. *Melvill*, 2 De G. & Sm. 257; *Wilton* v. *Colvin*, 3 Drew. 617; *Archer* v. *Kelly*, 1 Drew. & S. 300; *Williams* v. *Mercier*, 10 App. Cas. 1.

(*m*) See *Re Mackenzie's Settlement*, L. R. 2 Ch. 345; *Agar* v. *George*, 2 Ch. D. 706; *Cornmell* v. *Keith*, 3 Ch. D. 767; *Sweetapple* v. *Horlock*, 11 Ch. D. 745; *Re Jackson's Will*, 13 Ch. D. 189; *Re Madge*, 1913, 2 Ch. 92; Davidson, Prec. Conv. vol. iii. 200, 212, 3rd ed. For a form of such an agreement, see Appendix C., *post*.

(*n*) See *post*, Part III. Ch. V.; *Re Daniel's Trust*, 18 Beav. 309.

(*o*) *Ramsden* v. *Smith*, 2 Drew. 298; *Hammond* v. *Hammond*, 19 Beav. 29; *Young* v. *Smith*, 35 Beav. 87. See also *Butcher* v *Butcher*, 34 Beav. 222; *Cramer* v. *Moore*, 3 Sm. & Giff. 143; *Grey* v. *Stuart*, 2 Giff. 308; *Brooks* v. *Keith*, 1 Drew. & S. 462; *Coventry* v. *Coventry*, 32 Beav. 612; *Re Mainwaring's Settlement*, L. R. 2 Eq. 487; *Campbell* v. *Hainbridge*, L. R. 6 Eq. 269; *Dawes* v. *Tredwell*, 38 Ch. D. 354; *Re De Ros' Trust*, 31 Ch. D. 81; *Re Smith*, 1900, W. N. 75.

Property Act, 1882 (*p*), is not to interfere with any settlement made, *or to be made*, respecting the property of any married woman, it was held that a husband's covenant to settle his wife's after-acquired property contained in a settlement, made either before or after that Act took effect, would bind property to which the wife became entitled after the commencement of the Act, if such property were not expressly given for her separate use, and would on that account have been bound by the covenant before the Act (*q*). But now, under the Married Women's Property Act, 1907 (*r*), a settlement or agreement for a settlement made *after that year* by an intended husband respecting the property of his intended wife is not valid unless it is executed by her, if she is of full age, or confirmed by her after she has attained full age, though if she dies an infant any covenant or disposition by him contained in the settlement or agreement will bind or pass any interest in any property of hers to which he may become entitled on her death, and which he could have bound or disposed of if that Act had not been passed. If the intended wife should have entered into an agreement to settle her after-acquired property, her contract will bind any property to which she may become entitled for her separate use or as her separate property (*s*), without restraint on alienation (*t*).

(*p*) Stat. 45 & 46 Vict. c. 75, s. 19.

(*q*) *Re Stamor's Trusts*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *Hancock*, 38 Ch. D. 78; *Buckland* v. *Buckland*, 1900, 2 Ch. 534.

(*r*) Stat. 7 Edw. VII. c. 18, s. 2; see *post*, Part III. Ch. V.

(*s*) *Re Allnutt, Pott* v. *Brassey*, 22 Ch. D. 275; *Schalfield* v. *Spooner*, 26 Ch. D. 94; *Re De Ros' Trust*, 31 Ch. D. 81. As to the effect of such an agreement when the intended wife is an infant, see Ch. V., *post*.

(*t*) *Re Currey*, 32 Ch. D. 361. And investments of income, to which a wife may become entitled for her separate use without power of anticipation, will not be bound by such a covenant: *Findlay* v. *Darling*, 1897, 1 Ch. 719; *Re Clutterbuck's Settlement*, 1905, 1 Ch. 200.

Covenants to settle husband's property

Occasionally covenants are unadvisedly entered into by the intended husband to settle on his children, or to leave to them by his will, all the property that he may acquire during the coverture, or all his property generally (*x*). So a father may covenant, on the marriage of his daughter, to leave to her as great a share in his property as to any of his other children (*y*). These covenants will be enforced in equity; but from their vague and uncertain character they are likely to lead to much litigation. A covenant to settle property of a given value, when no time is limited for its performance, creates no lien on any of the property of the covenantor (*z*). And it appears to be now settled, contrary to what was before supposed to be the law, that no lien is created whether a time for the performance of the covenant be specified or not (*a*).

Marriage settlement equally valid as a purchase.

Marriage, as we have seen (*b*), is a valuable consideration. Every settlement, therefore, made by parties of full age, previously to and in consideration of marriage, or made subsequently to marriage in pursuance of written articles (*c*), stands on the footing of a purchase, and has equal validity. But by the Bankruptcy Act, 1883 (*d*), as we have seen (*e*), any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property

(*x*) *Lowe* v. *Maddocks*, 17 Ves. 48; 7 R. R. 40. *Needham* v. *Smith*, 4 Russ. 318; 28 R. R. 107; *Needham* v. *Kirkham*, 3 B. & Ald. 531; see 28 R. R. 108, *Hardy* v. *Green*, 12 Beav. 482; *Re Turcan*, 40 Ch. D. 5. *Re Ross*, 1904, 2 K. B. 709. *See ante*, p. 99, and n. (*b*).

(*y*) *Hill* v. *Bird*, 4 Russ. 170; *Clay* v. *Clay*, 2 Russ. & My. 570; *Eardley* v. *Owen*, 10 Beav. 572; *Jones* v. *How*, 7 Hare 267, 9 C. B. 1. *See Phelp* v. *Lincoln*, 17 W. R. 503.

(*z*) *Freemoult* v. *Dedire*, 1 P. Wms. 429; *Berrington* v. *Evans*, 3 You. & Coll. 384.

(*a*) *Mornington* v. *Keane*, 2 De Gex & J. 292, explaining *Rowdell* v. *Brearey*, 2 Vern. 482, and questioning *Welleslay* v. *Welleslay*, 4 My. & Cr. 561, 581.

(*b*) *Ante*, p. 181.

(*c*) Stat. 29 Car. II. c. 3, s. 4. *See ante*, p. 183.

(*d*) Stat. 46 & 47 Vict. c. 52, s. 47, subs. 2.

(*e*) *Ante*, p. 294.

wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy. A voluntary settlement is liable to be defeated by the creditors of the settlor, if he was so much indebted at the time as to bring the settlement within the provisions of the statute of the 13th of Elizabeth (*f*) already noticed (*g*), by which the alienation of goods and chattels made for the purpose of delaying, hindering or defrauding creditors, is rendered void as against them. For although by the phrase "goods and chattels" was intended only such personal property as could be taken by the sheriff under an execution on a judgment (*h*), yet as almost all kinds of personal property may now be taken in execution (*i*), or charged with the payment of judgment debts (*k*), all such property is now within the compass of the statute (*l*). As we have seen, the Bankruptcy Act, 1883 (*m*), contains provisions, under which a voluntary settlement of any property (*n*) may become void, in the event of the subsequent bankruptcy of the settlor, as against the trustee in the bankruptcy. It is provided by

Voluntary settlement void as against creditors.

Bankruptcy.

Married women.

(*f*) Stat. 13 Eliz. c. 5; *Skarf* v. *Soulby*, 1 Mac & Gord. 364; *Freeman* v. *Pope*, L. R. 9 Eq. 206, affirmed L. R. 5 Ch. 538; *Mackay* v. *Douglas*, L. R. 14 Eq. 106; *Ex parte Russell, Re Butterworth*, 19 Ch. D. 588; *Re Ridler*, 22 Ch. D. 74. See *Ex parte Mercier*, 17 Q. B. D. 290; *Re Lane Fox*, 1900, 2 Q. B. 508.

(*g*) *Ante*, p. 115.

(*h*) *Sims* v. *Thomas*, 2 A. & E. 536. See *ante*, pp. 107, n. (*p*), 251.

(*i*) Stat. 1 & 2 Vict. c. 110, s. 12. See *ante*, p. 251.

(*k*) Stats. 1 & 2 Vict. c. 110, s. 14; 3 & 4 Vict. c. 82, s. 1; *ante*, pp. 321, 325, 343.

(*l*) See *Edwards* v. *Cooper*, 11 Q. B. 33; *Barrack* v. *M'Culloch*, 3 K. & J. 110; *Jenkyn* v. *Vaughan*, 3 Drew. 419; *Re Mouat*, 1899, 1 Ch. 131; *Edmunds* v. *Edmunds*, 1904, P. 362; *Ideal Bedding Co. Ld.* v. *Holland*, 1907, 2 Ch. 157.

(*m*) Stat. 46 & 47 Vict. c. 52, s. 47, *ante*, p. 294.

(*n*) See sect. 168, *ante*, p. 280, n. (*b*).

the Married Women's Property Act, 1882 (*o*), that no settlement or agreement for a settlement, whether made before or after marriage respecting the property of any married woman, shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.

Gift of choses in action.

The settlement or conveyance without valuable consideration (*p*) of choses in action is governed by the following rules. If the thing intended to be settled or given be a legal chose in action capable by statute of transfer at law (*q*), the settlor or donor may either do what is necessary in order to transfer the thing at law to the trustee of the settlement or the donee, or he may, without effecting any such transfer, make a declaration of trust in favour of the proposed beneficiaries. But he must do either the one or the other: an attempted but ineffectual transfer at law will not be supported in equity as a declaration of trust (*r*). Thus a debt cannot be validly assigned, without valuable consideration, by word of mouth only (*s*); or in case of a debt secured by bond or covenant by delivery of the deed together

Gift of a debt;

(*o*) Stat. 45 & 46 Vict. c. 75, s. 19; Williams, Conveyancing Statutes, 447.

(*p*) As to the stamp duty on voluntary settlements or conveyances, see *ante*, pp. 75, n. (*c*), 397, n. (*x*).

(*q*) Decisions were conflicting as to the means of voluntarily transferring a legal chose in action incapable of transfer at law, as a debt formerly was: *ante*, p. 31. But the authority which ultimately prevailed was in favour of the validity of a gratuitous assignment by means of a power of attorney: *ante*, p. 34; at least where such power was created by deed. See Lewin on Trusts, 62, 63, 6th ed., 71–73, 11th ed.; *Re Patrick*, 1891, 1 Ch. 82.

(*r*) *Milroy* v. *Lord*, 4 De G., F. & J. 264; *Richards* v. *Delbridge*, L. R. 18 Eq. 11; *Moore* v. *Moore*, *ib.* 474. It was held by Neville, J., in *Re Stewart*, 1908, 2 Ch. 251, that a gift, imperfect at law, of property, other than a debt from the donee to the donor (as to which, see *ante*, p. 278, n. (*z*), and n. (*u*), below), may be validated by the subsequent appointment of the donee as the donor's executor. But this decision appears to be open to question; see *Re Innes*, 1910, 1 Ch. 188, 192–194.

(*s*) *Plowes* v. *Bossey*, Ney, 67; cf. *ante*, p. 36, n. (*q*).

with an oral or even a written expression of the intention of gift (*t*): but it must be duly assigned as required by the Judicature Act of 1873 in order to vest the legal right of action in the assignee (*u*). So also the gift of a policy of insurance does not transfer the benefit of the contract of insurance to the donee (*x*). But all negotiable securities transferable by delivery may, like choses in possession (*y*), be well assigned without valuable consideration by delivery to the donee (*z*). Thus if one deliver over without valuable consideration a bill, cheque, or note made or drawn by another and payable to bearer, or payable to order and duly endorsed, the gift is complete and irrevocable. But a cheque drawn by a man on his own banker is regarded as being only an order for payment of money; and the gift of such a cheque is not in general complete until it is acted upon and the money drawn out (*a*): though if the cheque be negotiated, the donor must pay (*b*). So if one give his own promissory note,

Of negotiable securities;

Cheques.

(*t*) *Edwards* v. *Jones*, 1 My. & Cr. 226; *Re Richardson*, 30 Ch. D. 396.

(*u*) *Ante*, pp. 38–40; *Lee* v. *Magrath*, 10 L. R. Ir. 313. See *ante*, p. 258, n. (*z*), as to the gift by way of release of a debt followed by the appointment of the donee as the donor's executor: and see note (*r*), above, and *Re Griffin*, 1899, 1 Ch. 408, in which case it may be doubted whether the assignment would have been valid without the appointment of the donee as the donor's executor. It is thought that a debt may be well transferred by a parol agreement between creditor, debtor and donee, that the debtor shall pay the donee instead of the creditor, but in such a case there is a true novation; *ante*, p. 32; and the element of valuable consideration is present to the debtor's consent to be bound to the donee instead of to the original creditor, and the creditor's relinquishment of his right of action.

(*x*) *Howes* v. *Prudential Assurance Co.*, 49 L. T. N. S. 133; see *ante*, pp. 304 *sq.* But the gratuitous assignment by deed, containing a power of attorney, of the benefit of such a policy was valid under the old law; *Pearson* v. *Amicable Assurance Office*, 27 Beav. 229; and see *Re King*, 14 Ch. D. 179.

(*y*) *Ante*, p. 71.

(*z*) *Langley* v. *Thomas*, 26 L. J. N. S. Ch. 809; *McCulloch* v. *Bland*, 2 Giff. 428; see *Trimmer* v. *Danby*, 25 L. J. N. S. Ch. 424.

(*a*) See *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Bromley* v. *Brunton*, *ib.* 275; *Re Beak's Estate*, L. R. 13 Eq. 489; *Clement* v. *Cheesman*, 27 Ch. D. 631, 632.

(*b*) See *Tate* v. *Hilbert*, 2 Ves. jun. 111, 115, 118; 2 R. R. 175; *Rolls* v. *Pearce*, 5 Ch. D. 730; *ante*, p. 209.

the donee cannot recover thereon for want of valuable consideration (*c*): but a holder in due course may (*d*). Again, if one intend to give or settle without valuable consideration any stock or shares standing in his own name, he must either duly transfer or make a declaration of trust with regard to the same; an attempted assignment lacking some requisite of legal transfer (such as transfer in the bank books of government stock or registration in the case of shares (*e*)) will be ineffectual, even though made by deed (*f*). If the chose in action intended to be given or settled without valuable consideration be equitable only, as stock standing in the name of a trustee for the donor or an unpaid legacy, it may be transferred either by a direct assignment thereof to the donee or trustee of the settlement, or by a declaration of trust on the part of the donor, or by a direction given to the trustee for the donor that he shall thenceforth hold the property for the benefit of the donee (*g*). It is now settled, after considerable conflict of opinion (*g*), that an equitable chose in action may be effectually transferred by an assignment thereof, though made without valuable consideration (*h*): and that such an assignment is complete, as against the assignor, although no notice of the assignment be given to the trustee (*i*). In all the cases in which this doctrine was established the assignment was made by deed: but the rule so laid down was not in any way founded upon the irrevocable nature of a deed: it was rested

Gift of stock or shares.

Of equitable chose in action.

(*c*) *Re Whitaker*, 42 Ch. D. 119, 124, 127.

(*d*) See *ante*, pp. 189 *sq.*, 209, 210.

(*e*) *Ante*, pp. 317, 325, 329, 338.

(*f*) *Dillon* v. *Coppin*, 4 My. & Cr. 647; *Searle* v. *Law*, 15 Sim. 95; *Beech* v. *Keep*, 18 Beav. 285; *Peckham* v. *Taylor*, 31 Beav. 250; *Milroy* v. *Lord*, 4 De G., F. & J. 264.

(*g*) *Le Marchant* v. *Trustees*, 140, 155, 6th ed., 71, 79, 12th ed.

(*h*) *Kekewich* v. *Manning*, 1 De G., M. & G. 176.

(*i*) *Donaldson* v. *Donaldson*, Kay, 711, *Gilbert* v. *Overton*, 2 H. & M. 110, *Re Hughes' Trusts*, 24 Ch. D. 635, *Re Patrick*, 1891, 1 Ch. 82, *ante*, p. 37, and n. (*r*).

upon the principle of equity which allowed the free alienation of equitable interests (*k*). And as there is no rule of modern equity requiring the formality of a deed for the alienation of such interests (*l*), it appears that a gratuitous assignment of an equitable chose in action may well be made without deed (*m*). As we have seen (*n*), the Statute of Frauds (*o*) requires all assignments of any trust to be in writing signed by the assignor or by will, and makes no mention of any exception in the case of chattels: but some consider that this enactment only applies to trusts of lands (*p*). An intention of present assignment must be expressed in order to constitute a gratuitous transfer of an equitable chose in action; for a Court of Equity will not enforce the specific performance of a gratuitous promise or agreement to convey any property, even though made by deed (*q*). There is no doubt that a declaration of trust of any chattels personal may be well made by parol (*r*). And a direction to a trustee of chattels personal by his *cestui que trust* to hold for the benefit of another may be given either in writing or by word of mouth, and by the authority of the *cestui que trust* as well as by himself personally (*s*). In practice, where the parties are acting under legal advice, voluntary settlements are effected by deed as well

(*k*) *Ante*, p. 36.

(*l*) See Williams, R. P. 172, 189, 190, 21st ed.

(*m*) See *Lambe* v. *Orton*, 1 Dr. & Sm. 125; *Re King*, 14 Ch. D. 179; *Harding* v. *Harding*, 17 Q. B. D. 442; *Re Griffin*, 1899, 1 Ch. 408; *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, 1905 A. C. 454, 461, 462. But an assignment of property to be afterwards acquired (which is really only an *agreement* to assign such property, when it shall be acquired; *ante*, p. 99, and n. (*m*)) is void, unless made for value; see *Glegg* v. *Bromley*, 1912, 3 K. B. 474; *ante*, p. 170; and cases cited in note (*q*), below.

(*n*) *Ante*, p. 97.

(*o*) Stat. 29 Car. II. c. 3, s. 9.

(*p*) See 1 Sand. Uses, 315, 4th ed., 343, 5th ed. Lewin on Trusts, 573, 6th ed., 890, 12th ed.

(*q*) *Ellison* v. *Ellison*, 6 Ves. 656, 662; 6 R. R. 19; *Re Lucan*, 45 Ch. D. 470; *Re Ellenborough*, 1903, 1 Ch. 697.

(*r*) *Ante*, p. 27.

(*s*) *Bentley* v. *Mackay*, 15 Beav. 12, *Roberts* v. *Roberts*, 11 Jur. N. S. 992, 12 Jur. N. S. 971; *Harding* v. *Harding*, 17 Q. B. D. 442.

as settlements on marriage: but if the property intended to be settled consist of stock or shares, the same is duly vested in the trustees of the settlement by the appropriate method of legal transfer, independently of the deed of settlement, and the trusts only, on which the trustees are to hold the same, are declared by the deed. If an equitable chose in action be settled, it is directly assigned to the trustees by the deed of settlement (*t*). It may be noted here that if one transfer any property, such as stock or shares, into the name of another without valuable consideration and no intention of gift be expressed or can be inferred from the circumstances of the case, a trust will result in favour of the transferor (*u*). And if one purchase stock or shares in the name of another, a trust will result in favour of the purchaser, unless the nominee were his wife or child or one to whom he stood *in loco parentis*, when a presumption (which may be rebutted by evidence to the contrary) arises that the purchase was intended for the other's advancement (*x*).

Resulting trust.

Although a voluntary settlement may be defeated as above mentioned by creditors, yet, when once completed, it is binding on the settlor, who cannot by any means undo it (*y*). Thus, in one case (*z*),

Voluntary settlement binding on the settlor.

(*t*) See for examples the precedent given in Appendix C., *post*.

(*u*) See *George* v. *Howard*, 7 Price, 646; 21 R. R. 775; *Batstone* v. *Salter*, L. R. 19 Eq. 250, 10 Ch. 431; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343; Cotton, L.J., *Standing* v. *Bowring*, 31 Ch. D. 282, 287; cf. *Re Shields*, 1912, 1 Ch. 591.

(*x*) Lewin on Trusts, 126—128, 144, 145, 151 *sq.*, 6th ed.; 163–165, 183—185, 191 *sq.*, 12th ed.; *Re Policy* (No. 6402) *of Scottish Equitable Life Assurance Society*, 1902, 1 Ch. 282.

(*y*) *Ellison* v. *Ellison*, 6 Ves. 656; 6 R. R. 19; *Newton* v. *Askew*, 11 Beav. 145; *Kekewich* v. *Manning*, 1 De Gex, M. & G. 176; *Bentley* v. *Mackay*, 15 Beav. 12; *Bridge* v. *Bridge*, 16 Beav. 315; *Re Way's Trusts*, 2 De Gex, J. & S. 365; *Paul* v. *Paul*, 19 Ch. D. 47, 20 Ch. D. 742; *Mallott* v. *Wilson*, 1903, 2 Ch. 494.

(*z*) *Bill* v. *Cureton*, 2 My. & Keen, 503; 39 R. R. 258. See also *Petre* v. *Espinasse*, 2 My. & Keen, 496; 39 R. R. 254; *M'Donnell* v. *Hesilrige*, 16 Beav. 346; *Donaldson* v. *Donaldson*, Kay, 711.

a maiden lady not immediately contemplating marriage, but thinking such an event possible, transferred a sum of stock into the names of trustees in trust for herself until she should marry, and, after her marriage, in trust for her separate use for her life, free from the control of any person or persons with whom she might intermarry, and, after her decease, upon trusts for the benefit of any such husband, and her child or children by any husband or husbands. She afterwards, being still unmarried, filed a bill in Chancery, praying that the settlement might be delivered up to her to be cancelled, and that the stock might be ordered to be re-transferred by the trustees. But the Court held that she was bound by the settlement she had made, and was not entitled to any assistance to release her from it. It is, however, the duty of every solicitor who prepares a voluntary settlement to suggest the insertion of a power of revocation (*a*). And in some cases the Court of Chancery has set aside voluntary settlements irrevocably made in ignorance that such a power might have been inserted (*b*). But the absence of a power of revocation is not of itself a ground upon which the Court will set aside a voluntary settlement. In order to avoid such a settlement, it must be shown that, when the settlor executed it, he did not understand what its effect would be (*c*).

Power of revocation.

Settlement for settlor's own benefit revocable by him.

If the object of the settlor is merely his own benefit or convenience, the settlement will be revocable by him at his pleasure. Thus, where a man,

(*a*) See *Powell* v. *Powell*, 1900, 1 Ch. 243. But it should be noted that the insertion of a power of revocation makes the property settled liable to estate duty on the settlor's death; see *post*, pp. 443—445.

(*b*) See *Phillips* v. *Mullings*, L. R. 7 Ch. 244, 247; *Hall* v. *Hall*, L. R. 8 Ch. 430, 436—438.

(*c*) See *Phillips* v. *Mullings*, L. R. 7 Ch. 244, 246; *Hall* v. *Hall*, L. R. 8 Ch. 430, 438; *Henry* v. *Armstrong*, 18 Ch. D. 668; *Dutton* v. *Thompson*, 23 Ch. D. 278.

without any communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, his object is said to be, not to benefit his creditors, but to benefit himself by the payment of his debts (*d*). He may accordingly revoke the trust thus created (*e*), so long as the creditors remain in ignorance of it (*f*). This rule, however, though well established, seems to attribute to debtors a somewhat light estimation of the claims of their creditors; and there appears to be no disposition in the Courts to extend it (*g*).

Voluntary settlements of personal estate never void against subsequent purchasers.

The statute of Elizabeth (*h*), under which voluntary settlements of lands and other hereditaments were formerly held void as against subsequent purchasers for valuable consideration, though it extended to chattels real (*i*) did not apply to purely personal estate (*k*). A voluntary settlement of personal estate, therefore, could never be defeated by a subsequent sale of the property by the settlor.

Succession duty.

By the Succession Duty Act, 1853 (*l*), a duty, called succession duty, was made payable in respect of the succession on death on or after the 19th of May, 1853, to the beneficial interest in any real or personal property, or the income thereof, either by virtue of

(*d*) *Per* Sir C. Pepys, M.R., 2 My. & Keen, 511; cited by Wigram, V.-C., in *Hughes* v. *Stubbs*, 1 Hare, 479.

(*e*) *Garrard* v. *Lord Lauderdale*, 3 Sim. 1; 30 R. R. 105; *Acton* v. *Woodgate*, 2 My. & Keen, 492; 39 R. R. 258; *Barnashaw* v. *Hollier*, 7 Sim. 3; 40 R. R. 57; *Law* v. *Bagwell*, 4 Dru. & Warren, 398; *Smith* v. *Keating*, 6 C. B. 136; *Driver* v. *Mawdesley*, 16 Sim. 511; *Johns* v. *James*, 8 Ch. D. 744; *Re Ashby*, 1892, 1 Q. B. 872; *R.* v. *Humphris*, 1904, 2 K. B. 89.

(*f*) *Browne* v. *Cavendish*, 1 Jo. & Lat. 606, 635; *Griffith* v. *Ricketts*, 7 Hare, 299, 307; *Mackinnon* v. *Stewart*, 1 Sim. N. C. 76, 89, 90; *Harland* v. *Binks*, 15 Q. B. 713; *Smith* v. *Hurst*, 10 Hare, 30. But see *Cornthwaite* v. *Frith*, 4 De Gex & Sm. 552.

(*g*) See *Wilding* v. *Richards*, 1 Coll. 661; *Simmonds* v. *Palles*, 2 Jo. & Lat. 489; *Kirwan* v. *Daniel*, 5 Hare, 493, 499–501.

(*h*) Stat. 27 Eliz. c. 4; Williams, R. P. 78, 21st ed.

(*i*) Co. Litt. 3 b; 6 Rep. 72.

(*k*) 2 My. & Keen, 512.

(*l*) Stat. 16 & 17 Vict. c. 51, ss. 2, 10, 54.

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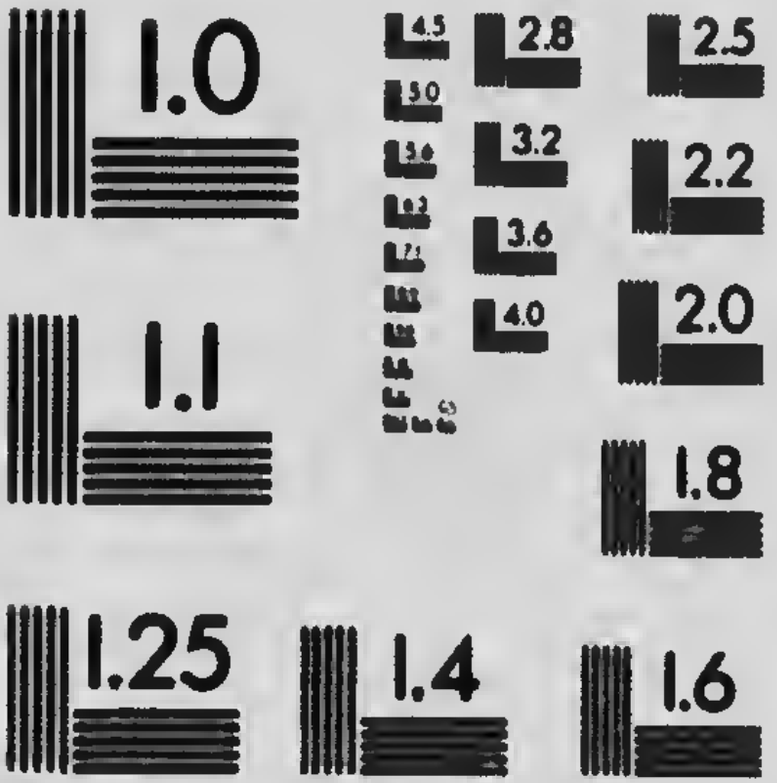

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any disposition of the property, or on devolution by law: except where legacy duty was already chargeable in respect of the succession (*m*). This duty is charged at the same rates as legacy duty (*n*), according to the degree of relationship between the successor and his predecessor in the interest to which he has succeeded (*o*); and, in the case of succession to an absolute interest in personalty, on the principal value thereof (*p*). It is a debt due to the Crown from the successor, and is a first charge on his interest in any personal property (other than leaseholds) in respect of which the duty is assessed, while the property remains in the ownership or control of the successor or any trustee for him or of his guardian or committee, or of the husband of any wife who is the successor (*q*). Besides the successor, the following persons are personally accountable to the Crown for succession duty, but to the extent only of the property or funds actually received or disposed of by them respectively; that is to say, every trustee, guardian, committee, or husband in whom respectively any property, or the management of any property, subject to such duty, is vested, and every person in whom the same is vested by alienation or other derivative title at the time of the succession becoming an interest in possession (*r*). Succession duty, therefore, becomes payable on the death of any person taking a life interest under a settlement made *inter vivos* of any personal estate, as on the death of a tenant for life of lands (*s*). And succession on death under an exercise of a power of appointment, whether general or limited (*t*),

(*m*) Sect. 18; *see post*, Part III., Chs. III., IV.; 2 Wms. V. & P. 1260 *sq.*, 2nd ed.

(*n*) And with the same exemptions; see stat. 10 Edw. VII. c. 8, s. 58; *post*, Part III., Ch. III.

(*o*) Stat. 16 & 17 Vict. c. 51, s. 10.

(*p*) Sect. 32.

(*q*) Sect. 42.

(*r*) Sect. 44.

(*s*) Williams, R. P. 418, 21st ed.

(*t*) *Ante*, pp. 405–414.

is as well chargeable with succession duty as succession under a direct disposition (*u*).

Estate duty

Estate duty was imposed by the Finance Act, 1894 (*x*), on the principal value (*y*) of all property, real or personal, settled or not settled, which passes on the death of any person dying after the 1st of August, 1894. Property passing on the death (*z*) of a person so dying is to be deemed to include (1) property of which the deceased was at the time of his death competent to dispose, either by virtue of his estate or interest therein, or of a general power of appointment (*a*); (2) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest (*b*); (3) property assured by the deceased in his lifetime by means of any of the following dispositions (*c*), viz., (i.) *donationes mortis causâ* (*d*); (ii.) any immediate gift, at law or in equity, not made *bonâ fide* three years before the donor's death (*e*);

(*u*) See stat. 16 & 17 Vict. c. 51 ss. 2, 4; 2 Wms. V. & P. 1263, and n. (*r*), 2nd ed.

(*x*) Stat. 57 & 58 Vict. c. 30, ss. 1, 24. There are several exceptions, see 2 Wms. V. & P. 1297–1302, 2nd ed.

(*y*) Allowance is made, as a rule, for funeral expenses, debts and incumbrances: see stat. 57 & 58 Vict. c. 30, s. 7, amended by 10 Edw. VII. c. 8, ss. 57, 60–62; 2 Wms. V. & P. 1294, n. (*k*), 2nd ed.

(*z*) See stat. 57 & 58 Vict. c. 30, s. 22 (1 *f*, *l*); 2 Wms. V. & P. 1295, n. (*n*, *o*), 2nd ed.

(*a*) See ss. 2 (1 *a*), 22 (2); 2 Wms. V. & P. 1295, and n. (*p*), 2nd ed.

(*b*) Sect. 2 (1 *b*). See 2 Wms. V. & P. 1296, 1310–1312, 2nd ed.

(*c*) See sect. 2 (1 *c*). Similar dispositions of personal property, but being as regards Nos. iv. and v. *voluntary* and as regards No. vi. *in favour of a volunteer*, gave rise under an Act of 1881 to a liability on the death of the disposing party to payment of a duty called account duty; but this duty was abolished by the Finance Act, 1894; stats. 44 Vict. c. 12, s. 38, amended by 52 Vict. c. 7, s. 11; 57 & 58 Vict. c. 30, s. 1; 2 Wms. V. & P. 1290–1292, 2nd ed.

(*d*) See *post*, Part III., Ch. III.

(*e*) Stat. 10 Edw. VII. cc. 8, s. 59 (1), substituting three years for twelve months (the previous period) except as to gifts made before the 30th April, 1908, or made for public or charitable purposes; *A.-G.* v. *Milne*, 1913, 1 K. B. 337. Subs. 2 exempts from this duty gifts which are made in consideration of marriage or which are proved to the

(iii.) any gift whenever made of any property, of which *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise (*f*); (iv.) any disposition, purchase, or investment, vesting any property in the deceased jointly with any other person so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on the deceased person's death to such other person; (v.) any settlement made by deed or other instrument not taking effect as a will, whereby an interest for life or determinable by death in the property settled is expressly or impliedly reserved to the settlor, or whereby the settlor has reserved to himself the right, by the exercise of any power, to restore to himself or to retain the absolute interest in such property (*g*); (vi.) any declaration of trust in favour of another person made, with like reservations in the settlor's favour, in writing or otherwise; and (vii.) any policy of assurance effected on a donor's life, and kept up wholly or partly for the benefit of a donee, whether nominee or assignee (*h*); (4) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the

satisfaction of the Commissioners to have been part of the normal expenditure of the deceased and to have been reasonable having regard to the amount of the income or to the circumstances or which in the case of any donee do not exceed in the aggregate 100*l.* in amount or value; see 2 Wms. V. & P. 1290, 1296, 2nd ed.

(*f*) See *A.-G.* v. *Worrall*, 1895, 1 Q. B. 99; *A.-G.* v. *Johnson*, 1903, 1 K. B. 617; *A.-G.* v. *Seccombe*, 1911, 2 K. B. 688. By stat. 10 Edw. VII. c. 8, s. 59 (3), in the above case the property shall not be deemed to pass on the donor's death if subsequently by means of the surrender of the benefit reserved or otherwise, it is enjoyed to the entire exclusion of the donor and of any benefit to him by contract or otherwise for three years preceding his death.

(*g*) See *Crossman* v. *R.*, 18 Q. B. D. 256; *A.-G.* v. *Heywood*, 19 Q. B. D. 326.

(*h*) See *Land Advocate* v. *Fleming*, 1897, A. C. 145.

extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased (*i*).

Rate of estate duty.

The rate of estate duty is now graduated according to the value of the estate as stated in the note (*k*); and for determining the rate of duty to be paid, all property passing on the death of the deceased and chargeable with estate duty is required, as a rule, to be aggregated so as to form one estate (*l*). Estate duty is therefore payable on any person's death, not only on the value of his own property which passes under his will or upon his intestacy to his executors or administrators (*m*), but also on the principal value of any property in which he enjoyed a life interest under some settlement. The executor or administrator is accountable for the estate duty in respect of

Persons accountable for estate duty.

(*i*) Stat. 57 & 58 Vict. c. 30, s. 2 (1 *d*); see *A.-G.* v. *Dobree*, 1900, 1 Q. B. 442; *A.-G.* v. *Hawkins*, 1901, 1 K. B. 285; *A.-G.* v. *Murray*, 1904, 1 K. B. 165; *Lethbridge* v. *A.-G.*, 1907, A. C. 19.

(*k*) Where the principal value of the estate

					At the rate per cent. of
Exceeds	100*l.*	and does not exceed		500*l.*	1
,,	500*l.*	,,	,,	1,000*l.*	2
,,	1,000*l.*	,,	,,	5,000*l.*	3
,,	5,000*l.*	,,	,,	10,000*l.*	4
,,	10,000*l.*	,,	,,	20,000*l.*	5
,,	20,000*l.*	,,	,,	40,000*l.*	6
,,	40,000*l.*	,,	,,	70,000*l.*	7
,,	70,000*l.*	,,	,,	100,000*l.*	8
,,	100,000*l.*	,,	,,	150,000*l.*	9
,,	150,000*l.*	,,	,,	200,000*l.*	10
,,	200,000*l.*	,,	,,	400,000*l.*	11
,,	400,000*l.*	,,	,,	600,000*l.*	12
,,	600,000*l.*	,,	,,	800,000*l.*	13
,,	800,000*l.*	,,	,,	1,000,000*l.*	14
,,	1,000,000*l.*				15

See stat. 10 Edw. VII. c. 8, s. 54, and Second Schedule, replacing 7 Edw. VII. c. 13, s. 12; 57 & 58 Vict. c. 30, s. 17.

(*l*) See stats. 57 & 58 Vict. c. 30, ss. 4, 7 (10), 15 (2), 16 (3), 17; 59 & 60 Vict. c. 28, ss. 17, 29; 63 Vict. c. 7, ss. 12, 13; 7 Edw. VII. c. 13, s. 16.

(*m*) *Ante*, p. 3.

all personal property of which the deceased was competent to dispose at his death (*n*); and with regard to any other property passing on the death, every person to whom any such property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title, is accountable for the duty (*o*); but a *bonâ fide* purchaser for valuable consideration without notice is not liable to or accountable for the duty (*p*).

Charge of estate duty.

A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, is a first charge on the property in respect of which duty is leviable; but not against a *bonâ fide* purchaser thereof for valuable consideration without notice (*q*).

Settlement estate duty.

Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition taking effect after the 1st of August, 1894, passes thereunder on the death of the deceased to some person not competent to dispose of the property (*r*), a further estate duty (called settlement estate duty) is leviable at the rate of 2 per cent. (*s*) on the principal value of the

(*n*) Stat. 57 & 58 Vict. c. 30, s. 8 (3).
(*o*) Sect. 8 (4).
(*p*) Sect. 8 (18).
(*q*) Sect. 9 (1).
(*r*) See *A.-G.* v. *Fairley*, 1897, 1 Q. B. 698; *A.-G.* v. *Owen*, 1899, 2 Q. B. 253; *A.-G.* v. *Clarkson*, 1900, 1 Q. B. 156; *Re Campbell*, 1902, 1 K. B. 113; *A.-G.* v. *Milne*, 1913, 2 K. B. 15.
(*s*) Stat. 10 Edw. VII. c. 8, s. 54, amending 57 & 58 Vict. c. 30, s. 17. By stat. 57 & 58 Vict. c. 30, s. 5 (4), the amount of the *ad valorem* stamp duty, if any, charged on the settlement in respect of the settled property, may be deducted; *ante*, p. 397, n. (*x*).

property so settled, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but during the continuance of the settlement the settlement estate duty shall not be payable more than once (*t*).

Money settled as land.

We have seen (*u*) that, if a trust be declared to lay out money in the purchase of land, the money will be considered as real estate in equity. If, therefore, money be subject to a trust for the investment thereof in the purchase of land, which is to be settled according to the limitations of some specified settlement, until land be actually purchased pursuant to the trust, the money will devolve according to the limitations of the settlement.

Proceeds of sale of settled land.

When land, subject to a settlement, is sold under the powers of sale given by law or by the settlement, the money, which arises from the sale, is generally subject to a trust for the application thereof in the purchase of land to be conveyed to the uses of the settlement (*x*). By the Settled Land Act, 1882 (*y*), capital money, arising under that Act from the sale of settled land or otherwise may be invested, at the direction of the tenant for life, in the names of the trustees for the purposes of that Act upon the securities thereby authorised (*z*); and such money and the investments thereof will be considered as land, for all purposes of disposition, transmission and devolution (*a*). By making use of the powers conferred by this Act, any person, who may be entitled to exercise the powers of a tenant for life under this Act (*b*), may have any such money so

(*t*) Stat. 57 & 58 Vict. c. 30, s. 5; see s. 22 (1, *h*, *i*); stat. 61 & 62 Vict. c. 10, ss. 13, 14.

(*u*) *Ante*, p. 419.

(*x*) Williams, R. P. 119, 123—125, 187, 394, 21st ed.

(*y*) Stat. 45 & 46 Vict. c. 38, ss. 2 (9), 21, 32, 33; see *Re Mackenzie's Trusts*, 23 Ch. D. 750; Williams' Conveyancing Statutes, 292, 325, 334, 335.

(*z*) See sects. 21, 22; Williams, R. P. 124, 21st ed.

(*a*) See sect. 22, sub-ss. 5, 6.

(*b*) See Stat. 45 & 46 Vict. c. 38, sects. 2, sub-ss. 5—7,

invested upon any authorised securities in the nature of personal estate (*c*). And the trustees may hold such securities as a permanent investment, and need not apply the money so invested in the purchase of land, until directed to do so by a person entitled to exercise the powers of a tenant for life under the Act (*d*). The *legal* interest in any such securities belongs to the trustees, and will devolve in their hands as personal estate, like any other personal property vested in trustees upon trusts declared by a settlement (*e*). But in equity the money so invested is regarded as real estate, and the *equitable* or beneficial interest therein will devolve in all respects according to the limitations of the settlement. Except in the case of capital money actually arising under the Settled Land Acts, in order to convert money into real estate in equity, an imperative trust must be declared for its investment in the purchase of land. A mere declaration by a settlor or testator that some money or other personalty shall be considered or shall devolve in equity as real estate is simply inoperative(*f*). And it has been decided that a direction that money shall be held on the same trusts as if it were capital money arising under the Settled Land Acts from the sale of some particular settled estate is insufficient for this purpose (*g*).

Chattels personal settled to go with land.

Sometimes it is desired to settle pictures, plate, jewels or other chattels, so that the same may be used by the person for the time being entitled to some particular landed estate, which is limited in settlement. In such cases the chattels in question

58–62; Williams R. P. 108, 123, 134, 189, 309.

(*c*) See sect. 21 (i); *ibid.*, p. 124.

(*d*) See sect. 22.

(*e*) See *ante*, p. 395.

(*f*) *A.-G.* v. *Mangles*, 5 M. & W. 120; *Edwards* v. *Tuck*, 23 Beav. 268; *Re Walker*, 1908, 2 Ch. 705, 712; *Re Gibbon*, 1909, 1 Ch. 367, 378; 2 Wms. V. & P. 432, 433, 2nd ed. But a trust for conversion may be impliedly, as well as expressly declared; *Johnson* v. *Arnold*, 1 Ves. Sen. 169.

(*g*) *Re Walker*, *ubi sup.*

are assigned to trustees to be held upon such trusts as shall correspond, as nearly as the rules of law and equity will permit, with the uses declared by the settlement of the land (*h*). When chattels are so settled, they are popularly said to be settled as "heirlooms," as we have seen (*i*). As there cannot be an estate tail in personal property (*k*), the first person, who becomes entitled to the land under the settlement for an estate tail, will become absolutely entitled to any chattels which have been so settled (*l*). In the case of and during the infancy of the first tenant in tail, this result would generally be undesirable. It is, therefore, usual to provide that any chattels so settled shall not vest absolutely in any person made tenant in tail by purchase under the settlement, unless he shall attain the age of twenty-one years, but shall devolve, on his death under that age, as if they were freeholds of inheritance limited to the uses of the settlement (*m*). Such a proviso should be limited to the case of the death under age of a tenant in tail by *purchase* (*n*), in order to avoid any infringement of the rule against perpetuities (*o*). Under the Settled Land Act, 1882 (*p*), chattels so settled may be sold at the instance of the tenant for life of the land; and the money to arise from the sale may be applied as capital money arising under

(*h*) Williams on Settlements, 225. The trustees may insure the goods against fire; *Re Egmont's Trusts*, 1908, 1 Ch. 821; and apply capital money arising from the land in discharge of incumbrances on the chattels; *Re Egmont's Settled Estates*, 1912, 1 Ch. 251.

(*i*) *Ante*, p. 141.

(*k*) *Ante*, p. 401.

(*l*) *Foley* v. *Burnell*, 1 Bro. C. C. 274; 4 Bro. P. C. 319; *Re Hill*, 1902, 1 Ch. 537, 807; *Re Fothergill's Estate*, 1903, 1 Ch. 149; *Re Parker*, 1910, 1 Ch. 581; see *Re Angerstein*, 1895, 2 Ch. 883; *Re Chesham's Settlement*, 1909, 2 Ch. 329, as to which see 54 Sol. J. 26.

(*m*) Davidson, Prec. Conv. vol. iii. 602, 624—627, 3rd ed.; vol. i. 338, 5th ed.; Williams on Settlements, 223—225.

(*n*) See Williams, R. P. 69, 227, 21st ed.

(*o*) *Ante*, p. 405. See Davidson, Prec. Conv. vol. iii. 602, note (*s*), 3rd ed.

(*p*) Stat. 45 & 46 Vict. c. 38, s. 87; see Williams' Conveyancing Statutes, 339.

that Act (*q*), or may be invested in the purchase of similar chattels to be settled in the same way. But no such sale or purchase of chattels can be made without an order of the Court.

Leaseholds settled to go with freeholds.

Leaseholds held for long terms of years are frequently settled together with freehold land. In such cases the leaseholds are assigned to trustees to be held upon such trusts as shall correspond, as nearly as the rules of law and equity will permit, with the uses declared of the freeholds, with a like proviso, to meet the event of the death under age of a tenant in tail by purchase, as in the case of chattels personal settled to go with freeholds (*r*).

Alienation for debt.

As we have seen (*s*), equitable interests in chattels could not be seized by process of execution *at law*: but a charging order may be made upon a judgment debtor's interest, whether in possession, remainder or reversion, and whether vested or contingent, in any stock or shares held in trust for him (*t*). And under the present practice, if a judgment debtor be entitled to the income of or to a reversionary interest in any personal property vested in trustees for his benefit, the judgment creditor may obtain an order for the appointment of a receiver on his behalf; a proceeding which is generally known as equitable execution (*u*).

Equitable execution.

(*q*) See stat. 45 & 46 Vict. c. 38, s. 21; Williams' Conveyancing Statutes, pp. 325, 326.

(*r*) See Williams on Settlements, 223; Davidson, Prec. Conv. iii. 599, 3rd ed.; iv. 435, 4th ed.; i. 337, 5th ed.

(*s*) *Ante*, p. 110.

(*t*) *Ante*, pp. 322, 325, 343.

(*u*) *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202; *Hood Barrs* v. *Heriot*, 1896, A. C. 174; *Ideal Bedding Co., Ld.* v. *Holland*, 1907, 2 Ch. 157.

CHAPTER II.

OF JOINT OWNERSHIP AND JOINT LIABILITY.

Joint owners.

THERE may be a joint ownership of any kind of personal property, in the same manner as there may be a joint tenancy of real estate (*a*); and the four unities of *possession*, *interest*, *title* and *time*, which characterize a joint tenancy of real estate, apply also to a joint ownership of chattels. But as no estates can exist in personal property, the distinctions which hold with respect to joint estates for life, in tail, or in fee, do not occur in a joint ownership of personalty. If personal property, whether in possession or in action, be given to A. and B. simply, they will be joint owners, having equal rights, as between themselves, during the joint ownership, and being, with respect to all other persons than themselves, in the position of one single owner. Hence it follows that if a bond or covenant be given or made to two or more jointly, they must all join in suing upon it, and a release by one of them to the obligor is sufficient to bar them all (*c*). As a further consequence of the unity of joint ownership, the important right of survivorship, which distinguishes a joint tenancy of real estate, belongs also to a joint ownership of personal property. Whether the subject of joint ownership be a chattel real as a lease, or a chose in possession as a horse, or a chose in action as a debt or legacy, the surviving joint owner will be entitled

Joint bond, all must sue.

Release by one bars all.

Survivorship.

(*a*) See Williams, R. P. 136, 21st ed.

(*b*) *Slingsby's Case*, 5 Rep. 18 b; *Petrie* v. *Bury*, 3 B. & C. 353; 2 [illegible] 384. 1 Wms. Saund [illegible]

(*c*) 2 Rol[illegible] 410 (I. pl. 1, 5.

to the whole, unaffected by any disposition which the deceased joint owner may have made by his will, unless the joint tenancy should have been previously severed in the lifetime of both the parties (*d*). And for this reason trustees of settlements of personal estate are always made joint owners, in order that the surviving trustees may take the entire fund, rather than that the executors or administrators of any trustee who may happen to die should have any right to intermeddle with the share of the deceased. Where a *beneficial* interest accrues to any joint owner by survivorship, it is liable to succession and estate duty (*e*).

Trustees of personal estate made joint owners.

Succession and estate duty.

If the joint ownership be created by a will, it is not necessary that the shares of all the joint owners should vest at the same time. Thus under a bequest to A. for life, and after his decease to the issue (*f*) or children (*g*) of B., without words of severance, all the issue or children born in A.'s litetime, will become entitled jointly, though some may not be living when the shares of the others become vested interests. On the decease of any of them therefore before payment, the survivors will become entitled to their shares. A similar exception to the unity of *time* occurs also in the case of a devise of real estate by will (*h*).

The share of joint owners under a will need not vest at the same time.

In analogy to the rule by which a joint estate in fee simple in lands is created by a limitation to two or more, *their heirs and assigns*, it was customary with conveyancers to make a gift of personal estate

Limitation to joint owners, their executors, administrators and assigns.

(*d*) Litt. ss. 281, 382; *Lady Shore* v. *Billingsley*, 1 Vern. 483; *Willing* v. *Baine*, 3 P. Wms. 115; *Morley* v. *Bird*, 3 Ves. 629; 4 R. R. 106; *Williams* v. *Henshaw*, 1 John. & H. 546; *Re Butler's Trusts*, 38 Ch. D. 286; *Re Hewett* 1894, 1 Ch. 362.

(*e*) Stat. 16 & 17 Vict. c. 51, s. 3; *ante*, pp. 442—445.

(*f*) *Bridge* v. *Yates*, 12 Sim. 645.

(*g*) *Amies* v. *Skillern*, 14 Sim. 428.

(*h*) See Williams, R. P. 139, 21st ed.

to two or more jointly, by limiting it to them, *their executors, administrators, and assigns*. This, however, though usual, was not strictly necessary. In ill-framed instruments, limitations of personalty were sometimes made to two persons, "and the survivor of them, and the executors and administrators of such survivor." If, however, the persons are simply made joint owners, the law will be sufficient of itself to carry the property to the survivor And it is now by no means unusual to vest personal estate in two or more persons, as joint owners, simply by conveying it to them without further words. Bonds and covenants, when intended to be given or made to two or more jointly, were in like manner usually given or made to the obligees or covenantees, *their executors and administrators*; or, if the subject-matter were assignable, to them, *their executors, administrators and assigns*. But it was always unnecessary expressly to extend the benefit of a personal covenant or obligation, made with or to two or more persons jointly to the survivors of them, or to their executors, administrators or assigns (*i*). And it is now not unusual simply or express that such covenants and obligations are made with or to certain specified persons, without further words (*k*). But when entered into with two or more persons, bonds or covenants cannot, as respects the obligees or covenantees, be joint or several, at their election, for one and the same cause; for otherwise the Court would be in doubt for which of them to give judgment (*l*). And whether a covenant be joint or several depends much more upon the subject-matter than upon the words employed. If each of the covenantees has

Joint bonds and covenants.

Joint or several

(*i*) See Williams' Conveyancing Statutes, 236, 498, n. (*a*).

(*k*) See *ibid.*, p. 498. See stat. 44 & 45 Vict. c. 41, s. 60 (*ibid.*, pp. 235—237), as to the effect of a covenant, a contract under seal or a bond or obligation under seal, made with two or more jointly.

(*l*) 5 Rep. 19 a; 1 East, 501.

a separate interest, each may have a separate cause of action, and the covenant will accordingly in such a case be several, though expressed to be made with the covenantees jointly and severally (*m*). But if each of the covenantees has not a separate cause of action, all of them must concur in suing upon the covenant, even although it be expressed to be made with some of them, "and as a separate covenant" with the others (*n*); for if all may sue, all must (*o*).

Partners in trade, no survivorship of choses in possession.

An exception to the right of survivorship between joint owners occurs in the case of partners in trade. In this case the law, in order to encourage commerce, vests in the executors or administrators of a deceased partner, the share of the deceased in all personal chattels in possession, such as merchandise or ships, which were the joint property of the partnership (*p*).

Otherwise as to choses in action at law. But not in equity.

But this rule does not extend at law to *choses in action*, which must accordingly be sued for in the name of the survivor (*q*). In equity, however, the share of the deceased partner, both in the choses in possession and in action belonging to the partnership, devolves on his executors or administrators. The consequence is that, though the choses in action must be sued for by the surviving partner, he will be a trustee of the share of the deceased partner for his executors or administrators (*r*).

Real estate purchased for partnership purposes.

The same rule was applied in equity even to real estate pur-

(*m*) 5 Rep. 19 a; 1 Wms. Saund. 155 a, n. (1).

(*n*) *Slingsby's Case*, 5 Rep. 18 b; *Anderson* v. *Martindale*, 1 East, 497; 6 R. R. 334; *Foley* v. *Addenbrooke*, 4 Q. B. 197; *Hopkinson* v. *Lee*, 6 Q. B. 964; *Bradburne* v. *Botfield*, 14 M. & W. 559; *Wakefield* v. *Brown*, 9 Q. B. 209; *Keightley* v. *Watson*, 3 Ex. 716.

(*o*) 4 Q. B. 208; *Wetherell* v. *Langston*, 1 Ex. 634; *Pugh* v. *Stringfield*, 3 C. B. N. S. 2. See *Cullen* v. *Knowles*, 1898, 2 Q. B. 380.

(*p*) Co. Litt. 182 a; *Kempe* v. *Andrews*, 3 Lev. 290; *Rex* v. *Collector of Customs*, 2 M. & S. 223; *Buckley* v. *Barber*, 6 Ex. 164.

(*q*) *Martin* v. *Crompe*, 1 Lord Raym. 340; *S. C.*, 2 Salk. 444; 2 Wms. Saund. 117 b, n. (2).

(*r*) *Jefferys* v. *Small*, 1 Vern. 217; *Lake* v. *Craddock*, 3 P. Wms. 158.

chased for the purposes of a trading partnership (*s*), and conveyed to the partners as joint tenants in fee. On the decease of any of them, equity held the survivors to be trustees of the share of the deceased for his executors or administrators as part of his personal estate (*t*). And this rule is now embodied in the Partnership Act, 1890 (*u*).

Joint ownership not favoured in equity. No survivorship in equity of joint securities

Indeed, as a general rule, joint ownership is not favoured in equity, on account of the right of survivorship which attaches to it (*x*). If, therefore, two persons advance money by way of mortgage or otherwise, and take the security to themselves jointly, and one of them die, the survivor will be a trustee in equity for the representatives of the deceased, of the share advanced by him (*y*). And it was formerly necessary, when the intention was that the survivor should receive the whole, that a declaration should be inserted that his receipt alone should be a sufficient discharge for the money secured (*z*). An enactment contained in the Conveyancing Act, 1881, has rendered unnecessary the insertion of such a declaration in mortgages or obligations made or transferred to two or more persons jointly after the 31st of December, 1881 (*a*).

Ownership in common.

An ownership in common (or, as it is usually styled in analogy to real estate, a tenancy in common) of chattels may arise either from the severance

(*s*) *Randall* v. *Randall*, 7 Sim. 271; 40 R. R. 142.

(*t*) *Phillips* v. *Phillips*, 1 My. & Keen, 649, 663; 36 R. R. 410; *Broom* v. *Broom*, 3 My & Keen, 443; *Morris* v. *Kearsley*, 2 You. & Coll. 139; *Bligh* v. *Brent*, 2 You. & Coll. 258; *Houghton* v. *Houghton*, 11 Sim. 491; *Custance* v. *Bradshaw*, 4 Hare, 315, 322; *Darby* v. *Darby*, 3 Drew. 495; see *Cookson* v. *Cookson*, 8 Sim. 529; *Waterer* v. *Waterer*, L. R. 15 Eq. 402.

(*u*) Stat. 53 & 54 Vict. c. 39. ss. 20—22.

(*x*) 2 Atk. 55; 2 Ves. sen. 258.

(*y*) *Petty* v. *Styward*, 1 Chan Rep. 57; 1 Eq. Ca. Ab. 290.

(*z*) See Williams, R. P. 568, 569, 21st ed.

(*a*) Stat. 44 & 45 Vict. c. 41, s. 61; see Williams Conveyancing Statutes, 238—240.

of a joint ownership, or from a gift to two or more to hold in common (*b*). But a joint ownership of a chose in action cannot be severed *at law* by either, or even by both, of the joint owners (*c*). And in case of the bankruptcy of a joint creditor, by which all his estate became vested in his assignees, an action against the debtor must formerly have been brought in the joint names of the assignees and the other joint creditors (*d*). And if two joint creditors should have become bankrupt, the action must have been brought in the joint names of the assignees of both of them (*e*). But by the Bankruptcy Act, 1883 (*f*), as under the Act of 1869 (*g*), where a bankrupt is a contractor in respect of any contract jointly with any person or persons such person or persons may sue or be sued in respect of the contract without the joinder of the bankrupt. A tenancy in common cannot in fact exist at law of a chose in action (*h*). A. may owe 20*l*. to B. and C. jointly or he may owe 10*l*. to B. and 10*l*. to C.; but he cannot owe 20*l*. to B. and C. in common. If each has a several cause of action, each must sue separately. In equity, however, the case is different. Though B. and C. are joint owners at law, in equity they may be owners in common; and on the decease of either of them, his share may in equity belong to his representatives, instead of accruing beneficially to his companion. And with regard to letters-patent, it appears that, even at law, they may be the subject of an ownership in common, and that the assignee of an undivided share may alone sue

No tenancy in common at law of a chose in action.

Otherwise in equity.

Letters-patent.

(*b*) Litt. sect. 321.

(*c*) See *Re McKerrill*, 1912, 2 Ch. 648, 653.

(*d*) *Thomason* v. *Frere*, 10 East 418; 10 R. R. 341. See stat. 46 & 47 Vict. c. 52, s. 113, and the repealed stats. 32 & 33 Vict. c. 71, s. 105; 12 & 13 Vict. c. 106, s. 152, and 5 & 6 Vict. c. 122, s. 31.

(*e*) See *Hancock* v. *Heywood*, 3 T. Rep. 433.

(*f*) Stat. 46 & 47 Vict. c. 52, s. 114.

(*g*) Stat. 32 & 33 Vict. c. 71, s. 112.

(*h*) *Re McKerrill*, 1912, 2 Ch. 648, 653.

for an infringement of that part of the patent without joining the persons interested in the remaining shares (*i*). And one owner in common of letters-patent can work the patent on his own account, without the concurrence of the others (*k*). In deciding whether a tenancy in common has been created by deed, there is very seldom any difficulty. But in wills, where greater indulgence is given to informal words, the rule is, that any words which denote an intention to give to each of the legatees a distinct interest in the subject of gift, will be sufficient to make them tenants in common. Thus a gift by will to two or more persons "equally to be divided between them" (*l*), or simply "between them" (*m*), or "in joint and equal proportions" (*n*), or "equally" (*o*), or "respectively" (*p*), or "to be enjoyed alike" (*q*), will make such persons tenants in common, and not joint tenants, as they would have been without the insertion of such words. In this respect the rule is the same whether the subject of the devise or bequest be real or personal estate (*r*).

Gifts by will which make a tenancy in common.

Owners in common of personal estate, like tenants in common of lands, have merely a unity of possession: the interest of one may be larger or smaller than that of the other, one having, for instance, one-third, and the other two-thirds of the property. So the title need not be the same, as one may have been originally a joint tenant with a third person,

Owners in common have merely a unity of possession.

(*i*) *Davenport* v. *Mallett*, 7 C. B. N. S. 209; *Watson* v. *Lawrence*, 8 C. B. N. S. 182.

(*k*) *Matthews* v. *Green*, L. R. 1 C. P. 29; *Steers* v. *Rogers*, 1893, A. C. 232.

(*l*) *Blount* v. *Cumming*, 1 Sch. & Lef. 226; *Phillips* v. *Phillips*, 2 Vern. 430; 1 Eq. Ca. Abr. 292, pl. 6; 1 P. Wms. 34.

(*m*) *Luckbraid* v. *Cook*, 2 Mer. 70; 16 R. R. 144.

(*n*) *Etherden* v. *Etherden*, 2 Atk. 250.

(*o*) *Lees* v. *Dodd*, Cr. & Phi. 443.

(*p*) 1 Ves. 340; 1 Ves. sen. 104.

(*q*) *Lawrence* v. *Mudge*, Bright. Cas. p. 352.

(*r*) See 2 Jarm. Wills, 1760 *sq.*, 4th ed.

No survivorship.

who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, which springs from a unity of interest and title, has accordingly no place between owners in common (*s*).

Severance of joint ownership in chattels personal.

The joint ownership of a tangible chattel, or chose in possession, may be severed, in the same manner as a joint tenancy of real estate (*t*), by the assignment by one joint owner of his share: after which the assignee will be owner in common of the share so assigned to him (*u*). And the same principle is generally applicable with respect to choses in action, to which more than one person are jointly entitled: that is to say, the assignment by one of them of his interest in the thing will deprive the others, in equity if not at law, of the benefit of survivorship therein (*x*). Thus if A. owe 20*l*. to B. and C. jointly, and B. assign his share of the debt to D., C. and D. will thenceforth be each entitled in equity to 10*l*., part of the debt (*y*). It is, however, doubtful whether part only of a debt can be assigned *at law* under the Judicature Act of 1873 (*z*). So if stock or shares be standing in the names of A. and B. jointly, an assignment by A. of his interest therein to C. will in equity operate as a severance of the joint ownership and constitute B. and C. owners in common (*a*): but A. and B., and the survivor of them, will remain entitled to the stock or shares at law until the same shall be duly transferred, by the proper legal means of transfer, half into B.'s name

(*s*) Litt. sect. 321.

(*t*) Williams, R. P. 140, 21st ed.

(*u*) Litt. ss. 319–321.

(*x*) See *Williams* v. *Hensman*, 1 J. & H. 546; *Re Butler's Trusts* 38 Ch. D. 286, 292; *Re Wilks*, 1891, 3 Ch. 59; *Re Hewett*, 1894, 1 Ch. 362, 367.

(*y*) *Watkinson* v. *Hudson*, 4 L. J. O. S. Ch. 213; *Taylor* v. *London and County Bank*, 1901, 2 Ch. 231, 237, 256.

(*z*) *Durham* v. *Robertson*, 1898 2 Q. B. 765, 774; *Jones* v. *Humphreys*, 1902, 1 K. B. 10, 11; *ante*, pp. 39, 40, and n. (*d*).

(*a*) *Burnaby* v. *Equitable Reversionary Interest Society*, 28 Ch. D. 416.

and half into C.'s (*b*). Where several persons are jointly entitled to the benefit of a contract, they may also be and usually are under obligations to be performed or observed on their part to the other contractor or contractors and to each other (*c*). In such case any one of them can assign over, in equity at least, his share of the benefit of the contract, that is to say, of the profit to be derived therefrom: but no disposition that he can make of his interest in the contract will affect his own liability thereunder or deprive any other contractor of any right against him, or other benefit conferred by the agreement (*d*). If therefore it should have been an express or implied term of the contract that the benefit of the obligation incurred to some of the contractors jointly should survive, one of them could not, by the assignment of his interest, deprive the others of this advantage. The same law is well illustrated in the case of the assignment of a share in a partnership, which is really the conveyance of the assigning partner's beneficial interest in the contract of partnership (*e*), and under which the assignee obtains, during the continuance of the partnership, a qualified interest only in the actual assets of the firm, taking them subject to all the other partners' rights in respect thereof under the agreement of partnership (*f*).

Joint benefit of a contract.

Assignment of a share in a partnership.

(*b*) *Ante*, pp. 315, 316, 324, 325, 329, 338.

(*c*) *Ante*, pp. 172, 173, 181.

(*d*) *Ante*, pp. 199–201.

(*e*) *Cassels* v. *Stewart*, 6 App. Cas. 64, 74, 75, 78.

(*f*) By the Partnership Act, 1890, stat. 53 & 54 Vict. c. 39, s. 31, an assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners. But in case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled

Joint liability.

Connected with the subject of joint ownership is that of joint liability. Two or more persons may be jointly liable to the same debt or demand. In a joint bond, the obligors, according to the usual form, bound themselves, their heirs, executors and administrators jointly; and in a joint covenant, they, in like manner, covenanted for themselves, their heirs, executors, and administrators jointly. For reasons already given (*g*), there is now no necessity for the express mention of the heirs, executors, or administrators of the persons to be jointly bound by any covenant, or bond under seal; and such instruments are now constantly drawn without naming them. In every case of joint liability, each is liable for the whole debt (*h*), yet they are all, like joint owners, considered as one person. They should accordingly all be sued together during their joint lives (*i*); for if an action be brought and judgment obtained against one only, the others will be discharged, though the judgment remain unsatisfied (*k*). So a release to one of them will discharge them all (*l*). But, as we have seen, the order of discharge of a bankrupt will not release any person who at the date of the

Judgment against or release of one discharges all.

Discharge by bankruptcy.

to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution. See *Watts* v. *Driscoll*, 1901, 1 Ch. 294; *Re Garwood's Trusts*, 1903, 1 Ch. 236.

(*g*) *Ante*, pp. 236, 237.

(*h*) 1 Barn. & Ald. 35.

(*i*) 1 Wms. Saund. 291 b, n. (4); *Kendall* v. *Hamilton*, 4 App. Cas. 504, 515, 516, 542–544.

(*k*) *King* v. *Hoare*, 13 M. & W. 494; *Kendall* v. *Hamilton*, 4 App. Cas. 504; *Hammond* v. *Schofield*, 1891, 1 Q. B. 453; *McLeod* v. *Power*, 1898, 2 Ch. 295; see *Wigg Prosser* v. *Evans*, 1895, 1 Q. B. 108. The rule is the same in every case of joint liability, in tort as well as in contract, 13 M. & W. 504–506; *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; but it is subject to an exception in the case of the absence beyond seas of any one jointly liable with the person against whom judgment has been obtained; see *post*, Part IV.

(*l*) 1 Rol. Abr. 412 (G), pl. 4; *Clayton* v. *Kynaston*, 3 Salk. 574; 2 Wms. Saund. 47 gg, n. (1); *Warwick* v. *Richardson*, 14 Sim. 281. But a covenant not to sue one of several joint debtors or tort-feasors will not discharge the others; *Hutton* v. *Eyre*, 6 Taunt. 289; 16 R. R. 619; *Duck* v. *Mayeu*, 1892, 2 Q. B. 511.

receiving order was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him (*m*). The law as to barring the liability of one of several joint contractors under the Statutes of Limitations is explained in a subsequent chapter (*n*). If one liable jointly with others be sued for the whole debt or demand, he will be entitled, as a rule, to have the others added as co-defendants to the action (*o*). Judgment against two or more jointly may be executed against all or any one of them (*p*). And if one joint debtor pays the whole debt, he will be entitled in equity to contribution from the others in equal shares (*q*): but there is no right of contribution as between persons jointly liable, whether in damages or on a judgment, for a tort wilfully or negligently committed (*r*). After the decease of any one joint debtor the survivors or survivor of them may still be sued for the whole debt, as though the deceased had no share in it (*s*), and the estate of the deceased will be discharged from all liability both at law and in equity (*t*). So if a judgment be obtained against two or more jointly, and one of them die, the estate

Discharge by Statute of Limitations.

Contribution.

After the decease of one joint debtor the survivor solely liable.

(*m*) Stat. 46 & 47 Vict. c. 52, s. 30, sub-s. 4, replacing 32 & 33 Vict. c. 71, s. 50; 24 & 25 Vict. c. 134, s. 163; 12 & 13 Vict. c. 106, s. 200; 5 & 6 Vict. c. 122, s. 37; and 6 Geo. IV. c. 16, s. 121; *ante*, p. 298.

(*n*) *Post*, Part IV.

(*o*) *Pilley* v. *Robinson*, 20 Q. B. D. 155; see *Wilson & Co.* v. *Balcarres & Co.*, 1893, 1 Q. B. 422; *Robinson* v. *Geisel*, 1894, 2 Q. B. 685.

(*p*) *Abbot* v. *Smith*, 2 W. Bl. 947, 949.

(*q*) *Dering* v. *Earl of Winchelsea*, 2 Bos. & Pul. 270; 1 White & Tudor, L. C. Eq.: 1 R. R. 41. See *ante*, p. 247.

(*r*) *Merryweather* v. *Nixan*, 8 T. R. 186; 16 R. R. 810; *The Englishman and The Australia*, 1895, P. 212; see *Adamson* v. *Jarvis*, 4 Bing. 66, 72; 29 R. R. 503; *Betts* v. *Gibbins*, 2 A. & E. 57; *Palmer* v. *Wick, &c., Co.*, 1894, A. C. 318; Pollock on Torts, 191, 5th ed.; *The Frankland*, 1901, P. 161. A trustee jointly liable with others for a breach of trust, may, as a rule, obtain contribution from the others: *Chillingworth* v. *Chambers*, 1896, 1 Ch. 685; *Robinson* v. *Harkin*, 1896, 2 Ch. 415.

(*s*) *Richards* v. *Heather*, 1 B. & Ald. 29; *Read* v. *Price*, 1909, 1 K. B. 577, 2 K. B. 724.

(*t*) *Richardson* v. *Horton*, 6 Beav. 185; *Wolmer* v. *Carrey*, 2 De G. & S. 347; *Crossley* v. *Dobson*, 2 De G. & S. 486; *Other* v. *Iveson*, 3 Drew. 177

of the survivor or survivors, whether real or personal will be exclusively liable to be taken in execution (*u*).

Joint and several liability.

A liability, however, may be both joint and several at the same time; and, as such a liability is more beneficial to the creditor, it is more usual than a liability which is simply joint. In such cases the intention to create a several as well as a joint liability should be clearly expressed (*x*). A joint and several bond by two persons ran in this form:—

Form of a joint and several bond.

"for which payment to be [well and truly] made, we bind ourselves, and each of us, [and the heirs, executors and administrators of us and each of us,] jointly and severally;" or if there were a larger number of obligors, say five, the better form was: "for which payment to be [well and truly] made, we bind ourselves, and each of us, and any two, three, or four of us, [and the heirs, executors and administrators of us, and each of us, and of any two, three, or four of us,] jointly and severally." But now, as we have seen (*y*), express mention of heirs, executors and administrators is unnecessary; and the words enclosed within brackets in the forms given above may be and are usually omitted. In the case of a joint and several bond thus worded, an action may be brought against all the obligors, or against any one, two, three or four of them whom the obligee may select; otherwise he must have sued either all of them jointly, or any one of them singly (*z*). A joint and several covenant was usually in this form:—"And the said A. B. and C. D. do hereby, for themselves [their heirs, executors and

Form of a joint and several covenant.

(*u*) 3 Rep. 14 b. *Smarte* v. *Edsun*, 1 Lev. 30; 2 Wms. Saund. 51. Formerly the real estate of the deceased, having been bound from the date of the judgment, was liable to contribute equally with the real estate of the survivors; see stats. 27 & 28 Vict. c. 112; 63 & 64 Vict. c. 26; Williams, R. P. 270—275, 21st ed.

(*x*) See *White* v. *Tyndall*, 13 App. Cas. 263.

(*y*) *Ante*, pp. 236, 237.

(*z*) Buller, J., *Streatfield* v. *Halliday*, 3 T. Rep. 782.

administrators] jointly, and each of them doth hereby for himself respectively, [and for his respective heirs, executors and administrators,] covenant," &c.; or if there were more than two covenantors the better form was, for the reason also given, "And the said A. B., C. D., E. F. and G. H., do hereby, for themselves [their heirs, executors and administrators] jointly, and any two or three of them, do hereby, for themselves [their heirs, executors and administrators] jointly, and each of them doth hereby for himself respectively [and for his respective heirs, executors and administrators] covenant," &c. The words enclosed within brackets may be and are now generally omitted, for the reasons already given (*a*). In all cases of joint and several liability, each party is individually liable, and may be sued alone for the whole debt (*b*), or, if the creditor please, he may sue them all jointly. In consequence of the joint liability, a release of one of the debtors will discharge them all; and, as they are all discharged, the creditor will thenceforth be unable even to sue any of them severally (*c*). As, however, the several liability is distinct from the joint, it is competent to the creditor, in releasing one of the debtors, expressly to reserve his remedy against the others; and in this case the remaining debtors will continue severally liable (*d*). So he may covenant with one of the debtors never to sue him; and in such a case he will retain his remedy against the others severally (*e*). On account of the several liability, the estate of a person who has

Release of one.

Covenant not to sue one.

(*a*) *Ante*, pp. 236, 237.

(*b*) *McCheane* v. *Gyles* (No. 2), 1902, 1 Ch. 911.

(*c*) 2 Rol. Abr. 412 (G), pl. 5; *Clayton* v. *Kynaston*, 2 Salk. 574; *Nicholson* v. *Revill*, 4 A. & E. 683; *Evans* v. *Bremridge*, 2 K. & J. 174; 8 De G., M. & G. 100; *Re E. W. A.*, 1901, 2 K. B. 642; cf. *Edwards* v. *Hood Barrs*, 1905, 1 Ch. 20.

(*d*) *Ex parte Gifford*, 6 Ves. 807; 6 R. R. 53; *Thompson* v. *Lack*, 3 C. B. 540; *Kearsley* v. *Cole*, 16 M. & W. 136; *Price* v. *Barker*, 4 E. & B. 760; *Willis* v. *De Castro*, 4 C. B. N. S. 216.

(*e*) *Lacy* v. *Kynaston*, 2 Salk. 575; 2 Wms. Saund. 48, n. (1); see *ante*, p. 460, n. (*l*).

become jointly and severally bound is not discharged by his decease in the lifetime of his co-debtors, but still remains liable to the entire debt as respects the creditor, and to a proportion of it as respects the surviving co-debtors.

Alternative liability.

Where there is an alternative, as distinguished from a joint or a cumulative several liability—for instance, where A. is entitled at his election to sue *either* B. *or* C. to recover the same debt—judgment against either debtor precludes the creditor from suing the other of them (*f*).

Liability of partners.

An exception to the general rules as to joint liability (*g*) occurs in the case of the liability of partners. During the partners' lives, their liability for debts incurred by the partnership is joint only (*h*): unless, of course, they should have contracted severally as well as jointly. Accordingly they ought all to be joined as defendants to an action for recovering any such debt (*i*). But a dormant partner, whose name may or may not be known, may either be joined or not at the pleasure of the creditor (*k*), unless the contract be under seal, in which case those only can be sued on it who have sealed and delivered it. A dormant partner cannot, however, be sued after judgment has been obtained against the active partners (*l*). Upon the death of one of several partners, the surviving partners become liable at law for all partnership debts previously incurred, as in any other case of joint

Dormant partner.

(*f*) *Scarf* v. *Jardine*, 7 App. Cas. 345; *Morel* v. *Westmorland*, 1904, A. C. 11.

(*g*) *Ante*, pp. 460—462.

(*h*) *Kendall* v. *Hamilton*, 3 C. P. D. 403; 4 App. Cas. 504.

(*i*) See *Rice* v. *Shute*, 5 Burr. 2611; 1 Wms. Saund. 291 b, n. (4); *Kendall* v. *Hamilton*, 4 App. Cas. 504, 515, 516, 542—544.

(*k*) *De Mautort* v. *Saunders*, 1 B. & Ad. 398; *Beckham* v. *Drake* 9 M. & W. 79; 11 M. & W. 315.

(*l*) *Kendall* v. *Hamilton*, *ubi sup.*; *ante*, p. 460.

liability (*m*). But, as the whole beneficial interest in the assets of the partnership does not accrue to the survivors, but the executors or administrators of the deceased partner are entitled in equity to his share (*n*), so also in equity the estate of the deceased partner is not discharged from liabilities incurred by the partnership before his death (*o*). For in equity the liability of partners for partnership debts is, for the purposes of the satisfaction of such deb out of the estate of a deceased partner, consider as several as well as joint (*p*). On the death o partner, therefore, his estate will be liable in equ to all the partnership debts incurred previous his decease (*q*); and the creditors may, if the please, resort in the first instance to the estate of t deceased, leaving it to his representatives to recov from the surviving partners their share of the debts (*r*). But the equitable remedy so given to partnership creditor against the estate of a deceased partner has always been qualified by the application of the rule in bankruptcy, first stated; in accordance with which the separate creditors of the deceased partner must first be paid in full out of his estate before its application to the payment of any of the debts of the partnership (*s*).

Liability in equity of estate of deceased partner.

(*m*) *Richards* v. *Heather*, 1 B. & Ald. 29; *Beresford* v. *Browning*, 1 Ch. D. 30, 36; see *ante* p. 461.

(*n*) *Ante*, p. 454.

(*o*) *Kendall* v. *Hamilton*, 3 C. P. D. 403, 408; 4 App. Cas. 504, 517, 538, 539; *Re Hodgson*, 31 Ch. D. 177.

(*p*) See James, L.J., *Beresford* v. *Browning*, 1 Ch. D. 30, 34; *Kendall* v. *Hamilton*, 3 C. P. D. 403, 406—410; 4 App. Cas. 504. 517, 520, 521, 536, 537—539, 545; *Re Hodgson*, 31 Ch. D. 177.

(*q*) *Devaynes* v. *Noble*, 1 Me. 529, 563; 2 Russ. & My. 495; stat. 53 & 54 Vict. c. 39, s. 9.

(*r*) *Wilkinson* v. *Henderson*, 1 My. & K. 582; *Braithwaite* v *Britain*, 1 Keen, 206; *Thorpe* v *Jackson*, 2 Yon. & Coll. 553; *Way* v. *Bassel*, 5 Hare, 55.

(*s*) See *Gray* v. *Chiswell*, 9 Ves. 118; 7 R. R. 151; *Brown* v. *Weatherby*, 12 Sim. 6, 10; *Ridgway* v. *Clare*, 19 Beav. 111; *Whittingstall* v. *Grover*, 10 W. R. 53; *Lodge* v. *Pritchard*, 4 Giff. 294; 1 De G., J. & S. 610; stat. 53 & 54 Vict. c. 39, s. 9. The rule is of course the same if the estate of a deceased partner be administered in bankruptcy; *ante*, p. 302.

Bankruptcy of a partnership. Joint and several debts.

In the case of the bankruptcy of a partnership (*t*), the rule which has always been followed in the payment of the debts is, that the joint assets of the firm are in the first place liable to the partnership debts; and that the separate estate of each partner is in the first place liable to his separate debts, which must be paid in full out of such separate estate, before any of it can be applied towards payment of the debts of the partnership (*u*). It is also held that no partner can prove against the firm in competition with other creditors of the firm (*x*). If a receiving order is made against one partner of a firm, any creditor to whom that partner is indebted jointly with the other partners of the firm, or any of them, may prove his debt for the purpose of voting at any meeting of creditors, and shall be entitled to vote thereat (*y*). But where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received

(*t*) Any proceedings under the Bankruptcy Act, 1883, may be taken by or against partners in the name of the firm. And a receiving order may be made against a firm, and will operate as if it were a receiving order made against each of the partners. But no order of adjudication shall be made against a firm in the firm name; but it shall be made against the partners individually. Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm, may present a petition against any one or more partners of a firm without including the others. See stat. 46 & 47 Vict. c. 52, ss. 115, 110; Bankruptcy Rules, 1886, Nos. 259–264; *ante*, pp. 272–276.

(*u*) *Ex parte Elton*, 3 Ves. 238, 241; 3 R. R. 84; *Ex parte Kensington*, 14 Ves. 447; 9 R. R. 325; *Ex parte Peake*, 2 Rose, 54; *Ex parte Harris*, 1 Mad. 583; 16 R. R. 266; *Ex parte Janson*, 3 Mad. 229; 18 R. R. 221; *Re Plummer*, 1 Phil. 56; *Ex parte Kennedy*, 2 De G., M. & G. 228; *Ex parte Topping*, 11 Jur. N. S. 210; stat. 46 & 47 Vict. c. 52, s. 40, sub-s. 3; *Re Head*, 1894, 1 Q. B. 638. But the rule does not apply where there is no joint estate; when the separate and partnership debts rank equally; *Re Budgett*, 1894, 2 Ch. 557. As to fraud, see *Read* v. *Bailey*, 3 App. Cas. 94.

(*x*) *Nanson* v. *Gordon*, 1 App. Cas. 195; *Ex parte Blythe*, 16 Ch. D. 620.

(*y*) Stat. 46 & 47 Vict. c. 52, First Schedule, rule 13.

the full amount of their respective debts (*z*). Under the old bankrupt law, if any creditor had a joint and several security, which would enable him, at law, to sue any partner severally, he might, at his option, prove his debt against the separate estate of any such partner instead of against the firm jointly (*a*); but he could not prove against both together (*b*). But now if a debtor was at the date of the receiving order liable in respect of distinct contracts as a sole contractor and also as a member of a firm, the circumstance that the sole contractor is also one of the joint contractors shall not prevent proof in respect of the contracts against the properties respectively liable thereon (*c*). The rule that the joint assets of the firm are in the first place liable to the partnership debts, applies equally where there has been a change in the partnership previous to the bankruptcy. The stock handed over to the new firm is primarily liable to all the debts incurred by them; and the creditors of the old firm must first have recourse to such assets, if any, as may still belong to the old firm, and cannot touch the property of the new partnership till all its creditors have been fully paid (*d*). The addition or withdrawal of a partner to or from a firm in difficulties may thus occasion serious detriment to its creditors.

(*z*) Stat 46 & 47 Vict. c. 52, s. 59, sub-s. 1. See *Re Von Hafen*, 19 Sol. J. 241, decided under the Bankruptcy Act, 1869.

(*a*) *Ex parte Hay*, 15 Ves. 4.

(*b*) *Ex parte Bevan*, 10 Ves. 107; *Ex parte Husbands*, 2 Glyn & Jam. 4.

(*c*) Stat 46 & 47 Vict. c. 52, Second Schedule, rule 18, applying the same rule to cases where the debtor is liable in respect of distinct contracts as a member of two or more distinct firms composed in whole or in part of the same individuals; and replacing 32 & 33 Vict. c. 71, s. 37; *Ex parte Honey*, L. R. 7 Ch. 178; *Ex parte Stone*, L. R. 8 Ch. 914. This enactment extends to liability through breach of trust or other fiduciary relationship resting on contract, but the old rule against double proof remains in all cases to which the Act does not apply; *Re Mafadyan*, 1908, 2 K. B. 817; *Re Kent County Gas, &c., Co., Ld.*, 1913, 1 Ch. 92.

(*d*) *Ex parte Freeman*, Buck, 471; *Ex parte Fry*, 1 Glyn & Jam. 96; *Ex parte Jameson*, 3 Madd. 229; 18 R. R. 221; *Ex parte Sprague*, 4 De G., M. & G. 866.

Dormant partner.

It has been decided that the share of a dormant partner in the assets of the partnership is not goods in the order or disposition of the acting partner with the consent of the true owner thereof, so as to pass to the trustee for the creditors, on the bankruptcy of the acting partner, as part of the bankrupt's separate estate (*e*). But, if two or more persons become liable as partners, and one of them permit goods, which are his separate property, to remain in the reputed ownership of the firm, such goods are liable to be treated as part of the joint estate, in the event of the bankruptcy of the firm (*f*).

Every partner liable for debts of the firm.

As we have seen (*g*), when two or more persons enter into partnership, each is liable, jointly with the other or others, for all the debts of the firm. This liability is incident to the relation of partnership, and is necessarily incurred whenever it is established, as a fact, that any particular persons are partners in business (*h*).

Ostensible partner.

But a man may also incur liability for the debts of a partnership by holding himself out as a partner in the firm, although he be not entitled to receive any share of the profits (*i*). Thus if a person allow his name to be used as one of a firm (*k*), or to be painted over the door of a shop (*l*), he will be liable to the debts of the firm; for credit may thus be given to the firm on the strength of his character as a solvent person.

Retiring partner.

On the same principle, if a person have once been

(*e*) *Reynolds* v. *Bowley*, L. R. 2 Q. B. 474; *ante*, pp. 111, 253, 281.

(*f*) *Re Rowland and Crankshaw*, L. R. 1 Ch. 421; *Ex parte Hayman, Re Pulsford*, 8 Ch. D. 11. See *ante*, p. 112.

(*g*) *Ante*, p. 464; *Pooley* v. *Driver*, 5 Ch. D. 458.

(*h*) *S. C.*, 5 Ch. D. 458, 472; see *Holme* v. *Hammond*, L. R. 7 Ex. 218, 226, 227, 233.

(*i*) *Waugh* v. *Carver*, 2 H. Bl. 235, 242; 14 R. R. 845; *M'Iver* v. *Humble*, 16 East, 169, 171; stat. 53 & 54 Vict. c. 39, s. 14.

(*k*) *Parkin* v. *Carruthers*, 3 Esp. 248; 6 R. R. 828; *Young* v. *Axtell*, cited 2 H. Black. 242; 14 R. R. 851, n.; *Ex parte Hayman, Re Pulsford*, 8 Ch. D. 11; see *Re Fraser*, 1892, 2 Q. B. 633.

(*l*) *Williams* v. *Keats*, 2 Stark. 296; 19 R. R. 725. See *M'Iver* v. *Humble*, 16 East, 169, 171, 175.

known to be a partner in the firm (*m*), his liability to its debts will continue after his withdrawment, unless he takes proper means to inform the creditors that he has ceased to be a partner (*n*). But the circumstance of the name of a deceased partner remaining in the firm will not render his estate liable to the debts of the survivors (*o*). And if a trader direct by his will that his trade shall be carried on by his executor, the executor who ostensibly carries on the trade will be liable for the debts he may thereby incur as fully as if he were carrying on the trade for his own benefit (*p*); but so much only of the estate of the testator will be liable to such debts as he may have directed to be employed in the business (*q*). The rest of the testator's estate is held to be exempt on the ground of the great inconvenience which would arise from holding it liable after its distribution amongst the legatees.

Deceased partner.

Executor carrying on trade.

Under the Partnership Act, 1890 (*r*), a writ of execution shall not issue against any partnership property except on a judgment against the firm

Execution against firm or partner.

(*m*) *Evans* v. *Drummond*, 4 Esp. 89; *Brooke* v. *Enderby*, 2 Brod. & Bing. 70; 4 Moore, 501; 22 R. R. 653; *Carter* v. *Whalley*, 1 B. & Ad. 11; 35 R. R. 199.

(*n*) *Graham* v. *Hope*, Peake 154; 3 R. R. 671; *Godfrey* v. *Turnbull*, 1 Esp. 371; 3 R. R. 672, n.; *M'Iver* v. *Humble*, 16 East, 169; *Re Hodgson*, 31 Ch. D. 177, 184; *Re Tucker*, 1894, 3 Ch. 429; stat. 53 & 54 Vict. c. 39 s. 17 (2). See *Scarf* v. *Jardine*, 7 App. Cas. 345. As to the continuing liability of a retiring partner for debts incurred before his retirement, see *Rouse* v. *Bradford Banking Co.*, 1894, 2 Ch. 32, A. C. 586.

(*o*) *Devaynes* v. *Noble*, *Houlton's Case*, 1 Mer. 529, 616, 623; 15 R. R. 151; *Vulliamy* v. *Noble*, 3 Mer. 614; 17 R. R. 143; *Webster* v. *Webster*, 3 Swanst. 490, n.; 19 R. R. 258; stat. 53 & 54 Vict. c. 39, s. 14 (2).

(*p*) 10 Ves. 119. And at law he will be liable, though his name do not appear; *Wightman* v. *Townroe*, 1 Man. & Selw. 412; 14 R. R. 475.

(*q*) *Ex parte Garland*, 10 Ves. 110; 7 R. R. 352; *Ex parte Richardson*, Buck. 202; *Cathush*, v. *Cathush*, 1 Beav. 184; *Re Butterfield*, 11 Jurist, 955; *Kirkman* v. *Booth*, 11 Beav. 273; *M'Neillie* v. *Acton*, 4 De Gex, M. & G. 744; *Re Johnson*, *Shearman* v. *Robinson*, 15 Ch. D. 548; *Fraser* v. *Murdoch*, 6 App. Cas. 855, 866, 874, 875.

(*r*) Stat. 53 & 54 Vict. c. 39, s. 23 (1). As to suing a firm, see R. S. C., Order XLVIIIA.

But any judgment creditor of a partner may obtain an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest, and the appointment of a receiver of his share of the profits (*s*)

Liabilities of partnership incurred by an agreement securing all its advantages.

The law will not permit a man to secure for himself all the advantages of partnership without incurring its liabilities (*t*). If therefore several persons enter into an agreement, that some specified business shall be carried on by some or one of them on behalf of all of them under arrangements which secure to all of them all the advantages of partnership, they will all incur the liabilities of partners, although the business be carried on in the name or names of the acting partner or partners alone (*u*). In such cases the question to be determined is, whether the effect of the whole agreement is to constitute a partnership between the parties thereto (*x*). And if this be so, a declaration inserted in the agreement, that certain parties thereto shall not incur the liabilities of partners, will not enable them to avoid the legal consequences of the relation into which they have entered (*y*). The rules for determining the existence of partnership are codified as follows by the Partnership Act, 1890 (*z*) :—

Rules for determining existence of partnership.

(Sect. 2.) In determining whether a partnership does or does not exist, regard shall be had to the following rules :—

(1) Joint tenancy, tenancy in common, joint property,

(*s*) Stat. 53 & 54 Vict. c. 39, s. 23 (2); *Brown & Co.* v. *Hutchinson*, 1895, 1 Q. B. 737, 2 Q. B. 126.

(*t*) *Pooley* v. *Driver*, 5 Ch. D. 458, 483, 493; *Ex parte Delhasse, Re Megevand*, 7 Ch. D. 511, 527, 528.

(*u*) See the same cases.

(*x*) *Pooley* v. *Driver*, 5 Ch. D. 458; *Ex parte Delhasse, Re Megevand*, 7 Ch. D. 511. See *Cox* v. *Hickman*, 8 H. L. C. 268; *Kilshaw* v. *Jukes*, 3 B. & S. 847; *Bullen* v. *Sharp*, L. R. 1 C. P. 86; *Holme* v. *Hammond*, L. R. 7 Ex. 218; *Mollwo, March & Co.* v *The Court of Wards*, L. R. 4 P. C. 419; *Ross* v. *Parkyns*, L. R. 20 Eq. 331; *Ex parte Tennant, Re Howard*, 6 Ch. D. 303; *Badeley* v. *Consolidated Bank*, 38 Ch D. 238.

(*y*) See *Ex parte Delhasse, Re Megevand*, 7 Ch. D. 511, 512, 527, 528, 532; and see *ante*, p. 468.

(*z*) Stat. 53 & 54 Vict. c. 39.

common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business (*a*); and in particular

(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such (*b*):

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such (*c*):

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto (*d*):

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of

(*a*) *Davis* v. *Davis*, 1894, 1 Ch 393.

(*b*) This replaces stat. 28 & 29 Vict. c. 86 (Bovill's Act); as to which see 5 Ch. D. 483, 484), s. 2.

(*c*) This replaces stat. 28 & 29 Vict. c. 86, s. 3.

(*d*) This replaces stat. 28 & 29 Vict. c. 86, s. 1; see *Pooley* v *Driver*, 5 Ch. D. 458; *Ex parte Delhasse, Re Megevand*, 7 Ch. D. 511; *Ex Young*, 1896 2 Q. B 484.

the business is not by reason only of such receipt a partner in the business or liable as such (*e*).

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied (*f*).

Each partner liable for acts of the other in the ordinary course of business.

When the relation of partnership has been established between two or more persons, each incurs liability from the acts and dealings of the other in the ordinary course of business. For every partner is the agent of the firm and his other partners for the purpose of carrying on the business of the partnership (*g*): and all the partners are liable, as principals, for all acts done by each of them as agent for and by the authority of the firm (*h*). Accordingly any one partner in a trading partnership (*i*) may buy, sell (*k*) or pledge goods (*l*), draw (*m*).

(*e*) This replaces stat. 28 & 29 Vict. c. 86, s. 4.

(*f*) Stat. 53 & 54 Vict. c. 39, s. 3, replacing 28 & 29 Vict. c. 86, s. 5; see *Re Holdershaw*, 1893, 2 Q. B. 357; *Re Fort*, 1897, 2 Q. B. 495. And see stat. 46 & 47 Vict. c. 52, s. 40, sub-s. 6; *ante*, table annexed to p. 244.

(*g*) Stat. 53 & 54 Vict. c. 39, s. 5; *Tomlinson* v. *Broadsmith*, 1896, 1 Q. B. 386.

(*h*) Lord Wensleydale, *Cox* v. *Hickman*, 8 H. L. C. 268, 312; Jessel, M.R., *Pooley* v. *Driver*, 5 Ch. D. 458, 476, 477.

(*i*) See *Hedley* v. *Bainbridge*, 3 Q. B. 316; *Wheatley* v. *Smithers* 1906, 2 K. B. 321.

(*k*) *Hyat* v. *Hare*, Comb. 383; *Lambert's Case* Godbolt, 244.

(*l*) *Reid* v. *Hollinshead*, 1 B. & C. 867; 28 R. R. 488; *Re Briggs & Co.*, 1906, 2 K. B. 209.

(*m*) *Smith* v. *Jarvis*, 2 Ld. Raym. 1484; *Re Clarke*, *Ex*

accept (*n*) or indorse (*o*) bills of exchange and promissory notes: give guarantees (*p*), receive moneys (*q*) and release or compound for debts (*r*) in the name (*s*) and on the account of the firm in the ordinary course of business. Each partner is also liable jointly with his co-partners, and also severally, for any wrongful act or omission of any other partner acting in the ordinary business of the firm, or with the authority of his co-partners (*t*). And in like manner notice of any matter relating to partnership affairs given to any partner, who habitually acts in the partnership business, operates as a notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner (*u*). And any agreement between the partners, by which any one of them may be restrained from doing any act to pledge the credit of the firm, though binding as between themselves, will not be binding on any creditor (*x*) who may not have notice of it (*y*). But no act done in contravention of such an agreement is binding on the firm with respect to persons having notice of the agreement (*z*). If, however, the transaction be not in the ordinary course of the business of the partnership, the other

Notice to one partner is notice to all.

Transactions not in the ordinary

parte Bo[illegible] 11 M. & W. [illegible]; 1 Ph. 362

[illegible] *Pa*[illegible] *Ha*[illegible] [illegible] 126; 11 Ex. Rep. [illegible] 4 Dow. 2 B. & Ad. 21; 3 P. R. 154

[illegible] *Sm*[illegible] 7 Exch. 270; 8 B. P. Cas. [illegible] 16 Q. B. 10; B. & C. 288; 34 P. R. [illegible]

[illegible] *Ex*[illegible] [illegible] 280; [illegible] *Ha*[illegible] [illegible] 9 B. 583

[illegible] *Dra*[illegible] *Ass*[illegible] *parte*, 13 Ves. [illegible] *Ex parte* [illegible] Ves. Rep. 1804, 11. 443

[illegible] *Pa*[illegible] Ex. [illegible] 1 L. P. 319; [illegible] 1 Ex. [illegible] 393

[illegible] *Ex parte Ha*[illegible] 9 M. & W. 284.

[illegible] *Sm*[illegible] 53 & 54 Vict. c. 39, s. 10. 12; *Rhodes* v. *Moules*, 1895, 1 Ch. 236; *Hamlyn* v. *Houlder*, Part. 1 K. B. 81

[illegible] *Sm*[illegible] 53 & 54 Vict. c. 39, s. 10.

[illegible] *Wauk*[illegible] *Carter*, 2 H. Bla. 235; 14 R. R. 815; *South* [illegible] *Bank* [illegible] 8 B. & C. 427; 32 R. R. 433; *Hawtayne* v. [illegible] 8 M. & S. 703, 710

[illegible] *Mo*[illegible] *Whinney*, 7 Bro. P. [illegible] *Ex parte Darlington* [illegible] *Ex parte Bank* [illegible] *Ex parte Peake*, 11 Ves. [illegible] 122; [illegible] *Happ* [illegible] 1 C. B. N. S. 126

[illegible] 53 & 54 Vict. c. 39, s. [illegible] 2.

course of business.

partners will not be liable as such in respect of it (*a*). Thus one partner cannot bind the firm by a submission to arbitration (*b*), or by confessing a judgment (*c*); and one partner has ordinarily no authority to execute a deed in the names of the others so as to bind the partnership (*d*). So a farmer carrying on his business in partnership with another would not be liable on a bill of exchange drawn by his partner in the name of the partnership (*e*); neither would a solicitor or an auctioneer be liable on a note made or bill accepted by his partner in the name of his firm, though given to secure a partnership debt (*f*); for bill transactions form no part of the ordinary business of farmers, solicitors, or auctioneers.

Limited partnerships.

Under the Limited Partnerships Act, 1907 (*g*), limited partnerships may be formed consisting of one or more general partners, who are to be liable for all debts and obligations of the firm, and one or more limited partners contributing as capital a certain amount of money or other property, who shall not be liable for the debts or obligations of the firm beyond the amount so contributed, and shall not take part in the management of this partnership business, and shall not have power to bind the firm. Every limited partnership must be registered as such under the Act, or it will be deemed to be a general partnership and every limited partner will be deemed to be a general

(*a*) Stat. 53 & 54 Vict. c. 39, s. 7.

(*b*) Stead *v.* Salt, 3 Bing. 101; *S. C.*, 10 J. B. Moore, 389; 28 R. R. 602.

(*c*) *Hambidge v. De La Crouee*, 3 C. B. 742.

(*d*) *Harrison v. Jackson*, 7 T. R. 207; 4 R. R. 422; see *Burn v. Burn*, 3 Ves. 573, 578.

(*e*) *Per* Littledale, J., 10 B. & C. 138.

(*f*) *Dudley v. Bainbridge*, 3 Q. B. 316; *Heatley v. Smithers*, 1906, 2 K. B. 321, reversed on the facts, 1907, 2 K. B. 684.

(*g*) Stat. 7 Edw. VII. c. 24 sec ss. 4, 6 (1).

partner (*h*). Subject to any agreement between the partners, a limited partner may, with the consent of the general partners, assign his share in the partnership, whereupon the assignee will become a limited partner (*i*).

(*h*) Sect. 5. (*i*) Sect. 6 (5 b).

CHAPTER III.

OF A WILL.

Growth of right of testamentary alienation.

ALL kinds of personal property may be bequeathed by will. This right, in its present extent, has been of very gradual and almost imperceptible growth; for anciently by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children and no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children (*a*). This ancient rule, however, gradually became subject to many exceptions, by the customs of particular places, until the rule itself took the place of an exception and became confined to such places as had a custom in its favour. These places, in later times, were the province of York, the principality of Wales, and the City of London, as to all which places, a general power of testamentary disposition was conferred by Acts of Parliament of William and Mary, Anne, and George I. (*b*). And now, by the Wills Act, 1837 (*c*), every person of full age is expressly empowered to bequeath by his will, to be executed as required by the Act, all personal estate to which he shall be entitled, either at law or in equity, at the time of his decease.

(*a*) Black. Com. 492; 1 Wms. Exors. 1 *sq.*; P. & M. Hist. Eng. Law, ii. 346 *sq.*

(*b*) Stat. 4 & 5 Will. & Mary, c. 2, explained by stat. 2 & 3 Anne, c. 5, for the province of York; stat. 7 & 8 Will. III. c. 38, for Wales, and stat. 11 Geo. I. c. 18, for London. See 2 Bl. Com. 493.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 3.

The ecclesiastical courts, as we shall hereafter see, very early acquired the right of determining as to the validity of wills of personal estate (*d*); and, in the exercise of this right, they generally followed the rules of the civil law. By this law males at the age of fourteen, and females at the age of twelve, were allowed, if of sufficient discretion, to make a testament (*e*); and the same rule, accordingly, prevailed in this country with respect to wills of personal property (*f*), although, by some authorities, seventeen and even eighteen was said to be the proper age (*g*). But the Wills Act has now made the law uniform with respect to all wills, whether of real or of personal estate, and has enacted that no will made by any person under the age of twenty-one years shall be valid (*h*). An exception is, however, allowed in the case of soldiers on an expedition, and sailors at sea, who may, though infants, make such wills of their personal estate as they might have made before the passing of that Act (*i*).

Age at which a will of personal estate might be made.

No will of a minor now valid.

Personal property was anciently of so little account that a will of it might be made by word of mouth, if proved by a sufficient number of witnesses, as well as by writing; and a will made by word of mouth was termed a nuncupative testament (*k*). By the Statute of Frauds, however, a nuncupative testament, where the estate bequeathed exceeded the value of thirty pounds, was surrounded by so many requirements as to cause its complete disuse (*l*). But no provision was made for guarding the execu-

Nuncupative will.

Statute of Frauds

(*d*) See *Marriot* v. *Marriot*, 1 Str. 666.

(*e*) Inst. lib. 2. tit. 12. s. 1; Dig. lib. 28. tit. 1. s. 5.

(*f*) 2 Bl. Com. 497.

(*g*) Co. Litt. 89 b. n. (6).

(*h*) Stat. 7 Will. IV. & 1 Vict. c. 26. s. 7.

(*i*) Sect. 11; *Re Farquhar*, 4 Notes of Cases, 651, 652; *Re M'Murdo*, L. R. 1 P. & D. 540; *post*, pp. 478, 479.

(*k*) Wentworth, Exors. 11 *sq.*, 14th ed.; 1 Wms. Exors. 116, 7th ed.; 90, 10th ed.

(*l*) Stat. 29 Car. II. c. 3, ss. 19—21, explained by 4 Anne, c. 16, s. 14.

No witness formerly required to a will of personal estate.

tion of a written will of personal estate; although by the same statute (*m*) a will of real estate was required to be attested by three or four witnesses. No attestation, therefore, was acquired to a will of personal estate, nor was it even necessary that such a will should be signed by the testator. Thus, instructions for a will committed to writing given by a person who died before the instrument could be formally executed, though such instructions were neither reduced into writing in the presence of the testator, nor even read over to him, have been held to operate as fully as a will itself (*n*). It was, however, provided by the Statute of Frauds that no will in writing of personal estate should be repealed or altered by word of mouth only, except the same were, in the life of the testator, committed to writing; and, after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least (*o*).

Two witnesses now required.

By the Wills Act, every will of personal estate must now be in writing, and signed at the foot or end thereof by the testator or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator, in the presence of *two* or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator (*p*). The Act, in fact, requires the same mode of execution and attestation to every will, whether the property be real or personal. But an exception is made in favour of soldiers being in actual military service, that is, on an expedition (*q*)

Exception in favour of soldiers and seamen.

(*m*) 29 Car. II. c. 3, s. 5.

(*n*) *Carey* v. *Askew*, 2 Bro. C. C. 58; *S. C.*, 1 Cox, 241.

(*o*) Stat. 29 Car. II. c. 3, s. 22.

(*p*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9, explained by 15 & 16 Vict. c. 24; see Williams, R. P. 245, 246, 21st ed.

(*q*) *Drummond* v. *Parish*, 3 Curt. 522; see *Re Hiscock*, 1901, P. 78; *Gattward* v. *Knee*, 1902, P. 99.

and of mariners and seamen, being at sea, who may dispose of their personal estate as they might have done before the making of the Act (*r*).

The wills of soldiers on an expedition may accordingly be made by an unattested writing, or by a mere nuncupative testament or declaration of their will by word of mouth, made before a sufficient number of witnesses (*s*). But the wills of petty officers and seamen in the royal navy, and of marines and non-commissioned officers of marines, so far as relates to any wages, pay, prize money or other moneys payable by the Admiralty (*t*), and the wills of merchant seamen dying during a voyage, with respect to any wages due to them and the effects which they leave on board ship (*u*), are required by statute to be executed with special formalities. It is provided by the Wills Act that no will or codicil, or any part thereof, shall be revoked, otherwise than by the marriage of the testator or testatrix (which will of itself effect a revocation (*x*)), or by another will or codicil executed in the manner thereby required, or by some writing, declaring an intention to revoke the same, and executed in the manner in which a will is thereby required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same (*y*).

Seamen in the royal navy and marines.

Merchant seamen.

Revocation of a will.

The succession to personal chattels upon their

(*r*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 11. A similar exception was contained in the Statute of Frauds (29 Car. II. c. 3, s. 23.

(*s*) See *Re Spratt*, 1897, P. 28.

(*t*) Stat. 28 & 29 Vict. c. 72, amended by 60 Vict. c. 15, and replacing 11 Geo. IV. & 1 Will. IV. c. 20, ss. 48—51; 7 Will. IV. & 1 Vict. c. 26, s. 12.

(*u*) Stat. 57 & 58 Vict. c. 60, ss. 166—177, replacing 17 & 18 Vict. c. 104, ss. 164—200.

(*x*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 18; see Williams R. P. 249, 21st ed.

(*y*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 20; see Williams R. P. 249, and n. (*o*), 21st ed.

Succession to personal chattels is according to the law of the owner's domicil.

owner's death is governed by the law of the country in which he was domiciled at the time of his death (*z*). So that if any man, whether Englishman or foreigner, die domiciled in a country, of which the law does not give full power of testamentary disposition (for example, does not permit a man to bequeath his personalty away from his children), the succession to any effects left by him in England will be regulated by the law of the country of his domicil, notwithstanding that he may have purported to dispose of them by will (*a*). But as the succession after death to land, which is immovable (*b*), is governed by the law of the country where it is situate (*c*), leasehold land in England devolves in all respects according to English law upon its owner's death (*d*). And the same rule seems to apply to mortgages of land in England (*e*). It was formerly necessary that a will of personal estate should be executed in accordance with the formalities required by the law of the country, where the testator was domiciled at the time of his death (*f*). And this is still the law with regard to the wills of aliens who leave assets in England (*g*), except that wills of aliens devising leasehold land in England, or any beneficial interest therein, are required to be made and executed in accordance with English law (*h*). But with regard to wills of personal estate (here including leaseholds (*i*)) made by British subjects, the Wills Act,

(*z*) 2 Wms. Exors. 1515, 7th ed.; 1256, 10th ed.

(*a*) *Campbell* v. *Beaufoy*, Joh. 320; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Re Trufort*, 36 Ch. D. 600.

(*b*) See Williams, R. P. II. 21st ed.

(*c*) *Doe* d. *Birtwhistle* v. *Vardill*, 5 B. & C. 438, aff. 2 Cl. & Fin. 571; 7 Cl. & Fin. 895: see 37 R. R. 253.

(*d*) *Freke* v. *Lord Carbery*, L. R. 16 Eq. 461; *Duncan* v. *Lawson*, 41 Ch. D. 394.

(*e*) *Re Hoyles*, 1910, 2 Ch. 333, 341; 1911, 1 Ch. 179.

(*f*) *Stanley* v. *Bernes*, 3 Hagg. 373; *Whicker* v. *Hume*, 7 H. L. C. 124.

(*g*) *Bloxam* v. *Favre*, 8 P. D. 101; 9 P. D. 130.

(*h*) *Pepin* v. *Bruyere*, 1902, 1 Ch. 24. *A fortiori*, wills of aliens devising real estate are required to be so executed.

(*i*) *Re Grassi*, 1905, 1 Ch. 584.

1861 (*k*), while preserving the validity of wills executed in accordance with the previous law (*l*), now provides (*m*) that, if made out of the United Kingdom, they may be executed according to the forms required either by the law of the place where the same are made, or by the law of the place where the testator is domiciled when the same are made, or by the laws then in force in that part of his Majesty's dominions where the testator had his domicil of origin; and such wills, if made within the United Kingdom, may be executed according to forms required by the laws for the time being in force in that part of the United Kingdom where the same are made (*n*). By the same Act, no will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicil of the person making the same (*o*). A person's domicil, it may be remarked, is the place which he makes his home. But with regard to many persons the circumstances connected with their change of residence are such as to render it an exceedingly difficult question of fact—what country is their domicil at any given time (*p*).

Donatio mortis causâ.

Connected with the subject of wills is that of donations *mortis causâ*, which may here be noticed.

(*k*) Stat. 24 & 25 Vict. c. 114. commonly called Lord Kingsdown's Act.

(*l*) Sect. 4.

(*m*) Sect. 1. As to wills executing powers of appointment by will, see 2 Wms. V. & P. 294, n. (*d*), 2nd ed.; *ante*, p. 406.

(*n*) Sect. 2.

(*o*) Sect. 3; *Re Reid*, L. R. 1 P. & D. 74. This section is not confined to the wills of British subjects; *Re Groos*, 1904, P. 269. It is a question whether this section gives any effect to the provisions of a will, which are materially invalid by the law of the country where the testator was domiciled where he died; see Dicey, Conflict of Laws, 680, 687. 2nd ed.; *ante*, p. 480.

(*p*) See *Douglas* v. *Douglas*, L. R. 12 Eq. 617, and the cases there cited; *Re Patience*, 29 Ch. D. 976; *Winans* v. *Attorney-General*, 1904, A. C. 287; *Huntley* v. *Gaskell*, 1906, A. C. 56, 66.

A donation *mortis causâ* is a gift made in contemplation of death, to be absolute only in case of the death of the giver (*q*). It has been said that such a gift can only be made of chattels, in which the property passes by delivery (*r*). But this principle has not been maintained, and the law of donations *mortis causâ* has been considerably differentiated from that of gifts *inter vivos* (*s*). Thus a bond debt has been allowed to pass by way of donation *mortis causâ* by delivery of the bond (*t*). The delivery of a mortgage deed has also been held to be a valid donation *mortis causâ* of the mortgage security (*u*). And similar gifts of a policy of life assurance (*x*), bills (including cheques drawn in favour of the donor (*y*)), or notes though payable to order and unindorsed (*z*), and of a banker's deposit note (*a*), and a Post Office savings bank deposit book (*b*) have been held to pass to the donee the right to the money thereby secured. But a cheque drawn by the donor is not, as a rule, well given *mortis causâ*, unless it be acted upon and the money drawn in the donor's lifetime (*c*). An actual or constructive delivery of the subject of gift to the donee is essential to a donation *mortis causâ* (*d*); it

(*q*) Inst. Gr. 7, De Donationibus, cited by Lord Loughborough in *Tate* v. *Hilbert*, 2 Ves. jun. 119; 2 R. R. 175; *Walter* v. *Hodge*, 2 Swanst. 99.

(*r*) See *ante*, pp. 28, 31, 69, 70; *Miller* v. *Miller*, 3 P. Wms. 356, 358.

(*s*) *Ante*, pp. 435 *sq.*

(*t*) *Snellgrove* v. *Baily*, 3 Atk. 214; and see *Boutts* v. *Ellis*, 1 De G., M. & G. 249; *Moore* v. *Darton*, 4 De G. & Sm. 517.

(*u*) *Duffield* v. *Elwes*, 1 Bligh, N. S. 497.

(*x*) *Witt* v. *Amis*, 1 B. & S. 109.

(*y*) *Clement* v. *Cheesman*, 27 Ch. D. 631.

(*z*) *Veal* v. *Veal*, 27 Beav. 303; *Rankin* v. *Bequelin*, 27 Beav. 309; *Re Mead, Austin* v. *Mead*, 15 Ch. D. 651.

(*a*) *Re Dillon*, 14 Ch. D. 76; *Cain* v. *Moon*, 1896, 2 Q. B. 283; *Hudson* v. *Spencer*, 1910, 2 Ch. 285.

(*b*) *Re Weston*, 1902, 1 Ch. 680; *Re Andrews*, 1902, 2 Ch. 394.

(*c*) *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Re Beaumont*, 1902, 1 Ch. 889; cf. *Bromley* v. *Brunton*, L. R. 4 Eq. 275; *and*, p. 436. In *Bolls* v. *Peters*, 5 Ch. D. 750, it was held that, where the donor's cheque payable to order is negotiated in his lifetime, the gift is complete, but it seems questionable whether in that case the gift was not really made *inter vivos*.

(*d*) *Ward* v. *Turner*, 2 Ves. sen. 431; *Bryson* v. *Brownrigg*, 9 Ves.

must also be made in expectation of the donor's decease (*e*), and must be on condition that the gift be absolute only on that event (*f*). It is no objection, however, that the donation is clogged with a trust to be performed by the donee (*g*). A donation *mortis causâ* is revocable by the donor during his life (*h*), and after his decease it is subject to his debts (*i*), to estate duty (*k*), and also to legacy duty (*l*).

Appointment of executor formerly essential.

The mode of operation of a will of personalty is essentially different from the operation of a will of lands in this respect, that in strictness the appointment of an executor was formerly essential to a will of personalty (*m*); and, at the present day, the usual and proper method is to appoint an executor as to the personal estate (*n*); whereas under a devise of landed property, the lands formerly passed at once to the devisee, and the intervention of an executor was quite unnecessary and inapplicable (*o*).

Executor entitled to all personal property of testator.

The executor of a will of personal estate becomes entitled, from the moment of the death of the testator, to all his personal property (*p*), which after

1; *Bunn* v. *Markham*, 7 Taunt. 224; 17 R. R. 497; *Ruddell* v. *Dobree*, 10 Sim. 241; *Farquharson* v. *Cave*, 2 Coll. 356; *Powell* v. *Hellicar*, 26 Beav. 261. The delivery may precede the gift; *Cain* v. *Moon*, 1896, 2 Q. B. 283.

(*e*) *Tate* v. *Hilbert*, 2 Ves. jun. 111; 4 Bro. C. C. 286; 2 R. R. 175.

(*f*) *Edwards* v. *Jones*, 1 My. & Cr. 226; *Staniland* v. *Willott*, 3 Mac. & G. 664.

(*g*) *Blount* v. *Burrow*, 4 Bro. C. C. 72; *Hills* v. *Hills*, 8 M. & W. 401; cf. *Solicitor to the Treasury* v. *Lewis*, 1900, 2 Ch. 812.

(*h*) 7 Taunt. 232.

(*i*) 1 P. Wms. 406; 2 Ves. sen. 434.

(*k*) *Ante*, p. 413; *Re Hudson*, 1911, 1 Ch. 206.

(*l*) Stat. 36 Geo. III. c. 52, s. 7; 8 & 9 Vict. c. [illegible] 1.

(*m*) Wms. [illegible], Exors. 3, 1, 14th ed.; 2 [illegible] Comm. 503.

(*n*) If by a will, the duties of an executor are imposed on some person not expressly appointed to that office, he is an executor *according to the tenor* of the will; 1 Wms. Exors. 239, 7th ed.; 165, 10th ed.

(*o*) *Re Barlow*, L. R. 1 P. & M. 325.

(*p*) Co. Litt. 388 *a*; Com. Dig. tit. Biens (C); 1 Wms. Exors. 629, 650 *sq.*, 7th ed.; 467, 485 *sq.*, 10th ed.; *ante*, p. 3.

Executor's assent.

payment of the debts of the deceased he is bound to apply according to the directions of the will. Thus if the testator should specifically bequeath any part of his personal property, the property so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest; and this assent must not be given until the executor is satisfied that there is sufficient to pay the debts of the deceased without having recourse to the property so specifically given (*q*). Under the Land Transfer Act, 1897 (*r*), a testator's real estate now vests in his executor on his death as well as his personal property; and the necessity for the executor's assent to any specific disposition made by the will is extended to the case of a devise of real estate.

Administrator *durante minore ætate*.

Married woman executrix.

If the testator should appoint as his sole executor an infant under the age of twenty-one years, such infant will not be allowed to exercise his office during his minority; but during this time the administration of the goods of the deceased will be granted to the guardian of the infant, or to such other person as the Court may think fit (*s*). Such person is called an administrator *durante minore ætate* (*t*). Formerly, if a married woman were appointed an executrix, she could not accept the office without the consent of her husband (*u*); and having accepted it with his consent, she was unable, without his concurrence, to perform any act of administration which might be to his prejudice; whilst he, on the other hand, might release debts

(*q*) Toller's Executors, bk. 3, s. 2; 2 Wms. Exors. 1372, 7th ed.; 1101, 10th ed.; *Re Culverhouse*, 1896, 2 Ch. 251; *Re West*, 1909, 2 Ch. 180.

(*r*) Stat. 60 & 61 Vict. c. 65, ss. 1–3; *ante*, p. 2, n. (*i*); Williams, R. P. 224–226, 259, 21st ed.

(*s*) Stat. 38 Geo. III. c. 87, s. 6.

(*t*) 1 Wms. Exors. 479, 7th ed.; 386, 10th ed. As to the powers of an administrator *durante minore ætate*, see *Re Cope*, 16 Ch. D. 49.

(*u*) 1 Wms. Exors. 282, 7th ed.; 160, 10th ed.

due to the deceased, or make assignment of the deceased's personal estate, without his wife's concurrence (*x*); for, according to the interpretation placed upon the general rule of law that a husband and wife are but one person (*y*), the power, and with it the responsibility, were vested in the husband. Under the Married Women's Property Act, 1882 (*z*), a married woman is now capable of accepting the office of executrix without the consent of her husband, and she was expressly empowered by that Act to dispose as if she were a *feme sole* of any stock, shares or debentures which might devolve upon her as executrix. This Act did not, however, invest a married woman with any express or general capacity to dispose, without her husband's concurrence, of any other property to which she might be entitled as executrix of a will (*a*). But by the Married Women's Property Act, 1907 (*b*), a married woman is

(*x*) Wms. Exors. 965, 7th ed.; 5 Rep. 27 b.

(*y*) See Williams, R. P. 306, 21st ed.

(*z*) Stat. 45 & 46 Vict. c. 75, ss. 1 (sub-s. 2), 18, 24; *Theobald* v. *Wilson*, 8 P. D. 18; *Re Jones*, *ib.* 168.

(*a*) *See Re Harkness and Allsopp's Contract*, 1896, 2 Ch. 358, deciding that the Act did not confer on married women a general capacity to dispose of property enabling them to dispose of property to which they were entitled as trustees; 2 Wms. V. & P. 918–921, 2nd ed.; *post*, Pt. III. Ch. V.

(*b*) Stat. 7 Edw. VII. c. 18, s. 1 (1). Sect. 1 (2) confirms dispositions of such property made by the wife alone after the 31st December, 1882 (the commencement of the Act of 1882), with a saving as to cases where any title or right had been acquired through or with the concurrence of the husband. The questions raised by the wording of this Act in the case of a married woman trustee are discussed in 2 Wms. V. & P. 922–924, 2nd ed.: where it is submitted that, unless the confirming provisions of this Act are to be rendered entirely nugatory, the Act must be construed as giving to married women trustees a *power* to dispose of all such estate or interest in the trust property as is vested at law in their husbands. As *fortiori*, it appears that a wife can under this Act dispose alone of all chattels, whether real or personal, vested in her as executrix; for the common law regarded all such chattels as vested in the wife *en autre droit*, and made no gift of them to the husband, although it empowered him to dispose thereof without her concurrence; see Co. Litt. 351 a; *Throckmorton* d. *Leech* v. *Coppin*, 2 W. Bl. 801; *Farr* v. *Newman*, 4 T. R. 621; 2 Wms. Exors. 965, 966, 7th ed.

able, without her husband, to dispose of or join in disposing of real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. By the common law, a married woman, being an executrix, might make a will without the consent of her husband, confined to the personal estate of which she was executrix (*c*); and the executor of her will so made became the executor of the original testator. The capacity of a married woman in this respect is in no way diminished by the provisions of the Act of 1882 (*d*). For it is a general rule, that if any executor should die before having completely administered the estate of his testator, the executor appointed by the will of such executer will be entitled to complete the distribution of the estate of the former testator (*e*).

Executor of executor entitled to be executor of testator.

Any one of the executors may perform acts of administration.

The testator, however, may and usually does, appoint more than one person his executors. In this case the law regards all the co-executors as one individual person; and consequently any one of the executors of full age may, during the life of his companions, perform, without their concurrence, all the ordinary acts of administration, such as giving receipts, making payments, and selling and assigning the property (*f*). But all the executors, infant included, must join in bringing actions respecting the estate (*g*). If, therefore, the testator appoint a person indebted to him as his executor, or one of his executors, this appointment will operate at law

All must join in bringing action.

(*c*) 1 Wms. Exors. 53, 7th ed.; 49, 10th ed.

(*d*) See Williams' Conveyancing Statutes, 150, 451, 455.

(*e*) 2 Black. Comm. 506. And it seems that he is bound to do so; *Brooke* v. *Haynes*, L. R. 6 Eq. 25.

(*f*) Shep. Touch. 481.

(*g*) 2 Wms. Exors. 1867, 7th ed.; 1515, 10th ed. An ejectment was an exception, as any one executor might demise the entirety of the testator's leasehold land; *Doe* d. *Stace* v. *Hicks*, 15 M. & W. 623. The old proceedings in ejectment were abolished in 1852; Williams, R. P. 65, n. (*q*), 21st ed.

as a release of the debt (*h*). For the debt is a chose in action, and a man cannot either solely or conjointly with others bring an action against himself. In equity, however, an executor who was indebted to the testator is bound to account for his debt to the estate of the testator (*i*). On the decease of any co-executor, the office su...es to those who remain (*k*); and after the decease of all of them, the executor of the will of the last survivor will be entitled to act as executor of their testator (*l*).

Appointment of debtor executor.

Survivorship of office of executor.

If any person not duly authorised should intermeddle with the goods of the testator, or do any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called in law French, an executor *de son tort*. Such an executor is liable to the same demands from the creditors of the deceased as if he had been regularly appointed; but like a regular executor he is not liable beyond the amount of the assets of the testator which have come to his hands. The chief difference between such an executor and one who has been duly appointed is this, that an executor *de son tort* is not allowed to derive any benefit from his own wrongful intermeddling; whereas a regularly appointed executor, if a creditor of the deceased, may lawfully retain his own debt out of the legal assets in preference to all other debts of the same degree (*m*). If the insolvent estate of a deceased

Executor *de son tort*.

Executor's right of retainer.

(*h*) Wentworth, Exors. 73, 14th ed.; *Frankly* v. *Lor*, 9 B. & C. 130; 32 R. R. 605; *Re Applebee*, 1891, 3 Ch. 422.

(*i*) Bac. Abr. Exors. (A). 10; *Simmons* v. *Gutteridge*, 13 Ves. 264; *Re Bourne*, 1906, 1 Ch. 697; *Re Pink*, 1912, 2 Ch. 528; cf. *Re Applebee*, 1891, 3 Ch. 422; *ante*, p. 238, n. (*z*).

(*k*) As to the survivorship of powers and trusts given to or vested in two or more executors see Williams' Conveyancing Statutes, 194—198.

(*l*) 1 Wms. Exors. 2.0, 7th ed.; 182, 10th ed.

(*m*) Wms. Exors. 257, 269, 1039, 1047, 7th ed.; 184, 193, 785, 795, 10th ed.; see *ante*, pp. 220—222; *Re Compton*, 30 Ch. D. 15; *Re Wells*, 45 Ch. D. 569; *Re Gilbert*, 1898, 1 Q. B. 282; cf. *Re Hayward*, 1901, 1 Ch. 221;

debtor be administered by the Court, either in the Chancery Division or in bankruptcy, the executor will not lose the priority given to him by his right of retainer (*n*).

The most striking difference between a will of personal estate and a will of lands yet remains to be noticed. A will of lands has always operated and still operates as a mode of conveyance requiring no extrinsic sanction to render it available as a document of title: although it is now provided by the Land Transfer Act, 1897 (*o*), that probate may be granted in respect of real estate only, where there is no personal estate. But a will of personal estate has always required to be proved. This probate of the will was formerly required to be made in some ecclesiastical court (*p*): but after the year 1857 the

A will of personalty must be proved

Re Marcin, 1905, 2 Ch. 490; *Wilson* v. *Wilson*, 1911, 1 K. B. 327.

Table opposite p. 244.

(*o*) Stat. 60 & 61 Vict. c. 65, s. 1 (3).

(*n*) *Ante*, pp. 222, 243, n. (*z*).

(*p*) The jurisdiction of the ecclesiastical courts over wills of personal estate was of ancient origin. So early as the time of Glanville, who wrote in the reign of Henry II., the ecclesiastical courts had acquired an exclusive right to determine on the validity of a will or the bequest of a legacy; Glanv. lib. 7, cc. 6, 7; see P. & M. Hist. Eng. Law, ii 312 *sq.*, 330, 339. And the right of the Church to interfere in testamentary matters continued until the year 1858. During this period, a will was required to be proved in the court of the bishop or ordinary in whose diocese the testator dwelt, and within whose jurisdiction the personal effects of the testator consequently lay. But if there were effects to the value of 5*l.*, called *bona notabilia*, in two distinct dioceses or jurisdictions within the same province, either of Canterbury or York, the will was required to be proved in the Prerogative Court of the archbishop of that province; 1 Wms. Exors. 289, 7th ed.; 209, 16th ed.; for an account of the rise of the archbishop's jurisdiction, see Gent. Mag., New Series, Vol. 12, p. 582. If there were personal effects within two provinces, the will must have been proved in each province, either in the Prerogative Court, or in some court of inferior jurisdiction; observing, as to each province, the same rule as would have applied had the testator had no property elsewhere; Second Report of Real Property Commissioners, 67. If probate were granted by a bishop, or other inferior judge, in a case where the deceased had goods to the value of 5*l.* in any other diocese in the same province, such probate was absolutely void; but probate granted by an archbishop, in a case where the deceased had not *bona notabilia* in divers dioceses, was voidable only, and not absolutely void; Wentworth, Exors. 110, 14th ed.; *Lysons* v. *Barrow*, 2 Birg. N. C.

jurisdiction of all the ecclesiastical courts over wills was entirely abolished, and a court was established called the Court of Probate, with a principal registry in London and district registries throughout the kingdom, in which all wills of personal estate were required to be proved (*q*). At the commencement of the Judicature Acts in 1875, the jurisdiction of the Court of Probate was transferred to the High Court of Justice, and its exercise assigned to the Probate, Divorce and Admiralty Division (*r*). And since then all wills have to be proved either in the principal or in some district probate registry of the High Court (*s*). Upon probate, the will itself is deposited under the control of the Court (*t*); and a copy of the will, which is given by the Court to the executor on proving, denominated the probate copy, is the only proper evidence of the right of the executor to intermeddle with the personal estate of his testator (*u*). Before probate, however, the executor may perform all the ordinary acts of administration, such as receiving and giving receipts for debts due to the testator, paying the debts owing by the testator, and selling and assigning any part of the personal estate. But when evidence is required of his right to intermeddle, the probate is the only valid proof; without it, therefore, no action or

Court of Probate.

The probate the only proper evidence.

Acts of executor before probate.

486. But the Court of Probate Act, 1857, rendered valid all previous grants of probates which were void or voidable by reason only that the courts from which they were obtained had not jurisdiction to make such grants, except where the same had been already litigated. Stat. 20 & 21 Vict. c. 77, s. 86; *Re Tucker*, 2 Sw. & Trist. 123; 9 W. R. 420.

(*q*) Stat. 20 & 21 Vict. c. 77, amended by 21 & 22 Vict. c. 95.

(*r*) *Ante*, pp. 160, 224, n. (*i*).

(*s*) Any will may be proved in the principal registry, without regard to the abode of the testator. But if the testator had, at the time of his death, a fixed place of abode within any district his will may be proved in the registry of that district; and the grant so made will be effectual even if he should not have had any fixed place of abode within that district; stat. 20 & 21 Vict. c. 77, ss. 59, 46, 47.

(*t*) Stat. 20 & 21 Vict. c. 77, s. 66. This has always been the case; 1 Wms. Exors. 315, 7th ed.

(*u*) *Rex* v. *Netherseal*, 4 T. R. 260; 1 Wms. Exors. 202, 7th ed.; 213, 10th ed.

suit can be maintained, although proceedings may be commenced before, and carried up to the point where the evidence is required (*x*).

Evidence required on probate.

The evidence required for the proof of a will varies according to the form of the attestation, and also according to the circumstance of the validity of the will being or not being disputed. The usual and proper form of attestation to a will expresses that the formalities required by the Wills Act (*y*) have been complied with: thus, "Signed and declared by the above-named A. B., the testator, as and for his last will and testament, in the presence of us, both present at the same time, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." When the attestation is in this form, and the validity of the will is not disputed, it is *proved* by the simple oath of the executor, that he believes the will to be the true last will and testament of the deceased. But as such a form of the attestation clause is not essential to the validity of the will (*z*), wills are sometimes informally made without any clause of attestation, or with a clause which does not express that the required formalities have been complied with. When this occurs, an affidavit in addition to the executor's oath, is required from one of the subscribing witnesses, that the will was executed in compliance with the statute (*a*). Probate in either of the above modes is termed probate in *common form*. But if the validity of the will should be disputed, or any dispute should be anticipated

Probate in common form;

(*x*) 1 Wms. Exors. 302, 7th ed.; 220, 10th ed.; *Stuart* v. *Burrowes*, 1 Drury, 265, 274; *Pinney* v. *Hurst*, 6 Ch. D. 98.

(*y*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9; *ante*, p. 478.

(*z*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 9; *ante*, p. 478.

(*a*) 1 Wms. Exors. 330, 7th ed.; 239, 10th ed.; *Re Perrott*, 1902, P. 205. The practice of the Court of Probate was generally the same as the old practice of the Prerogative Court of the Archbishop of Canterbury; stat. 20 & 21 Vict. c. 77, s. 29.

by the executor, the will is proved *in solemn form per testes* (*b*). In this case both the witnesses are sworn and examined, and such other evidence taken as the circumstances require, in the presence of the widow and next of kin of the testator, and all others pretending to have any interest, who are cited to be present to see the proceedings. When a will has once been proved in this form it is finally established, and the executor cannot be compelled to prove it any more; but when a will has been proved merely in common form, the executor may, at any time within thirty years, be compelled by any party interested to prove it *per testes* in solemn form (*c*). The contentious jurisdiction with respect to the grant and revocation of probates of wills has been transferred to the county courts in cases where the personalty is under the value of 200*l*. and the deceased was not at the time of his death beneficially entitled to any real estate of the value of 300*l*. (*d*). In solemn form. County Courts.

Any person appointed executor, either alone or with others, may decline the office, if he has not intermeddled with the estate: and on his signifying such refusal to the Court, he is said to renounce probate of the will (*e*). Thereupon, by the Court of Probate Act, 1857, his rights in respect of the executorship shall wholly cease, and the representation to the testator and the administration of the effects shall, without any further renunciation, go, devolve and be committed in like manner as if the person renouncing had not been appointed executor (*f*). Renunciation of probate may, however, by Renunciation of probate.

(*b*) See *Spicer* v. *Spicer*, 1899, P. 38.

(*c*) 1 Wms. Exors. 334, 7th ed.; 242, 10th ed.

(*d*) Stat. 21 & 22 Vict. c. 95, s. 10.

(*e*) *Jackson* v. *Wallington*, 3 Phillim. 577; *Long* v. *Symes*, 3 Hagg. 771.

(*f*) Stat. 20 & 21 Vict. c. 77, s. 79. By stat. 21 & 22 Vict. c. 95, s. 16, the like result is to follow whenever an executor named in a will survives the

leave of the Court to be given in a proper case, be subsequently retracted (*g*).

Estate duty.

As we have seen (*h*), under the Finance Act, 1894 (*i*), all property passing on the death of any person, whether by his will or otherwise, is now subject, with some exceptions (*k*), to the payment of estate duty. And where the property is settled by the will, a further estate duty, called settlement estate duty, is leviable thereon (*l*). The estate duty leviable in respect of all personal property, of which the deceased person was competent to dispose (*m*) at his death, is payable by his executor or administrator on delivering the affidavit necessary to obtain probate or administration (*n*). Before this Act took effect, a stamp duty, commonly called

Probate duty.

probate duty, was imposed on the grant of the probate of a will or of letters of administration in respect of the value of the deceased person's personal estate situate within the jurisdiction of the Court granting the probate or administration (*o*). Thus effects situate abroad were not chargeable with probate duty (*p*). Under the Finance Act

testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation: *Re Boschetti*, 1908, 1 Ch. 180. As to the previous law, see 1 Wms. Exors. 274, 283 *sqq.* 7th ed.

(*g*) *Re Stokes*, 1898, P. 12.

(*h*) *Ante*, p. 443.

(*i*) Stat. 57 & 58 Vict. c. 30, s. 1.

(*k*) Among these are the following:—the property of common seamen, marines or soldiers, who are slain or die in the King's service, sums under 100*l.* payable without requiring representation; and estates of the principal value of not more than 100*l.*; stat. 57 & 58 Vict. c. 30, ss. 8 (1), 17; 2 Wms. V. & P. 1297—1302, 2nd ed.

(*l*) *Ante*, p. 446.

(*m*) See *ante*, p. 443.

(*n*) Stat. 57 & 58 Vict. c. 30, s. 6 (2).

(*o*) Stat. 44 Vict. c. 12, ss. 26—37, replacing 43 Vict. c. 14, s. 9; and 55 Geo. III. c. 184, amended by 5 & 6 Vict. c. 79, s. 23, and 22 & 23 Vict. c. 35, s. 1; 1 Wms. Exors. 595, 7th ed.

(*p*) *A.-G.* v. *Hope*, 2 Cl. & Fin. 84; 37 R. R. 29. In order to obtain a grant of probate or administration from the Court of Probate or High Court in England, probate duty was, as a rule, payable only on effects situate in England. But if the deceased person had effects situate in Scotland or Ireland, and it was

1894 (*q*), however, estate duty is leviable, not only on property situate anywhere in the United Kingdom (*r*), but also on property passing on the death when situate out of the United Kingdom, if under the previous law legacy or succession duty is payable in respect thereof (*s*), or would be so but for the relationship of the person to whom it passes (*t*). Penalties are imposed by statute on any person who shall take possession of and in any manner administer any part of the personal estate and effects of any person deceased without obtaining probate or administration within six calendar months after the death (*u*).

Payment of funeral and

When the will has been proved it is the duty of

desired to obtain in England a grant, of which the effect might be extended to Scotland or Ireland, probate duty was chargeable on all his personal and moveable effects in the United Kingdom. The effect of probates and letters of administration obtained in England or Ireland, and of confirmations, as they are called, of executors obtained in Scotland, may be extended to the other parts of the United Kingdom, upon being produced to the proper Court and duly sealed or certified; see stats. 20 & 21 Vict. c. 79, ss. 94, 95; 21 & 22 Vict. c. 56, ss. 12—15; 21 & 22 Vict. c. 95, s. 29; 22 & 23 Vict. c. 31, s. 25; 39 & 40 Vict. c. 70, ss. 41, 42. Stat. 55 Vict. c. 6, provides for the recognition in the United Kingdom of probates and letters of administration granted in any British possession, or by a British court in a foreign country, see rules thereunder, W. N. 18th March, 1893.

(*q*) Stat. 57 & 58 Vict. c. 30, s. 2 (2); see sect. 7 (2—4).

(*r*) *Winans* v. *A.-G.*, 1910, A. C. 27.

(*s*) *Re Manchester*, 1912, 1 Ch. 540. Legacy duty is payable on all chattels personal, or moveable property, wherever situate, of a person dying domiciled in the United Kingdom; *A.-G.* v. *Napier*, 6 Ex. 217; 2 Wms. Exors. 1637–1643, 7th ed.; 1846 1851, 10th ed. Succession duty is payable on all chattels personal, or moveable property, wherever situate, vested in trustees amenable to the jurisdiction of an English court by a settlement made by any person, wherever domiciled, in such form that the trusts or provisions are enforceable and the property recoverable by the beneficiaries in an English court; and the like law prevails in Ireland and Scotland; *A.-G.* v. *Campbell*, L. R. 5 H. L. 521; *Lyall* v. *Lyall*, L. R. 15 Eq. 1; *Re Cigala's Settlement*, 7 Ch. D. 351; *A.-G.* v. *Felce*, 10 Times L. R. 337; *A.-G.* v. *Jewish Colonization Association*, 1901, 1 K. B. 123; *A.-G.* v. *Johnson*, 1907, 2 K. B. 885.

(*t*) As in the case of legacies or succession between husband and wife or ancestor and descendant; *post*, p. 500.

(*u*) Stats. 55 Geo. III. c. 184, s. 37; 57 & 58 Vict. c. 30, s. 8; *New York Breweries Co.* v. *A.-G.*, 1899, A. C. 62.

testamentary expenses and debts.

Powers of executors.

Purchaser from executor not bound to inquire if there be debts.

Nor to see to the application of his purchase-money.

Priority of payments.

the executor to pay the testator's funeral (*x*) and testamentary (*y*) expenses and debts out of the personal estate, to which such executor becomes entitled by virtue of his office. For this purpose the executor has reposed in him by the law the fullest powers of disposition over the personal estate of the deceased, whatever may be the manner in which it has been bequeathed by the will (*z*). And in the event of a sale of any such property by the executor, the purchaser is not bound to inquire whether there are any debts remaining unpaid: for, in the absence of evidence to the contrary (*a*), the executor is presumed to be acting in the proper discharge of his office (*b*). Nor is the purchaser at all concerned with the application which the executor may make of the purchase-money: but the executor's receipt will be a sufficient discharge, and he alone will be responsible to the creditors and legatees for its due application (*c*). The proper funeral expenses of the deceased are payable in full in priority to any debt, duty or charge whatever. Subject thereto, the testamentary expenses, or expense of obtaining probate of the will and administering the estate (including the estate duty in respect of the testator's personalty (*d*)), ought to be paid in

... Wms. Exors. 968. ... 737, 1426, 10th ... *Lush*, 10 Ch. ... *Penna*, 11 Ch. ... 1900, 2 Ch. ... *Ismore, ibid.*, 182; ... 1 Ch. 363. ... *orbet*, 2 P. Wms. ... *Phin*, 18 Beav. ... *Carill's contract*, ... 55. ... *v. Sitford*, 1 Atk. ... *v. Freeman*, 2 Atk. ... V. & P. 217, 218, ... 2nd ed. Cf. *Atten-* ... *Solomon*, 1913, A. C. ...

(*c*) *Whale* v. *Booth*, 4 T. Rep. 625, n.; 2 R. R. 483, n.; *M'Leod* v. *Drummond*, 17 Ves. 154; 11 R. R. 41.

(*d*) *Ante*, p. 492; *Re Clemow*, 1900, 2 Ch. 182, 194—196; *Re Avery*, 1913, 1 Ch. 208; see 2 Wms. V. & P. 1313, 1314, 1315, n. (*b*), 1318 and n. (*z*), 2nd ed. But settlement estate duty (*ante*, p. 446) on personalty settled by will is payable out of the settled property unless the will expressly direct the contrary; and it does not come under the head of testamentary expenses; stat. 59 & 60 Vict. c. 28, s. 19 (1); *Re King*, 1904, 1 Ch. 363; cf. *Re Manchester*, 1912, 1 Ch. 540, 556 *sq.*

full in priority to all other claims (*e*). The estate should then be applied in satisfaction of the debts of the deceased. The order in which debts are payable by an executor has been already stated; and we have also seen that if the testator's estate, being insolvent, be administered by the Court in the Chancery Division or in bankruptcy, his debts will be payable in different orders (*f*). By the Trustee Act, 1893 (*g*), an executor may pay or allow any debt or claim on any evidence that he thinks sufficient: and may, if and as he thinks fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate, and for any of those purposes may enter into, give, execute and do such agreements, instruments of composition or arrangement, releases, and other things as to him seem expedient, without being responsible for any loss occasioned by any act or thing so done by him in good faith. It has been held that, under this enactment, an executor may compromise a claim made by his co-executor against the testator's estate (*h*).

Power of executor to accept composition for debt, &c.

Every executor is entitled to obtain the assistance of the Court in deciding any questions which may arise in the course of the proper performance of his duties (*i*). And the costs incurred by obtaining

Application to the Court.

(*e*) Wms. Exors. 988, 989, 7th ed.; 751, 752, 10th ed.; *Re Boaine*, 1893, 1 Ch. 188; *Re Long*, 1895, 1 Ch. 652.

(*f*) *Ante*, pp. 219–221, 243, 244, and table thereto. As to the order in which the assets are applicable in payment of the debts, see Williams, R. P. 282, n. (*d*), 21st ed.; 1 Wms. V. & P. 231, n. (*o*), 2nd ed.

(*g*) Stat. 56 & 57 Vict. c. 53, s. 21, replacing 44 & 45 Vict. c. 41, s. 37.

(*h*) *Re Houghton*, 1904, 1 Ch. 622; see *ante*, p. 486.

(*i*) Jessel, M.R., *Sharp* v. *Lush*, 10 Ch. D. 468, 476, 471.

the assistance of the Court in the administration of the estate are considered and rank as testamentary expenses (*k*). Formerly, in order to procure this assistance, an executor was obliged to commence a suit in equity and obtain a decree for the general administration of the estate under the direction of the Court of Chancery. The administration by this Court of a deceased person's estate might also be obtained at suit of a creditor seeking to enforce payment of his debt out of the assets (*l*), of legatees desiring to secure due payment of their legacies (*m*) or of persons entitled to share in an intestate's effects (*n*). By the Judicature Acts of 1873 to 1875 (*o*), the jurisdiction of the Court of Chancery in respect of administration of the estates of deceased persons was transferred to the High Court of Justice, and its exercise assigned to the Chancery Division (*p*). Under the present practice, an order

By suit.

(*k*) *Ib.*; *ante*, p. 495, n. (c).

(*l*) See *ante*, pp. 114, 241, 242.

(*m*) See *ante*, p. 36, and n. (*m*).

(*n*) 1 Spence, Eq. Jur. ch. x., pp. 578—583; 1 Van Heythuysen's Equity Draftsman, 150, 257—308, 320, 2nd ed. (1828); 1 Maddock's Chancery Practice, 720 *sq.*, 3rd ed. (1837); Mitford on Pleading, 7, 34, 165—168, 4th ed. Under stats. 13 & 14 Vict. c. 35, s. 19; 23 & 24 Vict. c. 38, s. 14, executors could apply for an account of debts and liabilities by motion, petition or summons; and under 15 & 16 Vict. c. 86, s. 45, creditors, legatees and next of kin could obtain an order for administration upon summons. After the Court of Chancery had pronounced such a decree, it would grant an injunction to restrain any creditor or legatee (other than the plaintiff) from taking any further proceedings against the executor, either at law or in equity; on the ground that the continuance of any such proceedings would necessarily be prejudicial to the just administration of the assets; *Drewry* v. *Thacker*, 3 Sw. 529, 541, 544; 19 R. R. 274; *Clarke* v. *Earl of Ormonde*, Jac. 108, 122—125; 23 R. R. 8, 143; *Gardner* v. *Garratt*, 20 Beav. 469. See Mitford on Pleading, 168, 4th ed.; 2 Wms. Exors. 1914, 1915, 7th ed.

(*o*) *Ante*, pp. 160, 161.

(*p*) Under these Acts, no cause or proceeding at any time pending in the High Court of Justice or before the Court of Appeal, is to be restrained by prohibition or injunction; but either of these Courts may direct a stay of proceedings in any cause or matter pending before it, on the application of any person, who would have been entitled, if the Act had not passed, to apply to any Court to restrain the prosecution thereof; stat. 36 & 37 Vict. c. 66, s. 24 (5). And when an order has been made in the Chancery Division for the administration of the assets of any testator or in

for the administration by the Court of a deceased person's estate may be obtained either in an action brought for the purpose, or upon an originating summons taken out by any of his executors, administrators, creditors, legatees or next of kin, or any person claiming under any such creditor, legatee or next of kin (*q*); or an originating summons may be taken out by any of the same parties to obtain the determination by the Court, without an administration of the estate, of any question arising in the administration of a deceased person's estate (*r*). And it is not obligatory on the Court or a judge to make an order for the administration of the estate of any deceased person, if the questions between the parties can be properly determined without such order (*s*). Besides these remedies, under the Public Trustee Act, 1906 (*t*), any executor who has obtained probate may, with the sanction of the Court, transfer the estate to the public trustee (*u*) for administration either solely or jointly with the continuing executors, if any (*x*).

Transfer of the estate to the public trustee for administration.

testate, the judge, in whose Court administration is pending, has power, without further consent, to order the transfer to himself of any cause or matter pending in any other Court or Division brought or continued by or against the executors or administrators of the testator or intestate; R. S. C., 1883, Order XLIX., r. 5. As to the obtaining by an executor of the stay or transfer of proceedings against him, see Seton on Judgments, 799, 7th ed.; *Re Stubbs*, 8 Ch. D. 154; *Re Womersley*, 29 Ch. D. 557.

(*q*) R. S. C., 1883, Order LV., r. 4. Actions by creditors, legatees or next of kin for the administration of estates not exceeding 500*l.* in value may be brought in the County Court; stat. 51 & 52 Vict. c. 43, s. 67, replacing 28 & 29 Vict. c. 99, s. 1.

(*r*) Order LV., r. 3; see *Re Davies*, 38 Ch. D. 210; *Re Royle*, 43 Ch. D. 18; *Re Skinner*, 1904, 1 Ch. 289; *ante*, p. 429.

(*s*) Order LV., r. 10; see *Re Wilson*, 28 Ch. D. 457; *Re Blake*, 29 Ch. D. 913.

(*t*) Stat. 6 Edw. VII. c. 55, s. 6 (2).

(*u*) *Ante*, p. 422.

(*x*) The provisions of this Act as to the investigation and audit of trust accounts (*ante*, p. 430), apply to executorship accounts; see sect. 15. And under the same Act, sect. 3, application may be made to the public trustee for the administration by him of a deceased person's estate, whereof the gross capital value is less than 1,000*l.*; see *Re Devereux*, 1914, 2 Ch. 515; Public Trustee Rules, 1912, Nos. 12–15; W. W. 27th April, 1912. This Act also enables the public

Legacies.

Executor's year.

When the debts have been paid, the legacies left by the testator are then to be discharged. In order to give the executor sufficient time to inform himself of the state of the assets and to pay the debts of the deceased, he is allowed a twelvemonth from the date of the death of the testator before he is bound to pay legacies (*y*).

Interest on legacies.

From this time all such general legacies as remain unpaid carry interest, at the rate of 4 per cent. per annum (*z*).

Legacy by parent.

But if the legacy be given by a parent, or by a person *in loco parentis*, to a legatee under the age of twenty-one years, interest is given from the death of the testator for the maintenance of the legatee, in the absence of any provision for that purpose (*a*).

Liability of executor.

Notwithstanding the lapse of a year from the testator's death, the executor is still liable to any creditor of the deceased to the amount of the assets which have come to the executor's hands (*b*); and if he should have paid any legacies in ignorance of the claims of the creditor, his only remedy is to apply to the legatees to refund their legacies, which they will be bound to do, in order to satisfy the debt (*c*). From this liability to creditors, an executor could not

trustee to be appointed and to act as an executor or an original, new or additional trustee of any will; sects. 5, 6 (1), 15.

(*y*) *Wood* v. *Penoyre*, 13 Ves. 333; 9 R. R. 185; *Beason* v. *Maude*, 6 Madd. 15.

(*z*) *Wood* v. *Penoyre*, *ubi sup.*; R. S. C., 1883, Order LV., r. 64; *Walford* v. *Walford*, 1912, A. C. 658, 663.

(*a*) *Harvey* v. *Harvey*, 2 P. Wms. 21; 2 Wms. Exors., 1425, 7th ed.; 1164, 10th ed. Interest may also be payable from the death on an infant's legacy where the will shows an intention that the legatee shall be maintained as part of the testator's bounty; *Re Churchill*, 1909, 2 Ch. 431.

(*b*) *Norman* v. *Baldry*, 6 Sim. 621; *Knatchbull* v. *Fearnhead*, 3 Myl. & Cr. 122; *Hill* v. *Gomme*, 1 Beav. 540.

(*c*) *March* v. *Russell*, 3 My. & Cr. 31. See *Blake* v. *Gale*, 32 Ch. D. 571. An executor may lawfully distribute the estate, notwithstanding that he has notice of a remote contingent liability not amounting to a debt, such as the liability on shares not fully paid up of a company believed to be solvent (*ante*, pp. 335, 337); and he will not be precluded from calling on the legatees to refund, if the liability should afterwards have to be met: *Jervis* v. *Wolferstan*, L. R. 18 Eq. 18; *Whittaker* v. *Kershaw*, 45 Ch. D. 320; see *Re King*, 1907, 1 Ch. 72; *ante*, p. 114, n. (*l*).

formerly have been discharged, unless he took proceedings to have the estate administered by the Court of Chancery (*d*), when he was exonerated from all risk (*e*). But the Law of Property Amendment Act, 1859 (*f*), exonerates an executor from all liability to the rents and covenants of any leasehold or other property liable to rents or covenants after an assignment made by him to a purchaser (*g*), provided he shall have set apart a sufficient fund to answer any future claim in respect of any fixed and ascertained sum agreed by the lessee or grantee to be laid out on the property. And by the same Act, where an executor shall have given the like notices as would have been given by the Court of Chancery, in an administration suit, for creditors and others to send in their claims against the estate of the testator, the executor may distribute the assets amongst the parties entitled thereto, without liability to any person of whose claim he shall not have had notice at the time of distribution; but this shall not prejudice the right of any creditor to follow the assets (*h*). The executor is of course not answerable to the testator's creditors beyond the amount of assets which have come to his hands (*i*), unless he should for sufficient consideration give a written promise to pay personally (*k*), or should do any act amounting to an

Protection to executors.

Not liable beyond amount of assets.

(*d*) *Ante*, p. 496.

(*e*) 3 Myl. & Cr. 126.

(*f*) Stat. 22 & 23 Vict. c. 35, ss. 27, 28, extending leases made before it passed; *Smith* v. *Smith*, 1 Drew. & Smale, 384; *Re Green*, 2 De Gex, F. & J. 321.

(*g*) Here meaning one who buys the lease and pays a price in money for it, and not including one, to whom money is paid "or taking it over; *Re Lawley*, 1, 2 Ch. 530.

(*h*) Stat. 22 & 23 Vict. c. 35 s. 29; *Clegg* v. *Rowland*, L. R. 3 Eq. 368; *ante*, p. 334. As to the notices, which ought to be given, see *Wood* v. *Weightman*, L. R. 13 Eq. 434; *Newton* v. *Sherry*, 1 C. P. D. 246; *Re Bracken*, 43 Ch. D. 1.

(*i*) Bac. Abr. tit. Executors (P.), 1.

(*k*) Stat. 29 Car. II. c. 3, s. 4; *ante*, p. 183; 1 Wms. Saund. 210, n. (1); 211, n. (2).

admission that he has assets of the testator sufficient for the payment of the debts (*l*)

Legacy duty.

On the payment or delivery of any legacy, whether payable out of the testator's own personal estate, or out of any personal estate over which he had a power of appointment (*m*), a receipt must be given by the legatee, which is charged with a duty, called legacy duty, on the amount or value of the legacy (*n*). Legacy duty is also charged upon bequests of the residue, or any share of the residue, of a testator's personal or moveable estate (*o*). The amount of legacy duty varies according to the degree of relationship which the legatee bore to the deceased; and the rates at which the duty is charged are stated in the note (*p*). By the Succession Duty

Leasehold property.

(*l*) *Horsley* v. *Chaloner*, 2 Ves. sen. 83; see *ante*, p. 220, and n. (*q*).

(*m*) Stat. 8 & 9 Vict. c. 76, s. 4, amended by the effect of 51 Vict. c. 8, s. 21 (2). But no sum of money, which by any marriage settlement is subjected to any limited power of appointment to or for the benefit of any person or persons therein specially named or described as the object or objects of such power, or to or for the benefit of the issue of any such persons or person, is liable to legacy duty under the will in which such sum is appointed or apportioned in exercise of such limited power; stat. 8 & 9 Vict. c. 76, s. 4. Such sums are, however, liable to succession duty; *ante*, p. 441.

(*n*) Stat. 36 Geo. III. c. 52, s. 27. The legacy duty on annuities for lives is fixed by tables given in the Succession Duty Act, and is payable by four equal payments to be made successively on completing each of the first four years' payments of the annuity; stats. 36 Geo. III. c. 52, s. 8; 16 & 17 Vict. c. 57, s. 31.

(*o*) Stat. 55 Geo. III. c. 184, s. 2, and schedule, part iii., amended by the effect of 51 Vict. c. 8, s. 21 (2). As to legacy duty on successive interests in residue, see *Re Duppa*, 1912, 2 Ch. 445.

(*p*) (1) To a child, parent or any other lineal issue or ancestor, or husband or wife, 1*l.* per cent., subject to the exemptions mentioned below.

(2) To a brother or sister, or descendant of a brother or sister, 5*l.* (originally 3*l.*) per cent.

(3) To a brother or sister of the father or mother, or descendant of such brother or sister, 10*l.* (originally 5*l.*) per cent.

(4) To a brother or sister of the grandfather or grandmother, or descendant of such brother or sister, 10*l.* (originally 6*l.*) per cent.

(5) To a person in any other degree of collateral consanguinity, or to a stranger in blood, 10*l.* per cent.

Succession duty (*ante*, p. 441) is charged at the same rates; see

Act, 1854, leasehold property, although personal estate, is exempted from legacy duty, and is charged in lieu thereof with succession duty, calculated

stats. 55 Geo. III. c. 184, schedule, part iii.; 16 & 17 Vict. c. 51, s. 10; 10 Edw. VII. c. 8, s. 58. A person chargeable with legacy or succession duty, who shall have been married to any wife or husband of nearer consanguinity than himself or herself to the testator or predecessor, pays the same rate of duty only as such wife or husband would have been chargeable with; stat. 16 & 17 Vict. c. 51, s. 11.

Gifts by will of property on trust for any charitable or public purposes are subject to succession duty at the rate of 10*l.* per cent. on the amount or principal value thereof; stat. 16 & 17 Vict. c. 51, s. 16.

Legacy or succession duty at the rate of 1 per cent. as between lineal issue and ancestor was not payable in respect of any property on the value of which either probate or account duty (*ante*, pp. 492, 443, n. (c)) had been paid under the Inland Revenue Act, 1881 (44 Vict. c. 12), s. 41, or in respect of property chargeable with estate duty under the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 24, and First Schedule (*ante*, pp. 443, 491), on any death occurring after the 1st August, 1894. And legacy or succession duty was not payable as between husband and wife on any death occurring *before* the 30th April, 1909; stats. 55 Geo. III. c. 184, schedule, part iii.; 16 & 17 Vict. c. 51, s. 18; 10 Edw. VII. c. 8, s. 58, sub-ss. 2—4. But by the Finance Act, 1910 (10 Edw. VII. c. 8), s. 58, sub-ss. 2—4, legacy and succession duty at the rate of 1 per cent. were re-imposed as between lineal issue and ancestor and imposed as between husband and wife, subject to exemption in the cases following:—

(a) Where the principal value of the property passing on the death of the deceased in respect of which estate duty is payable (other than property in which the deceased never had an interest, and property of which the deceased never was competent to dispose and which on his death passes to persons other than the husband or wife or a lineal ancestor or descendant of the deceased) does not exceed 15,000*l.*, whatever may be the value of the legacy or succession;

(b) Where the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor does not exceed 1,000*l.*, whatever may be the principal value of such property;

(c) Where the person taking the legacy or succession is the widow or a child under the age of twenty-one years of the testator, intestate or predecessor, and the amount or value of the legacy or succession together with any other legacies or successions derived by the same person from the testator, intestate or predecessor, does not exceed 2,000*l.*, whatever may be the principal value of such property.

By sub-s. 3, in this section, the expression "deceased" means, as to legacy duty, the testator or intestate, and in the case of a succession arising through devolution by law, the person on whose death the succession arises, and in the case of a succession arising under a disposition, the person on whose death the first succession thereunder arises. And by sub-s. 1, this section shall take effect as to legacy duty where the testator or intestate dies on or after the 30th April, 1909, and in the case of a succession arising through devolution by law

Legacies charged on real estate.

upon the same principles as the duty on real property (*q*). And under the Inland Revenue Act, 1888 (*r*), legacy duty is no longer payable in respect of any legacy payable, satisfied, or charged out of or upon any real or heritable estate, which belonged to the testator, or which he had any right or power to charge with the payment of money, or out of or upon the rents and profits, or any moneys to arise from the sale, mortgage, or other disposition of any such real or heritable estate, but such legacies are chargeable with succession duty as upon a succession to personal property (*s*).

Legacy to infant or person beyond seas.

If a legacy be given to an infant, or to a person absent beyond the seas, the only way in which the executor can obtain a proper discharge for such legacy is by payment of it, after deducting the legacy duty, into Court under the Trustee Act,

only where the succession arises on or after that date, and in the case of a succession arising under a disposition, only if the first succession under the disposition arises on or after that date.

Legacy or succession duty is not payable by any member of the royal family; stats. 55 Geo. III. c. 184, schedule, part iii.; 16 & 17 Vict. c. 51, s. 18. Succession duty is not payable where the whole succession or successions derived from the same predecessor and passing on any death to any person or persons shall not amount in money or principal value to 100*l.*; stat. 16 & 17 Vict. c. 51, s. 18; see 52 Vict. c. 7, s. 10, sub-s. 2. Legacy duty is not payable where the value of the whole of the testators or intestate's personal estate does not amount to 100*l.*, stat. 43 & 44 Vict. c. 14, s. 13. And where the net value of the property, in respect of which estate duty is payable on some death (inclusive of property settled otherwise than by the will of the deceased) does not exceed 1,000*l.*, and the fixed duty (payable where the gross value of such property does not exceed 500*l.*) or estate duty has been paid upon the principal value of that estate, the legacy and succession duties shall not be payable under the will or intestacy of the deceased in respect of that estate; stat. 57 & 58 Vict. c. 30, s. 16 sub-s. 3; see sect. 16, sub-s. 2; 10 Edw. VII. c. 8, s. 61, sub-s. 2. Also in case of death on or after the 30th April, 1909, objects of national, scientific, historic, or artistic interest are exempted from legacy and succession duty while enjoyed in kind, and such duty will only become chargeable when the property is sold, and then only in respect of the last death on which the property passed; stat. 10 Edw. VII. c. 8, s. 63, extending 59 & 60 Vict. c. 28, s. 20, which partially exempted such objects from estate duty.

(*q*) Stat. 16 & 17 Vict. c. 51, ss. 1, 19, 21. See Williams, R. P. 261—267, 21st ed.

(*r*) Stat. 51 Vict. c. 8, s. 21 (2).

(*s*) *Ante*, p. 441.

1893 (*t*). It is now provided that when an executor, administrator, or trustee shall have given notice in writing to the Commissioners of Inland Revenue for any claim to legacy duty or succession duty in respect of any fund in his hands which he intends to distribute, and shall have delivered to the Commissioners all particulars which they may require in order to ascertain the existence and extent of any such claim, he shall be at liberty to distribute the fund amongst the parties entitled thereto, after satisfaction of any claims to duty made by the Commissioners, and shall be entitled to receive from them a certificate discharging him from his liability to any duty in respect of the fund. But such certificate shall not in any way affect the liability of any person other than the person in whose favour it is expressed to be given (*u*).

Discharge of executor, &c., from claim to duty on distribution of fund.

A legacy may be either specific, demonstrative, or general. A specific legacy is a bequest of a specific part of the testator's personal estate. Thus a bequest of "the service of plate, which was presented to me on such an occasion," is specific, and so also is a bequest of "100*l*. Consols now standing in my name at the Bank of England" (*x*), or of "100*l*. Consols, part of my stock" (*y*). A specific legacy must be paid or retained by the executor in preference to those which are general, and must not be sold for the payment of debts until the general assets of the testator are exhausted (*z*). It is, however, liable to *ademption* by the act of the testator

Specific legacy.

Entitled to preference.

Ademption.

(*t*) Stats. 56 & 57 Vict. c. 53, s. 12, replacing 36 Geo. III. c. 52, s. 32; *Ex parte Bennett*, 15 Jur. 213; *Re Salaman*, 1907, 2 Ch. 16; *ante*, p. 429.

(*u*) Stat. 43 Vict. c. 14, s. 32.

(*x*) Roper on Legacies, c. 3; *Gordon* v. *Duff*, 28 Beav. 519.

(*y*) *Kirby* v. *Potter*, 4 Ves. 750 a; 4 B. R. 342; *Hayes* v. *Hayes*, 1 Keen. 97; *Shuttleworth* v. *Greaves*, 4 M. & Cr. 35; *Bethamley* v. *Sherson*, L. R. 20 Eq. 304.

(*z*) *Brown* v. *Allen*, 1 Vern. 31; *Hinton* v. *Pinke*, 1 P. Wms. 539; *Sleech* v. *Thorington*, 2 Ves. sen. 560.

in his lifetime. Thus, in the instances given above, if the testator should part with the plate, or sell the stock in his lifetime, the legacy will be adeemed, and the legatee will lose all benefit (*a*). A demonstrative legacy is a gift by will of a certain sum directed to be paid out of a specific fund. Thus, "I bequeath to A. B. the sum of 50*l*. sterling, to be paid out of the sum of 100*l*. Consols now standing in my name at the Bank of England," is a demonstrative legacy. Such a legacy is not liable to ademption by the act of the testator in his lifetime; for it is considered to be the testator's intention that the legatee should at all events have the legacy: but that it should, if possible, be paid out of the fund he has pointed out. If, therefore, the testator in this case should sell the 100*l*. Consols in his lifetime, the 50*l*. will still be payable to the legatee out of the general assets (*b*). A demonstrative legacy is accordingly more beneficial to the legatee than a specific legacy. And it is also more beneficial than a legacy which is merely general; for being payable out of a specific fund, it is not, while that fund exists, liable to abatement with the general legacies (*c*). A general legacy is one payable only out of the general assets of the testator, and is liable to abatement in case of a deficiency of such assets to pay the testator's debts and other legacies. A bequest to A. of 100*l*. sterling is a general legacy; so is a bequest of 100*l*. Consols, without referring to any particular stock to which the testator may be entitled (*d*). A bequest of a mourning ring of the value of 10*l*. is also a general legacy, no specific

Demonstrative legacy.

General legacy.

(*a*) *Ashburner* v. *M'Guire*, 2 Bro. C. C. 108; *Harrison* v. *Jackson*, 7 Ch. D. 339; *Re Slater*, 1907, 1 Ch. 665; cf. *Re Clifford*, 1912, 1 Ch. 29; *Re Leeming*, *ib.* 828.

(*b*) *Roberts* v. *Pocock*, 4 Ves. 150; *Attwater* v. *Attwater*, 18 Beav. 330.

(*c*) *Acton* v. *Acton*, 1 Meriv. 178; *Livesay* v. *Redfern*, 2 Y. & C. 90.

(*d*) *Wilson* v. *Brownsmith*, 9 Ves. 180; *Re Greig*, 36 Ch. D. 205; see, however, *Townsend* v. *Martin*, 7 Hare, 471.

ring of the testator's being referred to (*e*). In the two last cases, the executor would be bound to set apart or buy the stock, or purchase the ring, for the legatee out of the general assets of the testator, supposing them sufficient for the purpose; and should there be a deficiency, the amount of the stock, or the value of the ring to be purchased, would abate proportionably. Legacies given by husbands to their wives in consideration of their releasing their dower are not liable to abatement with the other general legacies (*f*). But this doctrine has not been extended to legacies given in consideration of the legatee's releasing a debt due to him from the testator (*g*), or a claim against a third party (*h*).

Dower.

When a legacy is bequeathed by a testator to his creditor, it is considered to be a satisfaction of the debt, if the legacy be equal to or greater than the amount of the debt (*i*). But if it be less than the debt (*j*), or payable at a different time (*k*), or of a different nature from the debt (*l*), or if the debt be contracted subsequently to the date of the will (*m*), or if the will contain an express direction for payment of debts and legacies (*n*), or even of debts only (*o*), the legacy will not be a satisfaction. The

Satisfaction of debts by legacies.

(*e*) 1 Roper on Legacies, c. 3, s. 2.

(*f*) *Burridge* v. *Bradyl*, 1 P. Wms. 127; *Norcott* v. *Gordon*, 14 Sim. 258. But this rule does not apply where the wife's dower is barred by her husband's declaration, or his disposition of his land by his will; see stat. 3 & 4 Will. IV. c. 105, s. 12; *Roper* v. *Roper*, 3 Ch. D. 714; *Re Greenwood*, 1892, 2 Ch. 295; Williams, R. P. 326, 327, 21st ed.

(*g*) *Re Wedmore*, 1907, 2 Ch. 277.

(*h*) *Re Whitehead*, 1913, 2 Ch 56.

(*i*) *Fowler* v. *Fowler*, 3 P. Wms. 353; *Fourdrin* v. *Gowdey*, 3 M. & K. 383, 409; 2 Roper on Legacies, c. 17, s. 1; *Edmonds* v. *Low*, 3 K. & J. 318; *Re Rattenbury*, 1906, 1 Ch. 667; see *Re Fletcher*, 38 Ch. D. 373.

(*j*) *Graham* v. *Graham*, 1 Ves. sen. 262.

(*k*) *Nicholls* v. *Judson*, 2 Atk. 300; *Hales* v. *Darrall*, 3 Beav. 324; *Re Horlock*, 1895, 1 Ch. 516.

(*l*) *Alleyn* v. *Alleyn*, 2 Ves. sen. 37; *Bartlett* v. *Gillard*, 3 Russ. 149; 27 R. R. 45; *Fourdrin* v. *Gowdey*, 3 M. & K. 383, 409.

(*m*) *Cranmer's Case*, 2 Salk. 508.

(*n*) *Richardson* v. *Greese*, 3 Atk. 65; *Hassell* v. *Hawkins*, 4 Drew. 468.

(*o*) *Re Hnish*, 43 Ch. D. 260.

Satisfaction of portions.

leaning of the Courts is against the doctrine of the satisfaction of debts by legacies, a doctrine which seems to have been established on rather questionable grounds. When, however, a parent has undertaken to pay a sum of money to a child by way of portion, the inclination of the Courts is against double portions; and a legacy to such a child is accordingly regarded as a satisfaction of the portion, either in part or in whole, notwithstanding such legacy may be less than the portion, or payable at a different period (*p*). A bequest of the residue, or of a share in the residue of the testator's estate, will also be considered as a satisfaction *pro tanto* (*q*). The presumption of satisfaction is indeed so strong, that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both (*r*). Parol evidence of the intention of the testator is, however, admissible to rebut this presumption (*s*). And according to the same doctrine of an inclination against double portions, if a parent who has made a will bequeathing a legacy or share of residue to a child, afterwards make over in his lifetime a sum of money or other property to the child, the presumption is that this is an advancement, or an ademption *pro tanto* of the amount bequeathed (*t*). This

(*p*) *Hinchcliffe* v. *Hinchcliffe*, 3 Ves. 516; 4 R. R. 89; *Weall* v. *Rice*, 2 Russ. & Myl. 251; 34 R. R. 83.

(*q*) *Rickman* v. *Morgan*, 2 B. C. C. 394; *Earl of Glengall* v. *Barnard*, 1 Keen. 769; affirmed, 2 H. L. C. 131; *Beckton* v. *Barton*, 27 Beav. 99, 106; *Montefiore* v. *Guedalla*, 1 De Gex, F. & J. 93; *Coventry* v. *Chichester*, L. R. 2 H. L. 71; *Re Blundell*, 1906, 2 Ch. 222.

(*r*) See *Re Tussaud's Estate*, 9 Ch. D. 363; *Montagu* v. *Earl of Sandwich*, 32 Ch. D. 525. A *donatio mortis causâ* (*ante*, p. 481) is not presumed to be satisfied by a legacy of equal amount, unless perhaps in the case of a portion: *Hudson* v. *Spencer*, 1910, 2 Ch. 285.

(*s*) *Re Tussaud's Estate*, 9 Ch. D. 372—375.

(*t*) *Montefiore* v. *Guedalla*, 1 De G., F. & J. 93; *Dawson* v. *Dawson*, L. R. 4 Eq. 504; *Noys* v. *Drysdale*, *ib.*, 517; *Cooper* v. *Macdonald*, L. R. 16 Eq. 258; *Leighton* v. *Leighton*, L. R. 18 Eq. 458; *Re Vickers*, 37 Ch. D. 525; *Re Boddington*, 1909, 1 Ch. 771; see *Re Jacques*, 1903, 1 Ch. 267; *Re Heather*, 1906, 2 Ch. 230. This

presumption may, however, be rebutted in the same manner as in the former case (*u*). If property be made over to a child before a will is executed, there is no presumption of the ademption of any benefit conferred by the will (*x*). The presumption against double portions exists in the case of a bequest by any one *in loco parentis* to a child as well as by a parent (*y*), but not in any other case (*z*).

Mortmain Acts.

Under a statute of George II., commonly called the Mortmain Act (*a*), and divers amending statutes, of which the provisions were consolidated in the Mortmain and Charitable Uses Act, 1888 (*b*), every assurance of land, including any hereditaments, and any estate or interest therein, or of any personal estate to be laid out in the purchase of land, to or for the benefit of any charitable uses, was rendered void, save in a few special cases, unless made by deed, and otherwise in compliance with the conditions of the Acts. These enactments were held to prohibit the bequest for charitable purposes of personal estate in any degree savouring, as it is said, of the realty (*c*). There is, however, no law

doctrine has also been applied in the case of an appointment made to a child by deed under a special power subsequently to a similar appointment by will to the same child; *Re Peel's Settlement*, 1911, 2 Ch. 165.

(*u*) *Kirk* v. *Eddowes*, 3 Hare, 509; *Re Lacon*, 1891, 2 Ch. 482; *Re Scott*, 1903, 1 Ch. 1.

(*x*) *Taylor* v. *Cartwright*, L. R. 14 Eq. 167, 176; *Re Peacock's Estate*, *ib.*, 236; *Leighton* v. *Leighton*, L. R. 18 Eq. 458, 466.

(*y*) See *Powys* v. *Mansfield*, 3 My. & Cr. 359; *Pym* v. *Lockyer*, 5 My. & Cr. 29; *Campbell* v. *Campbell*, L. R. 1 Eq. 383; *Fowkes* v. *Pascoe*, L. R. 10 Ch. 343.

(*z*) *Re Shields*, 1912, 1 Ch. 591.

(*a*) Stat. 9 Geo. II. c. 36.

(*b*) Stat. 51 & 52 Vict. c. 42.

(*c*) Thus it was decided that money secured on mortgage of land could not be left by will to a charity; *A.-G.* v. *Meyrick*, 2 Ves. sen. 44; *A.-G.* v. *Caldwell*, Amb. 635; *Re Watts*, 29 Ch. D. 917; *Re Hoyles*, 1911, 1 Ch. 179; nor could leasehold estates; *A.-G.* v. *Graves*, Amb. 155. It was ultimately held that shares in companies were not interests in land; *Myers* v. *Perigal*, 2 De G., M. & G. 599; *Edwards* v. *Hall*, 6 De G., M. & G. 74; *Entwistle* v. *Davis*, L. R. 4 Eq. 272, except such shares as were real estate; *House* v. *Chapman*, 4 Ves. 542; 1 B. R. 292; see *ante*, p. 327. Debentures or bonds giving merely a charge upon the undertaking of some

which prevents the bequest of purely personal property to any amount for charitable purposes. In consequence of the effect of the Mortmain Acts, it was formerly necessary, in making a bequest to a charity, to direct that it should be paid out of such part of the testator's personal estate as he might lawfully bequeath for such a purpose. For if this precaution should have been neglected, the charitable legacies would fail in the proportion which the personal assets savouring of the realty might bear to those which were purely personal (*d*). But an Act of 1891 (*e*) has now removed the restrictions placed by the Mortmain Acts on gifts for charitable purposes of money secured on land, or other personal estate arising from or connected with land. This Act further authorises the assurance of land by will to or for the benefit of any charitable use, providing, however, that land so assured must be sold (*f*). And under the same Act gifts by will of personal estate to be laid out in the purchase of land to or for the benefit of any charitable use are no longer void; but the property bequeathed is to be held by the charity as though there had been no direction to lay it out in the purchase of land (*g*). It has been held that, since the passing of the Act, a bequest to a charity of such part of a testator's estate as may by law be given for charitable purposes will pass the testator's real as well as his personal estate (*h*). Here it may be noted, with regard

company or public body but no direct security upon any land were also held to be pure personalty; but not such debentures or bonds as gave a direct charge on land; see *Re Parker*, 1891, 1 Ch. 682; *Re Pickard*, 1894, 3 Ch. 704.

(*d*) *A.-G.* v. *Tyndall*, 2 Eden, 207; *S. C.*, 2 Amb. 614; *Hobson* v. *Blackburn*, 1 Keen, 273; *Philanthropic Society* v. *Kemp*, 4 Beav. 581; and see *Robinson* v. *Geldard*, 3 Mac. & G. 735; *Tempest* v. *Tempest*, 7 De G., M. & G. 470; *Beaumont* v. *Oliveira*, L. R. 4 Ch. 309.

(*e*) Stat. 54 & 55 Vict. c. 73, s. 3.

(*f*) Sects. 5, 6; see *Re Hunt*, 1895, 1 Ch. 429.

(*g*) Sect. 7.

(*h*) *Re Bridger*, 1894, 1 Ch. 297; see *Re Harris*, 1912, 2 Ch. 241.

to the bequest of money to be laid out in the purchase of hereditaments, that a bequest of money to be laid out in building on land already in mortmain was held to be good (*i*); but if some land already in mortmain were not distinctly referred to, a bequest of money for building for any charitable purpose was void, as implying a direction for the purchase of land on which to build (*k*). Under the present law it appears that in the latter case the bequest would not fail, but the money would have to be held by the charity as if no direction for its employment in building had been given. When a legacy is plainly devoted to charity, and is clear of the Mortmain Acts, but cannot or cannot immediately be devoted to the specific charity intended, the Court will give effect to it *cy-près* or as nearly as possible (*l*).

Bequests which require some care are those to [illegible] illegitimate children. It is clear that a bequest to the future illegitimate children of a particular man is void, as the Courts cannot enter into the inquiry which would be necessary to identify such children (*m*). A child *primâ facie* means a legitimate child: a bastard is considered by the law as *nullius filius*. Accordingly an illegitimate child can never take under a gift to children, unless it be clear, upon the terms of the will, or according to the state of facts at the making of it, that legitimate children never could have taken (*n*). An illegiti-

(*i*) *Glubb* v. *A.-G.*, Amb. 373; *Champney* v. *Davy*, 11 Ch. D. 949.

(*k*) *Pritchard* v. *Arbouin*, 3 Russ. 456; 27 R. R. 106; *Smith* v. *Oliver*, 11 Beav. 481; *In re Watmough's Trusts*, L. R. 8 Eq. 272; *Pratt* v. *Harvey*, L. R. 12 Eq. 544; *In re Cox*, 7 Ch. D. 204. And see *Philpott* v. *St. George's Hospital*, 6 H. L. C. 338.

(*l*) *Smartt* v. *Herbert*, L. R. 7 Ch. 232; *Church charges* v. *Brocklett*, L. R. 8 Ch. 200; *Loddiges* v. *Bickersteth*, 24 W. R. 507; 1 Jarm. Wills, 204 *sq.*, 5th ed.

(*m*) *Wilkinson* v. *Adam*, 1 V. & B. 466; 12 R. R. 255.

(*n*) *Cartwright* v. *Vawdry*, 5 Ves. 530; 5 R. R. 108; *Godfrey*

mate child, may, however, take under any gift in which he is sufficiently identified as the object of the testator's bounty. Thus, a bequest to the child of which a woman is now pregnant is good (*o*). And if illegitimate children have acquired the reputation of being the children of the testator or any other person, and it appear by necessary implication on the face of the will that such persons were intended in a bequest to children, they will be entitled, not on account of their being children, but on account of their reputation as such (*p*). Under such a bequest, it has been held that an illegitimate child *en ventre sa mère* at the date of the will (*q*) although not born till after the testator's death (*r*), can take, as well as children by reputation actually born at the date of the will. And it would seem that illegitimate children, who have acquired their reputation of children at the date of the testator's death, can take under such a bequest, although begotten after the date of the will (*s*). But it has been decided that an illegitimate child, both begotten and born after the death of the testator, cannot share in such a bequest, because

v. *Davis*, 6 Ves. 43; 5 R. R. 204; *Harris* v. *Lloyd*, 1 T. & Russ. 310; 24 R. R. 68; *Bagley* v. *Mollard*, 1 Russ. & M. 581; 32 R. R. 281; *Dover* v. *Alexander*, 2 Hare, 275; *Re Overhill's Trust*, 1 Sm. & Giff. 362; *Paul* v. *Children*, L. R. 12 Eq. 16; *Dorin* v. *Dorin*, L. R. 7 H. L. 568; *Ellis* v. *Houstoun*, 10 Ch. D. 236; *Re Bolton*, 31 Ch. D. 542; *Re Hall*, 35 Ch. D. 551; and see *Re Eve*, 1909, 1 Ch. 796.

(*o*) *Gordon* v. *Gordon*, 1 Meriv. 141; 15 R. R. 88.

(*p*) *Wilkinson* v. *Adam*, 1 Ves. & B. 422; 12 R. R. 255; *Gill* v. *Shelley*, 2 Russ. & My. 336; 34 R. R. 106; *Meredith* v. *Farr*, 2 You. & Coll. 525; *Hill* v. *Crook*, L. R. 6 H. L. 265; *Lepine* v. *Bean*, L. R. 10 Eq. 160; *Re Humphries*, *Smith* v. *Millidge*, 24 Ch. D. 691; *Re Bryon*, 30 Ch. D. 110; *Re Haseldine*, 31 Ch. D. 511; *Re Horner*, 37 Ch. D. 695; *Re Harrison*, 1894, 1 Ch. 561. The like rule applies in the case of a settlement made by deed; *Ebbern* v. *Fowler*, 1909, 1 Ch. 578.

(*q*) *Occleston* v. *Fullalove*, L. R. 9 Ch. 147.

(*r*) *Crook* v. *Hill*, 3 Ch. D. 773.

(*s*) *Occleston* v. *Fullalove*, *ubi sup.*; *Re Hastie's Trusts*, 35 Ch. D. 728; *Re Loveland*, 1900, 1 Ch. 542; but see *Re Bolton*, 31 Ch. D. 542; *Re Ida Barker*, 1901, 2 Ch. 441; and cf. *Re Frogley* 1905, P. 137.

to hold otherwise would be to encourage immorality (*t*).

Rights of residuary legatee.

After payment of the testator's debts and legacies, the residue of his personal estate must be paid over to the residuary legatee, if any, named in the will. A will of personal estate has always been considered as speaking from the death of the testator; and it is now expressly enacted, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*u*). Hence it follows that all personal property acquired by the testator between the time of making his will and his decease will pass under it.

Lapse.

If any legacy should lapse by the death of the legatee in the testator's lifetime, or should fail from being contrary to law, it will fall into the residue, and belong to the residuary legatee. And a legacy will lapse by the death of the legatee in the testator's lifetime, although given to the legatee, his executors, administrators and assigns (*x*); for these words are merely inserted in analogy to the limitation of real estate to a man and his heirs.

Joint tenants.

If a bequest be made to two or more as joint tenants, and one of them die in the lifetime of the testator, his share will not lapse, but will survive to the others (*y*).

Tenants in common.

But if the bequest be to two or more in common, and one of them die in the testator's lifetime, his share will lapse (*z*); unless the bequest be made to a class, as to the children of A. in equal

Bequest to a class.

(*t*) *Crook* v. *Hill*, 3 Ch. D. 773; see also *Re Harrison*, 1894, 1 Ch. 561.

(*u*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 24. See *Re Slater*, 1907, 1 Ch. 665.

(*x*) *Elliott* v. *Davenport*, 1 P. Wms. 83.

(*y*) *Morley* v. *Bird*, 3 Ves. 628, 631; 4 R. R. 106.

(*z*) *Bagwell* v. *Dry*, 1 P. Wms. 700; *Page* v. *Page*, 2 P. Wms. 480; *Barber* v. *Barber*, 3 My. & Craig, 688; *Bain* v. *Leacher*, 11 Sim. 397; *Re Venn*, 1904, 2 Ch. 52.

shares, in which case all who answer that description at the testator's decease (*a*), and also (if the period of distribution be postponed by the will) all who come into being before such period (*b*), will be entitled to divide the bequest amongst them. It is, however, provided by the Wills Act that where any person, being a child or other issue of the testator, to whom any personal estate shall be bequeathed for any interest not determinable at or before the death of such person, shall die in the testator's lifetime leaving issue, and any such issue shall be living at the death of the testator, such bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*c*). The effect of this provision is curious. If the legatee had died immediately after the testator, leaving a will, it is evident that the estate bequeathed to him would have passed under his will. It has been decided, therefore, that the will of the legatee shall, after his death, operate on the estate bequeathed to him in the same manner as if he had been living (*d*). This provision has been held to apply to a testamentary appointment under a general power of appointment (*e*), but to be inapplicable to a testamentary appointment under a power to appoint amongst the testator's children (*f*); and it does not extend to gifts to children or issue as a class, and not individually (*g*). If a bequest of residue, or

Legacies to children.

Lapse of residue.

(*a*) *Viner* v. *Francis*, 2 Cox, 190; 2 R. R. 29; Jarm. Wills, 431, 1664, 6th ed.; *Lee* v. *Pain*, 4 Hare, 250.

(*b*) *Ayton* v. *Ayton*, 1 Vox, 327; Jarm. Wills, 431, 1667, 6th ed.

(*c*) Stat. 7 Will. IV. & 1 Vict. c. 26, s. 33, which applies if there be any issue *en ventre sa mère* at the testator's death; *Re Griffith's Settlement*, 1911, 1 Ch. 246.

(*d*) *Johnson* v. *Johnson*, 3 Hare 157. Estate duty attaches; *Re Scott*, 1901, 1 Q. B. 228.

(*e*) *Eccles* v. *Cheyne*, 2 Kay & J. 676.

(*f*) *Griffiths* v. *Gale*, 12 Sim. 354; *Freeland* v. *Pearson*, L. R. 3 Eq. 658; *Holyland* v. *Lewin*, 26 Ch. D. 266.

(*g*) *Browne* v. *Hammond*, John.,

of a share of residue, should lapse by the legatee's death in the testator's lifetime, the property bequeathed will, in the absence of any further disposition thereof by the will (*h*), and subject to the effect of the above-mentioned provision of the Wills Act as to bequests to children or other issue, devolve as upon intestacy (*i*).

Former right of executor to the residue.

If there were no residuary legatee, the residue of the testator's personal estate, after payment of debts and legacies, formerly belonged to the executor for his own benefit, unless a contrary intention appeared from his being left executor in trust (*k*), or from his having a legacy left him for his trouble (*l*), or from other circumstances (*m*). But by the Executors Act, 1830 (*n*), it is enacted that when any person shall die, having by will or codicil appointed any executor, such executor shall be deemed by Courts of equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions (*o*), in respect of any residue not expressly disposed of, unless it shall appear by the will or any codicil thereto (*p*), that the person so appointed executor was intended to take such residue beneficially. It has been held that this Act applies only where there is a bare appointment of executors without any gift to them of the testator's residuary personalty, so that resort

Executors Act, 1830

210; *Re Harvey's Estate*, 1893, 1 Ch. 567.

(*h*) See *Re Palmer*, 1893, 3 Ch. 369; *Re Parker*, 1901, 1 Ch. 408.

(*i*) *Skrymsher* v. *Northcote*, 1 Sw. 566; 18 R. R. 142; *Re Venn*, 1904, 2 Ch. 52; *Re Roby*, 1908, 1 Ch. 71.

(*k*) *Pring* v. *Pring*, 2 Vern. 99; *Bagwell* v. *Dry*, 1 P. Wms. 700.

(*l*) *Rachfield* v. *Careless*, 2 P. Wms. 158.

(*m*) *Mullen* v. *Bowman*, 1 Coll. 197. See *Re Bacon's Will*, 31 Ch. D. 460.

(*n*) Stat. 11 Geo. IV. & 1 Will. IV. c. 40; see *Re Lacy*, 1899, 2 Ch. 149.

(*o*) The Statute of Distributions is that under which the personal estate of any one dying intestate is distributed between his widow and next of kin; see *ante*, p. 3, and next chapter.

(*p*) *Lowe* v. *Gaze*, 8 Beav. 472; *Harrison* v. *Harrison*, 2 H. & M. 237.

has to be had to the implication of law to determine whether they are beneficially entitled to the residue; and that a case where the residue is expressly bequeathed to the executors, either in trust or otherwise, is still regulated by the old law (*q*). It has also been decided that the Act has no application where the testator leaves no next of kin; in which case the executors may still be beneficially entitled according to the previous law (*r*).

Alienation for debt.

The law does not give any direct process of execution against an unpaid legacy or share of residue bequeathed to a judgment debtor: but the judgment creditor may obtain an order for the appointment of a receiver thereof by way of equitable execution (*s*). Such property vests, of course, in the legatee's trustee in bankruptcy (*t*).

(*q*) *Williams* v. *Arkle*, L. R. 7 H. L. 606; *Re Roby*, 1908, 1 Ch. 71.

(*r*) *A.-G.* v. *Jeffreys*, 1908, A. C. 411.

(*s*) See *Fuggle* v. *Bland*, 11 Q. B. D. 711; *Re Potts, Ex parte Taylor*, 1893, 1 Q. B. 648; *Tyrrell* v. *Painton*, 1895, 1 Q. B. 202; *Re Goudie*, 1896, 2 Q. B. 481; *Re Anglesey*, 1903, 2 Ch. 727; *Ideal Bedding Co., Ld.* v. *Holland*, 1907, 2 Ch. 157; *ante*, p. 450.

(*t*) See *ante*, p. 280.

CHAPTER IV.

OF INTESTACY.

Jurisdiction of Ecclesiastical Courts over goods of intestate persons.

THE Ecclesiastical Courts formerly had jurisdiction not only over the wills of testators, but also over the goods of persons dying intestate. This jurisdiction, though of long standing, appears to have been at first gradually acquired. In early times the clergy, being possessed of almost all the learning, appear to have been the principal framers of wills. The power they thus acquired was exercised for their own benefit, every man being expected, on making his will, after bequeathing to his lord his heriot, in the next place to remember the church (*a*). If, however, a man should have died intestate, without opportunity of making this provision, the distribution of his goods devolved on the church, together with his friends, the lord first having taken his heriot (*b*). The wife and the children were entitled to their shares; and that part of the goods which the intestate had power to dispose of by his will (called the portion of the deceased) was applied by the church *in pios usus*. This application to pious uses appears to have been as follows: in the first place, the bequest, which it was to be presumed the intestate would have made to the church, was retained, and the residue was then disposed of in paying the debts of the deceased, and distributed amongst his wife and children, his parents and their relatives.

Pious uses.

(*a*) Glanv. lib. 7, c. 5; Bract. 60 *a*; Fleta, lib. 2, c. 57; see P. & M. Hist. Eng. Law, ii. 329 *sq.*, 354 *sq.*

(*b*) Bract. 60 *b*; Fleta, *ubi supra*.

That this was the case appears from the complaints which were made by the clergy of those days, of the interference of the temporal lords in cases of intestacy, whereby the distribution of the effects in the manner pointed out was prevented (*c*). The clergy themselves, however, do not appear to have been always free from blame; for they are accused of having frequently taken the whole of the intestate's portion to themselves, making no distribution, or at least an undue one, amongst the creditors and relatives of the deceased (*d*); and in order to remedy this evil, it was enacted in the reign of Edward I., by one of the very few statutes then passed relating to personal estate (*e*), that the ordinary should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt (*f*); but the right of the relatives to the surplus still remained undefined.

Administrator.

The duty of administering intestate's effects was not, as may be supposed, usually performed by the bishops in person. For this purpose they usually appointed an administrator: but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself have a *locus standi* in the King's Courts. It was

(*c*) Matthew Paris, 951, Additamenta, 201, 204, 209 (Watts's ed. London, 1640); Constitutions of Boniface, Constitutiones Provinciales, 20, at the end of Lyndewood's Provinciale (Oxon. 1679), recited also in a Constitution of Archbishop Stratford (Lynd. Prov. lib. 3, tit. 13). See Gent. Mag. New Series, vol. ii. 355, 474. See also *Dyke* v. *Walford*, 12 Jur. 839; 5 Moore P. C. 434.

(*d*) Fleta, lib. 2, c. 57, § 10; P. & M. Hist. Eng. Law, ii. 358.

(*e*) Stat. 13 Edw. I. c. 19.

(*f*) 1 Ro. Abr. 906; Bac. Abr. Exors. (E).

accordingly enacted by a statute of the reign of Edward III. (*g*), that where a man died intestate the ordinaries should depute the next and most lawful friends of the deceased to administer his goods, which persons so deputed should have action to demand and recover as executors the debts due to the deceased, to administer and dispend for the soul of the dead; and should answer also, in the King's Courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. By a subsequent statute (*h*), administration might be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary should be thought good. The widow was usually preferred to the next of kin in the grant of administration (*i*); and a joint grant was seldom made, so seldom, indeed, that the powers of co-administrators appear to be still a matter of doubt (*k*). In granting administration to the next of kin, the Ecclesiastical Courts were guided by the right to the property to be administered (*l*). This right will be hereafter explained. If none of the next of kin would take out administration, a creditor might by custom do so, on the ground that he could not be paid his debt until representation were made to the deceased (*m*);

(*g*) 31 Edw. III. c. 11.

(*h*) 21 Hen. VIII. c. 5.

(*i*) *Webb* v. *Needham*, 1 Addams, 494.

(*k*) Shep. Touch. 485, 486; Wms. Exors. 428, 950, 7th ed.; 720, 10th ed.

(*l*) *Re Gill*, 1 Hagg. 342. Under the Land Transfer Act, 1897, where a person dies possessed of real estate, the Court shall, in granting administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin; stat. 60 & 61 Vict. c. 65, s. 2 (4). And under the Public Trustee Act, 1906 (6 Edw. VII. c. 55), s. 6 (1), administration may be granted to the public trustee; but as between him and the widower, widow or next of kin of the deceased, they are to be preferred, unless for good cause shown to the contrary; see Public Trustee Rules, 1912, No. 6; W. N. 27th April, 1912.

(*m*) *Webb* v. *Needham*, 1 Addams, 494. See *Coombs* v. *Coombs*, L. R. 1 P. & D. 288.

Court of Probate Act, 1857.

and, for want of creditors, administration might be granted to any person at the discretion of the Court (*n*). But the Court of Probate Act, 1857 (*o*), abolished the whole of the jurisdiction of the Ecclesiastical Courts over the effects of intestates; and administration of the effects of deceased persons was formerly granted by that Court, and is now granted by the Probate Division of the High Court of Justice in the same manner as the probate of wills (*p*). After the decease of any person intestate, his personal estate vested in the judge of the Court of Probate for the time being, until letters of administration were granted, in the same manner and to the same extent as they formerly vested in the ordinary (*q*). It is not clear what person was substituted for the judge of the Court of Probate in this respect by the Judicature Act of 1873 (*r*), but it has been said to be the President of the Probate Division (*s*).

Rights and powers of administrator.

The administrator, when appointed, has the same right to and power over all the personal estate of the intestate as his executors would have had if he had made a will (*t*); and this right and power relate back to the time of the intestate's decease (*u*).

(*n*) 1 Wms. Exors. 440, 445, 7th ed.; 350, 354, 10th ed.

(*o*) Stat. 20 & 21 Vict. c. 77, amended by 21 & 22 Vict. c. 95.

(*p*) *Ante*, p. 489. By stats. 36 & 37 Vict. c. 52; 38 & 39 Vict. c. 27, facilities have been given to the widows and children of deceased intestates, and to the children of intestate widows, whose whole estate and effects shall not exceed in value the sum of 100*l*., for taking out letters of administration to their effects, by application to the registrar of the County Court of the district, within which the intestate had his or her fixed place of abode at his or her death.

(*q*) Stat. 21 & 22 Vict. c. 95, s. 19.

(*r*) See stat. 36 & 37 Vict. c. 66, ss. 11, 12, 16, 31, 34; *Pinney* v. *Hunt*, 6 Ch. D. 98.

(*s*) *Whitehead* v. *Palmer*, 1908, 1 K. B. 151, 157.

(*t*) Wms. Exors. 650, 925, 7th ed.; 485, 694, 10th ed.; *Montefiore* v. *Guedalla*, 1903, 2 Ch. 26; *ante*, pp. 483, 494, 495.

(*u*) *Tharpe* v. *Stallwood*, 5 Man. & Gran. 760; *Foster* v. *Bates*, 12 M. & W. 226; *Welchman* v. *Sturgis*, 13 Q. B. 552; *Re Pryse*, 1904, P. 301, 305.

The same duty also devolves upon the administrator of paying the funeral and testamentary expenses and debts in the first place (*x*). The statutory provisions enabling executors to compromise claims, and protecting them in distributing the assets of their testator extend also to the administrator of the effects of an intestate (*y*). And an administrator has the same right as an executor to apply to the Court for its assistance in administering the estate or in determining any question, which may arise in the course of administration (*z*). An administrator also has, in general, the same privilege as an executor of preferring one creditor to another of equal degree, and of retaining his own debt in preference to all others of the same degree (*a*): but a creditor taking out administration as such is now required to pay the deceased person's debts without preferring his own (*b*). After payment of the debts, the surplus of the intestate's estate must be distributed by the administrator amongst the persons who may be entitled thereto under the Statutes of Distribution to be hereafter mentioned. In order to enable the administrator to inform himself of the state of the assets, and to pay the debts of the deceased, the same period of a year from the time

Administrator's year.

(*x*) See *ante*, p. 494.

(*y*) Stats. 56 & 57 Vict. c. 53, s. 21; 22 & 23 Vict. c. 35, ss. 27, 28, 29; *ante*, pp. 495, 499. The last of these enactments protects an administrator distributing the estate, after issuing the prescribed advertisements, against the claims of unknown next of kin as well as creditors; *Newton* v. *Sherry*, 1 C. P. D. 246.

(*z*) See *ante*, pp. 495–497. And the above-mentioned provisions of the Public Trustee Act, 1908, with respect to the transfer of deceased persons' estates to the public trustee for administration, the investigation and audit of trust accounts, and the administration by the public trustee of deceased persons' estates under 1,000*l.* in value (*ante*, p. 497) apply also to the administration of the estates of intestates.

(*a*) *Warner* v. *Wainsford*, Hob. 127; Wms. Exors. 1032, 1035, 7th ed.; 782, 785, 10th ed.; *Davies* v. *Perry*, 1899, 1 Ch. 602; *Re Belham*, 1901, 2 Ch. 52; see *ante*, pp. 220, 234, 487.

(*b*) See W. N. 1899, p. 262; Tristram and Coote's Probate Practice, 22, 101, 102, 118, 716, 718, 12th ed.

of the decease as is allowed to an executor is also given to the administrator before he can be required to make any distribution (*c*). But, notwithstanding this delay, the interest of the persons entitled to the surplus vests in them from the time of the decease of the intestate; so that in case any of them should die within a twelvemonth after the decease of the intestate, the share of the person so dying will pass to his own executors or administrators (*d*).

Limited administration:

durante minore ætate:

durante absentiâ:

pendente lite:

In some instances administration is granted for a limited purpose, or confined to a given time. Of this we have already had an instance in the case of administration *durante minore ætate*, when the sole executor named in a will is under age (*e*); and the same sort of administration is granted on intestacy, in case of the minority of the next of kin (*f*). So if the executor or next of kin, as the case may be, should be out of the realm at the time of the decease of the testator or intestate, the Court will grant a limited administration *durante absentiâ*, which will expire the moment of the return of such executor or next of kin. And if the executor should prove the will, or if any person should obtain letters of administration, and afterwards go to reside out of the jurisdiction of the English Courts, the Court is empowered by Act of Parliament (*g*) to grant administration, at the end of the year from the death of the testator or intestate. Again, when a suit concerning the right of administration is pending in the Probate Division of the High Court, the Court may appoint an administrator *pendente lite*, who will have all the rights and powers of a general

(*c*) Stat. 22 & 23 Car. II. c. 10, s. 8.

(*d*) *Edwards* v. *Freeman*, 2 P. Wms. 442.

(*e*) *Ante*, p. 181.

(*f*) 1 Wms. Exors. 479, 7th ed.; 386, 10th ed.

(*g*) Stat. 38 Geo. III. c. 87, ss. 1–5, extended by 20 & 21 Vict. c. 77, s. 74; 21 & 22 Vict. c. 95, s. 18.

administrator, other than the right of distributing the residue of the personal estate (*h*); and the administrator so appointed may receive such reasonable remuneration for his trouble as the Court may think fit (*i*). The Court also may appoint such administrator or any other person receiver of the real estate of the deceased pending any suit touching the validity of his will, if it affect such real estate (*k*). So if a will should have been made, but the executors should have renounced, or died before their testator, or if no executor should have been appointed, the Court will appoint the person having the greatest interest in the effects, generally the residuary legatee, to administer the same according to the directions of the will, in which case the administration granted is termed an administration *cum testamento annexo*, with the will annexed (*l*). And it is now provided, that, if by reason of the insolvency of the estate of the deceased, or other special circumstances, the Court shall think it necessary or convenient to appoint as administrator any other person than the person by law entitled to the grant, the Court may do so; and every such administration may be limited as the Court shall think fit (*m*).

cum testamento annexo.

As we have seen (*n*), estate duty is payable by a person applying for letters of administration as by an executor; and penalties are imposed for administering any of the deceased person's effects without taking out administration to him.

Estate duty.

(*h*) Stat. 20 & 21 Vict. c. 77, s. 70; see 36 & 37 Vict. c. 66, s. 16; *Re Tolcman*, 1897, 1 Ch. 866.

(*i*) Stat. 20 & 21 Vict. c. 77, s. 72.

(*k*) Sect. 71.

(*l*) 1 Wms. Exors. 461, 7th ed.; 370, 10th ed.; *Re Pryse*, 1904, P. 301.

(*m*) Stat. 20 & 21 Vict. c. 77, s. 73; *Re Llanwarne*, L. R. 1 P. & D. 306; *Re Fraser*, L. R. 1 P. & D. 327; *Re Wensley*, 7 P. D. 13; *Re Clayton*, 11 P. D. 76; *Whitehead* v. *Palmer*, 1908, 1 K. B. 151, 156.

(*n*) *Ante*, pp. 443, 445, 492, 493.

Office of administrator is not transmissible.

The office of administrator is not transmissible, like the office of executor. On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to administer according to the will of the testator, such of the effects as were not distributed by the deceased executor (*o*). In each of these cases the administration granted is called a grant *de bonis non administratis*, of the goods of the deceased, or, more shortly, *de bonis non* (*p*). All second and subsequent grants of probate or letters of administration must be made in the principal registry of the Probate Division of the High Court of Justice, or in the district registry where the will is registered or the original grant of administration has been made, or to which it may have been transmitted (*q*).

Administration *de bonis non.*

Distribution of intestate's effects.

The application of an intestate's effects, after payment of his debts (*r*) is generally regulated by the law of the country, in which at the time of his death he had his domicil (*s*). So that if an Englishman, or a native of any other country die intestate, domiciled in France or Scotland, and leaving assets in England, they must be distributed according to the French or Scotch law of intestate succession. But as the succession to land upon intestacy is governed by the law

(*o*) Shep. Touch. 465; 1 Wms. Exors. 254, 7th ed.; 180, 10th ed.

(*p*) 1 Wms. Exors. 470, 7th ed.; 379, 10th ed.

(*q*) Stat. 21 & 22 Vict. c. 95, s. 20.

(*r*) See *Re Kloebe*, 28 Ch. D. 175; 1 Wms. Exors. 754, 755, 10th ed.

(*s*) *Enohin* v. *Wylie*, 10 H. L. C. 1; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Re Trufort*, 36 Ch. D. 600; 2 Wms. Exors. 1515, 7th ed.; 1256, 10th ed.: see *ante*, p. 480; *Re Johnson*, 1903, 1 Ch. 821.

of the country where the land is situate, leasehold property situate in England will devolve in all respects according to English law on its intestate owner's death, even though he were domiciled elsewhere (*t*). And the same rule seems to apply to mortgages of land in England (*u*). If the intestate were domiciled in England, the distribution of the surplus of his personal estate is regulated by statutes of the reigns of Charles II. and James II., commonly called the Statutes of Distribution (*x*), by which statutes the rights of the relations of the deceased appear to have been first definitely ascertained and rendered legally available (*y*). Under these statutes if the intestate leave a widow and any child or children or descendant of any child, the widow shall take a third part of the surplus of his effects. If he leaves no child, nor descendant of any child, she shall have a moiety. In this respect, the distribution is the same as took place under the ancient law. But the widow of a man, who dies intestate without leaving issue, is now entitled to an additional interest in his personalty under the Intestates' Estates Act, 1890 (*z*). By this Act (*a*) the real and personal estates of

Statutes of Distribution.

Widow's share.

(*t*) *Duncan* v. *Lawson*, 41 Ch. D. 394.

(*u*) *Ante*, p. 480, n. (*e*).

(*x*) 22 & 23 Car. II. c. 10; 1 Jac. II. c. 17, s. 7. See Watkins on Descents, Appendix 257 *sq.* 4th ed.; *Re Goodman's Trusts*, 17 Ch. D. 266, as to which, see 1 Wms. V. & P. 159 n. (*e*), 2nd ed. The estates of intestate freemen of the city of London, and of persons having their fixed or general residence within the archiepiscopal province of York (excepting the diocese of Chester), were formerly distributed according to peculiar customs, apparently derived from the ancient mode of distribution (*Onslow* v. *Cawne*, 1 Sim. 18); 2 Wms. Exors. 1527 *sq.* 7th ed.). Some parts of W also appear to have been subje to peculiar customs of distr tion; for these several custom though postponed to the right of testamentary disposition by the statutes to which we have already referred (*ante*, p. 476), were nevertheless not abolished by those statutes in the event of no will being made. But a statute of 1856 (19 & 20 Vict. c. 94) altogether abolished all customary modes of intestate distribution.

(*y*) See *ante*, p. 3, n. (*m*).

(*z*) Stat. 53 & 54 Vict. c. 29, applying in cases of death after the 1st Sept., 1890.

(*a*) Sects. 1–3, not applying to cases of partial intestacy. *Re*

every man, who shall die intestate, leaving a widow, but no issue, shall, if not exceeding 500*l.* in net value (*b*), belong to his widow absolutely; and shall, if exceeding that sum in net value, be subject to a charge in her favour of 500*l.*, with interest at four per cent. from the date of death till payment, to be borne by the real and personal estates in proportion to their value. And the provision so made is to be in addition to the widow's other interest in her intestate husband's real and personal estate, and any sum so charged in her favour upon her late husband's personalty must be first satisfied and deducted before the surplus, in which she is entitled to share under the Statutes of Distribution, can be ascertained (*c*). The husband of a married woman is entitled to the whole of her effects (*d*); including any personal estate, to which she may have been entitled as her separate property by virtue of the Married Women's Property Act, 1882 (*e*). If the intestate leave children, two-thirds of his effects if he leave a widow, or the whole if he leave no widow, shall be equally divided amongst his children, or, if but one, to such one child. But the descendants of such children as may have died in the intestate's lifetime, shall stand in the place of their parent or ancestor, taking as between themselves *per stirpes* (*f*); and such descendants take *per stirpes*, whether any child of the intestate survive him or not. Such children, however, as have any estate by settlement from the

Shares of children and their descendants.

Advancements to be accounted for.

Twigg's Estate, 1892, 1 Ch. 579; cf. *Re Cuffe*, 1908, 2 Ch. 500.

(*b*) *I.e.*, after deducting the value of any charges on the real estate, and of all debts, funeral and administration expenses, and other liabilities, payable out of the personal estate; Stat. 53 & 54 Vict. c. 20, ss. 5, 6; *Re Twigg's Estate*, 1892, 1 Ch. 579. Reversionary or contingent interests are to be taken at their value at the death; *Re Heath*, 1907, 2 Ch. 270.

(*c*) See s. 4.

(*d*) Stat. 20 Car. II. c. 3, s. 25.

(*e*) *Re Lambert's Estate*, 39 Ch. D. 626, confirming the opinion expressed in previous editions of this book and in Williams' Conveyancing Statutes, 456—458.

(*f*) See Burton's Compendium, pl. 1102; *Ross's Trusts*, L. R. 13 Eq. 286; *Re Nott*, 37 Ch. D. 517

intestate, or have been advanced by him by portion in his lifetime, must bring the amount of their advancement into hotch-pot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir at law, notwithstanding any lands he may have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land (*g*). If the intestate leave no issue, the interest of his widow, if any, under the Intestates' Estates Act, 1890 (*h*), must first be ascertained; subject to which the intestate's father, if living, is entitled to one-half of the surplus of the effects, the widow taking the other half. If the intestate leave neither widow nor issue, the father will be entitled to the whole (*i*). If the father be dead, the mother, brothers and sisters of the intestate shall take in equal shares (*k*), subject, as before, to the widow's right to a moiety; and brothers or sisters of the half blood have an equal claim with those of the whole blood (*l*). If any brother or sister shall have died in the lifetime of the intestate, leaving children, such children shall stand *in loco parentis*, provided the mother or any brother or sister be living (*m*). If there be no brother or sister, nor child of such brother or sister, the mother shall take the whole, or, if the widow be living, a moiety only, as before; but a stepmother can take nothing (*n*). If there be no mother, the brothers and sisters take equally, the children of such

Father of intestate.

Mother, brothers and sisters.

(*g*) Stat. 22 & 23 Car. II. c. 10, s. 5; *Boyd* v. *Boyd*, L. R. 1 Eq. 305; *Taylor* v. *Taylor*, L. R. 20 Eq. 155; *Hatfield* v. *Minet*, 8 Ch. D. 136; *Re Blockley*, 29 Ch. D. 250; *Re Ford*, 1902, 2 Ch. 605.

(*h*) *Ante*, p. 523.

(*i*) 2 Wms. Exors. 1508, 7th ed.; 1248, 10th ed.

(*k*) Stat. 1 Jac. II. c. 17, s. 7.

(*l*) *Jessop* v. *Watson*, 1 My. & K. 665; *Barnett* v. *Mann*, 1 My. & K. 672, n.; *Re Green*, 1911, 2 Ch. 275.

(*m*) *Lloyd* v. *Tench*, 2 Ves. sen. 215; *Durant* v. *Prestwood*, 1 Atk. 454; West. 448.

(*n*) *Duke of Rutland* v. *Duchess of Rutland*, 2 P. Wms. 216.

Next of kin.

as may be dead standing *in loco parentis* (*o*). Beyond brothers' and sisters' children, no right of representation belongs to the children of relatives, with respect to the shares which their deceased parents would have taken. And if there be neither brother, sister nor mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him.

Degrees of kindred traced according to the civil law.

In tracing the degrees of kindred in the distribution of an intestate's personal estate, no preference is given to males over females, nor to the paternal over the maternal line (*p*), nor to the whole over the half blood, as in the case of descent of real estate; nor do the issue stand in the place of the ancestor. The degrees of kindred are reckoned according to the civil law, both upwards to the ancestor and downwards to the issue, each generation counting for a degree (*q*). Thus from father to son, or from son to father, is one degree; from grandfather to grandson, or from grandson to grandfather, is two degrees; and from brother to brother is also two degrees, namely, one upwards to the father, and one downwards to the other son. So from uncle to nephew is three degrees, one upwards to the common ancestor, and two downwards from him; and from nephew to uncle is also three degrees, two upwards and one downwards. If, therefore, there be neither issue, father, brother, sister nor mother of the intestate living, such persons as are his next of kin, according to the rule above laid down, are entitled in equal shares *per capita* to his personal estate, subject to his wife's right to a moiety should she survive him. Thus if in such case there be any children surviving of any brother or sister of the

(*o*) *Re Gist*, 1896, 1 Ch. 38; 2 Ch. 280.

(*p*) *Moor* v. *Barham*, 1 P. Wms. 53.

(*q*) *Montagu* v. *Petty*, Pre. Cha. 593; *Wallis* v. *Hodson*, 2 Atk. 117; 2 Black. Com. 501, 515.

intestate, these do not then take *per stirpes* by representation of their deceased parent (as they would have taken if the mother or any brother or sister of the intestate had survived him (*r*)), but they take *per capita* as the intestate's next of kin, and along with any other surviving relatives, such as uncles or aunts, in the same degree of kindred (*s*). As the kindred becomes more distant, the number of persons entitled, if living, as well as the difficulty of proving their respective pedigrees, becomes prodigiously augmented (*t*).

Duty on shares of an intestate's estate.

The shares of persons claiming any personal estate under an intestacy are subject to the same duty as legacies to persons of the same degree of kindred; and the exemptions from duty are the same as in the case of legacies (*u*). If there be no next of kin, the Crown, by virtue of its prerogative, will take the intestate's personalty as *bona vacantia* (*x*), but subject always to the widow's right to a moiety in case she should survive (*y*).

The Crown.

(*r*) *Ante*, p. 525.

(*s*) *Walsh* v. *Walsh*, 1 Eq. Ca. Abr. 249, pl. 7; Prec. Ch. 54; *Lloyd* v. *Tench*, 2 Ves. sen. 213, 215.

(*t*) "It is at the first view astonishing," says Blackstone, "to consider the number of lineal ancestors which every man has within no very great number of degrees; and so many different bloods is a man said to contain in his veins as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and, by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate": 2 Black. Comm. 203. The number of collateral relations who may claim through such ancestors is of course far more numerous.

(*u*) Stats. 55 Geo. III. c. 184; 44 Vict. c. 12, ss. 36, 41, 42; 10 Edw. VII. c. 8, s. 58. See *ante*, pp. 500–502, n. (*p*).

(*x*) *Taylor* v. *Haygarth*, 11 Sim. 8; *Powell* v. *Merrett*, 1 Sim. & Giff. 381; *Re Hargreaves and Dean*, 1899, 1 Q. B. 325, 329; *Re Barnett's Trusts*, 1902, 1 Ch. 847. See also 39 & 40 Vict. c. 18 (repealing 15 & 16 Vict. c. 51); 47 & 48 Vict. c. 71.

(*y*) *Cave* v. *Roberts*, 8 Sim. 214.

Place of the half blood.

The division of the personal estate of an intestate, effected by the Statute of Distributions, is remarkable for its fairness. The only provision which might be amended is that which places the half blood on an equality with the whole. A corresponding equality in interest and feeling but rarely exists in actual life. The proper place for the half blood appears to be that now assigned to them in the descent of real estate, according to the recommendation of the Real Property Commissioners, namely, next after those of the same degree of the whole blood (*z*). The appointment of an executor or administrator, in whom the whole personal property is vested, with full power of disposition, tends greatly to simplify the title to leasehold estates and other property of a personal nature. It could be wished, however, that the office of an administrator were transmissible in the same manner as that of an executor. In other respects, the distribution of personal estate on intestacy approaches far more nearly to the disposition which the deceased himself would probably have made, than the descent of real property, either at the common law or according to the custom of gavelkind. A person possessed only of small landed property usually devises it to trustees for sale, with full power to give receipts to purchasers, and directs the division of the produce by his trustees amongst his children in such shares as he may think just, with regard to the provision already made for any of them in his lifetime. He does not leave his younger children to beggary in order that his whole property may devolve to his eldest son according to the course of the common law, a course pursued, as the author believed, in no other civilised country in the world (*a*). Neither does he leave it to all his sons equally in undivided shares, thus

Points in which distribution is preferable to descent.

(*z*) See Williams R. P. 235, 21st ed.

(*a*) Co. Litt. 191 a, n. (1), vi. 4.

inflicting an injustice on his daughters, and allowing all plans for the improvement of the lands to be checked by one dissentient voice, unless a partition should be resorted to, by which the property would be split up into parcels too small for the convenience of agriculture. If by any accident a man should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention. It is true that when property is large it is usually entailed on the eldest son and his issue subject to moderate portions for the younger children. This custom of primogeniture is suited to the institutions of our country, and to the habits of the class to which large landed property usually belongs, and the author had no wish to see it disturbed. The settlements, however, by which these entails are created are more frequently made by deed than by will. They almost invariably contain provisions for the portions of younger children, varying in amount with the value of the property; and, whether made by deed or will, they are usually long and intricate in their nature, providing for the numerous contingencies which may arise under the peculiar circumstances of each family. Nothing in fact can be more different than the devolution of an estate to the eldest son under a family settlement, and the descent on an intestacy to the eldest son as heir at law. In the one case he takes subject to the proper claims of the other members of his family; in the other he is bound to them by no obligation at all. There seems to be no method of making, in case of intestacy, any sort of disposition of landed property which might be reasonably simple, and at the same time resemble an ordinary family settlement. If such a settlement be not made by deed, the owner has ample power of effecting the same object by his will.

Primogeniture.

Intestacy, in fact, rarely happens to the owner of large landed property. The property which descends to heirs under intestacies, though large in the aggregate, is generally small in individual cases. When the wishes of all cannot be consulted, that which would have been the wish of the generality of intestates ought apparently to form the foundation of the rule. From a consideration of these circumstances the reader may perhaps be induced to think, that if, in case of intestacy, the rules for the devolution of real and personal estate were identical, and with some slight variations similar to those which now exist as to personalty, the law on this subject would be rendered both more simple and more just.

Descent and devolution to distant heirs and kindred.

The descent of real estate to distant heirs, and the devolution of personalty to distant kindred, involve an amount of learning and litigation, the abolition of which would perhaps be desirable. The family and near relations of an intestate have generally claims upon his bounty, which ought not to be disappointed by the accident of his decease without making a will. But distant relatives have seldom any such claims, nor consequently any expectation of such claims being fulfilled. To withhold from them, therefore, that which they never had expected to enjoy, would not be to inflict a loss. Under the present system, the property of an intestate who has no near relations, is not infrequently frittered away in expensive contests between opposing claimants, or else it devolves unexpectedly upon persons who, for want of previous education, are unable to make use of it with benefit either to themselves or to the community. In a country so heavily burdened as our own, any addition to the public income, not having the pressure of a tax, would be a very desirable acquisition. Such an addition might, as it appeared to the author, be very properly made by the devolu-

tion to the public of the properties of intestates having none but distant relatives. The country in which a man has lived, and in which his property has been acquired, or at any rate protected, has certainly some claims upon him,—claims which seem preferable to those of the man who, in the case of real estate, founds his title on his descent from the mother of the *most remote* male paternal ancestor of the intestate (*b*), or who claims a share in the personalty because he chances to be a survivor amongst the multitude standing in the fifth or sixth degree of a series of kindred which increases, as it grows distant, in geometrical progression (*c*).

Vesting.

We have seen (*d*) that the share, to which any person may be entitled under the Statutes of Distribution in an intestate's effects, vests in him on the death of the intestate and will be payable to his own executor or administrator if he die before the estate be actually distributed. It appears that, until this share has been ascertained, that is, until the intestate's funeral and testamentary expenses and debts have all been paid, it may be attached by the same process of equitable execution as is available against an unpaid share of a testator's residuary estate (*e*). But after all such expenses and the debts have been paid, the persons taking under the statutes become absolutely entitled to the intestate's remaining effects *in specie* as tenants in common (*f*); and it seems that their respective interests would then be subject to the appropriate processes of execution for debt according to the nature of the chattels so enjoyed.

Alienation for debt.

(*b*) See Williams, R. P. 236, 21st ed.

(*c*) The author's attention was since called to a similar proposal in Mill's Political Economy, vol. ii., pp. 272, 273, 2nd ed.

(*d*) *Ante*, p. 520.

(*e*) *Ante*, p. 514.

(*f*) *Cooper* v. *Cooper*, L. R. 7 H. L. 53, 65; *Blake* v. *Bryne*, 1908, A. C. 371, 379

CHAPTER V.

OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.

A VERY great change was made in the legal capacity of married women and in the respective rights of husband and wife by the Married Women's Property Act, 1882 (*a*). This Act came into operation on the 1st of January, 1883 (*b*); and the rights of wives who were married on or after that day, are chiefly regulated by its provisions. Married women, however, whose marriage took place before that date, remain in many respects still subject to the previous law. So that a knowledge of the law, which was in force before the commencement of this Act, will be necessary for the legal practitioner for some time to come. It is, moreover, impossible to understand the Act without some acquaintance with the previous law. For these reasons it is proposed in the present chapter to explain first the rights given to husband and wife respectively by the common law, and the important rights secured to married women by Courts of Equity, together with the modifications introduced by the Married Women's Property Act, 1870 (*c*), and other statutes; and then to consider the changes made by the Married Women's Property Act, 1882 (*d*).

§ 1. *At Common Law and in Equity prior to* 1883.

Ancient rights of husband and wife.

Down to the time when the Act of 1882 took effect, the principles which governed the legal (as

(*a*) Stat. 45 & 46 Vict. c. 75. See Williams' Conveyancing Statutes, pp. 373 *sq.*, 418, 421.

(*b*) Sect. 25; *ibid.*, p. 463, and see p. 436, note (*q*).

(*c*) Stat. 33 & 34 Vict. c. 93.

(*d*) Stat. 45 & 46 Vict. c. 75.

distinguished from the equitable) rights of husband and wife to personal property were traceable rather to the circumstances of ancient than of modern times. In ancient times landed property was by far the most important; and the wife was accordingly entitled to a provision out of the lands of her husband, in the event of her surviving him, which no alienation that he could make, nor any debts which he might incur, were able to set aside (*e*). But the law made no such provision in the wife's favour with regard to the husband's chattels; although the early law did indeed prevent a husband from bequeathing more than a certain part of his chattels away from his wife or children (*f*). As we have seen, however, this ancient rule came in time to take the place of an exception to the general law, which has not allowed a wife to take any interest in her husband's personalty, except in case of his intestacy (*g*). A husband, on the other hand, according to the established common law, was considered absolutely entitled to such personal chattels as his wife might possess (*h*). In this respect the law was then both simple and sufficient. By the act of marriage, the wife placed herself under the coverture or protection of her husband. She became in the law French of those days a *feme covert*. Thenceforth all demands to which she was personally liable were to be answered by her natural protector. The wife was considered as merged in her husband, and both were regarded as but one person (*i*). Accordingly, all rights in respect of personal estate, which were enjoyed by a man at the time of marriage, remained to him unaltered after marriage. A husband, moreover, enjoyed the full legal capacity for acquiring

(*e*) See Williams, R. P. 322, 21st ed.

(*f*) *Ante*, pp. 2, 470.

(*g*) *Ante*, pp. 476, 523.

(*h*) As to the early history of the law of husband and wife, see P. & M. Hist. Eng. Law, i. 465, ii. 397, *sq.*, 402, 425 *sq.*, 435.

(*i*) Williams, R. P. 306, 21st ed.

and exercising all rights with regard to property, just as much as an unmarried man. And in this respect the law still remains the same. But the capacity of the wife for acquiring and exercising rights over personal estate was by the common law mainly transferred to the husband during the period of her coverture, that is, during the continuance of the marriage (*k*). So long therefore as the coverture continued, the husband was absolutely entitled to all personal property which his wife might have or acquire, and which was in possession or was reduced by him into his possession. During the same period, however, he was liable to be sued, jointly with his wife, in respect of all contracts made by her before marriage (*l*), and all torts (*m*) committed by her either before or during the marriage (*n*). He might thus be made liable to the payment of all debts which she might have incurred before marriage. Until the passing of the statute above mentioned, these simple principles pervaded the law relating to the husband's interest in his wife's personal estate; although the several different species of personal estate to which modern civilisation has given rise, conjoined with the rules of equitable administration laid down by the Court of Chancery, and the anomalous rights conferred upon married women by the Married Women's Property Act, 1870 (*o*), gave to this branch of law a perplexity unknown to the simple, though somewhat harsh, rules of our ancestors.

The wife's chattels personal belong to her husband.

In the first place then, by the common law, personal property of the ancient kind, namely, chattels personal or movable goods, belonging to the wife at

(*k*) See Williams' Conveyancing Statutes 373—376.
(*l*) *Ibid.*, 396, 132—136.
(*m*) See *ante*, p. 162.
(*n*) See Williams' Conveyancing Statutes, 399 *sq.*
(*o*) Stat. 33 & 34 Vict. c. 93.

the time of her marriage, or given to her afterwards, became the absolute property of her husband in the same manner precisely as if they had been originally his own, or had been subsequently given to him (*p*). He might dispose of them as he pleased in his lifetime or by his will; they were subject to his debts; and if he died intestate, the wife had no further claim to them than to any other of his effects. So imperative was this rule, that if chattels personal in possession were given to a married woman jointly with a stranger, the law instantly severed the jointure, and made the husband and the stranger tenants in common (*q*).

Paraphernalia.

The only exceptions to this sweeping rule were the wife's *paraphernalia*, so called from the Greek παραφερνη, being things to which the wife was entitled over and above her dower. The wife's paraphernalia consisted of her apparel and ornaments suitable to her rank and degree (*r*): and gifts made by the husband to his wife of jewels or trinkets to be worn by her as ornaments were considered as part of her paraphernalia (*s*). These articles, equally with the wife's other personal chattels, might be disposed of by the husband in his lifetime (*t*), and, with the exception of the wife's necessary clothing, were also liable to his debts (*u*). The wife also herself had no power to dispose of them by gift or will

(*p*) Co. Litt. 300 a, 351 b; Bac. Abr. Baron and Feme (C.) 3; 1 Rop. Husband and Wife, 169.

(*q*) *Bracebridge* v. *Cook*, Plowden 416, 418; *Re Barton's will*, 10 Hare, 12; *Re Butler's trusts*, 38 Ch. D. 286.

(*r*) 2 Bl. Com. 436; 2 Rop. Husb. and Wife, 140; 11 Vin. Abr. tit. Executor (Z. 5).

(*s*) *Graham* v. *Londonderry*, 3 Atk. 394; *Jervoise* v. *Jervoise*, 17 Beav. 566. See *Re Breton's estate*, 17 Ch. D. 416, as to the jewellery; *Tasker* v. *Tasker*, 1895, P. 1; *Masson, Templier & Co.* v. *De Fries*, 1909, 2 K. B. 831, 839, 840.

(*t*) *Ibid.*; 2 Rop. Husb. and Wife, 111.

(*u*) 2 Bl. Com. 436; *Ridout* v. *Earl of Plymouth*, 2 Atk. 104; *Lord Townsend* v. *Wyndham*, 2 Ves. sen. 1, 7.

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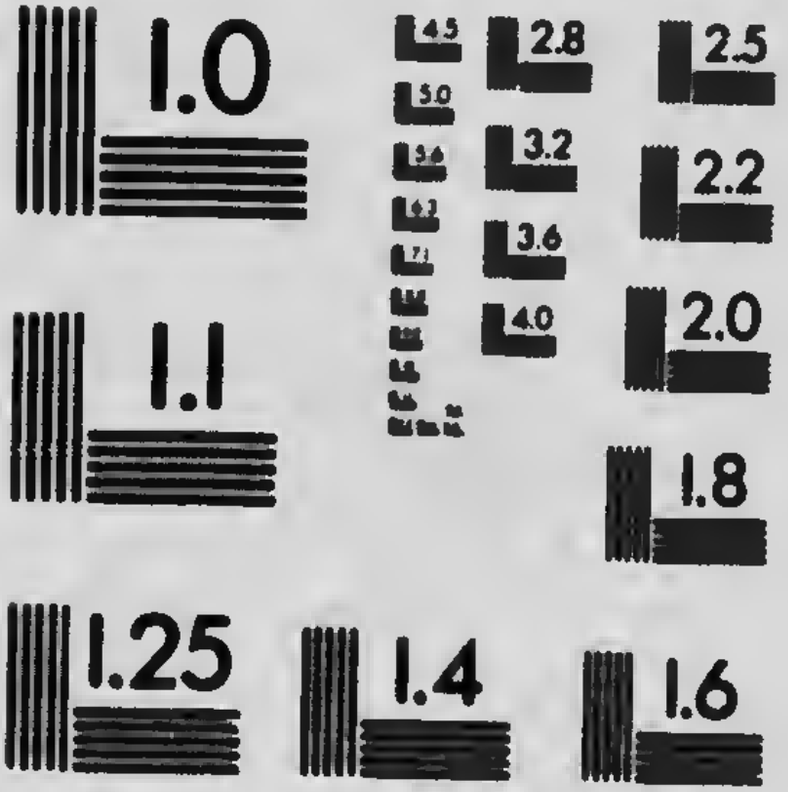

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during her husband's lifetime (*x*). But paraphernalia differed from the wife's other personal chattels in this respect, that the husband, though he might dispose of them in his lifetime, had no power to bequeath them away from his wife by his will (*y*). Gifts of jewels or trinkets made to the wife by a relative or friend, either upon or after her marriage, were generally considered in equity as intended for her *separate use* (*z*), in which case they were not reckoned amongst her paraphernalia, but were, as we shall hereafter see, exempt from the control and debts of her husband, and might be disposed of by the wife in the same manner as if she were unmarried.

Choses in action.

With regard to such of the wife's personal estate as was not in possession, but for which she had only a right to sue, the rights of the husband were different according as the proceedings against the persons liable to be sued were required to be taken in a court of law or of equity. Property of this nature, as we have already seen (*a*), is termed in law French *choses in action*: such as might be recovered by action at law were called legal choses in action, and such as might be recovered by suit in equity were called equitable choses in action. With regard to each of them, the rights of the husband were of a different kind, although in each the same rule applied, that if he could get them into his possession during the coverture he had a right to keep them, otherwise they would belong to his wife (*b*).

Husband might keep them if he could get them during coverture.

Legal choses in action.

Legal choses in action consist principally of debts due to the wife, and secured or not by bond or by

(*x*) 2 Rop. Husb. and Wife, 141.

(*y*) *Tipping* v. *Tipping*, 1 P. Wms. 730; *Northey* v. *Northey*, 2 Atk. 77.

(*z*) *Graham* v. *Londonderry*, 3 Atk. 394; 2 Rop. Husb. and Wife, 143.

(*a*) *Ante*, p. 28.

(*b*) 2 Bl. Com. 434; 1 Wms. Exors. 846 *sq.*, 7th ed.; 941 *sq.*, 10th ed.

bills or promissory notes. Of all these the husband had a right to receive payment, and, should payment have been refused him, he might sue for them in the joint names of himself and his wife (*c*); but bills and notes of the wife payable to order, being transferable by indorsement, might be indorsed by the husband alone (*d*), or sued for in his own name (*e*). All such legal choses in action as accrued to the wife *after* her marriage might be sued for by the husband, either in the joint names of himself and his wife, or in his own name only (*f*); but if the wife had really no interest, he could not of course make use of her name (*g*). If the husband sued in the joint names of himself and his wife, the benefit of the judgment of the Court survived to her in the case of his decease (*h*); but if he sued in his own name, the benefit of the judgment formed part of his own personalty. If, however, the husband should not have received the money in his lifetime, or should not have obtained judgment for it in his own name, on his decease his wife became entitled by survivorship to the chose in action so remaining still unreduced into possession (*i*), and bills and notes formed no exception to this rule (*k*): but if the wife died before her husband, these choses in action, still remaining unreduced, formed part of her personal estate; and her husband had to take out administration to her effects before he could proceed to recover them (*l*). When recovered, they belonged to him absolutely,

Husband surviving must take out administration.

(*c*) 1 Rop. Husb. and Wife, 213, 214; *Sherrington* v. *Yates*, 12 M. & W. 855. In this case the note was not payable to order, and therefore not negotiable.

(*d*) *Mason* v. *Morgan*, 2 A. & E. 30.

(*e*) *Burrough* v. *Moss*, 10 B. & C. 558.

(*f*) 1 Rop. Husb. and Wife, 213.

(*g*) *Abbott* v. *Blofield*, Cro. Jac. 644.

(*h*) 1 Vern. 396; 1 Rop. Husb. and Wife, 212.

(*i*) Co. Litt. 351 b.

(*k*) *Richards* v. *Richards*, 2 B. & Ad. 447; 36 R. R. 619; *Gaters* v. *Madeley*, 6 M. & W. 423; *Hart* v. *Stephens*, 6 Q. B. 937; *Scarpellini* v. *Atcheson*, 7 Q. B. 864.

(*l*) 1 Rop. Husb. and Wife, 205. See *Betts* v. *Kemplan*, 2 B. & Ad. 273.

as did any other personalty, which he might acquire as his wife's administrator (*m*). But the husband, as the administrator of the wife, was bound to satisfy her ante-nuptial debts and other personal liabilities out of the assets which he acquired in that capacity (*n*).

Exception.

The only exception to the rule, requiring the husband to take out administration to the wife in order to recover her chose in action, occurred in the case of the husband being entitled, in right of his wife, to "any estate in fee simple, fee tail, or for term of life, of or in any rents or fee farms;" in which case the husband, after the death of his wife, was empowered by statute (*o*) to recover the arrears accrued to his wife before marriage by action of debt or distress. But this provision did not apply to the rents reserved upon leases for years (*p*).

Equitable choses in action.

Equitable choses in action consist principally of legacies, residuary personal estate of testators, and money in the funds. But all kinds of personal property, including chattels real (*q*), vested in trustees, who were formerly answerable only to the Court of Chancery, were subject to a rule of equity, by which equitable choses in action were mainly distinguished from such as were merely legal. This rule was as follows: that the Court of Chancery would not assist, nor, if the wife should dissent, would it allow the husband to recover or receive any property of his wife recoverable only in that Court, without his settling a due proportion of such property on his wife and children (*r*). The right of the wife to such

(*m*) See Williams' Conveyancing Statutes, 375, 452–454; *Smart* v. *Tranter*, 43 Ch. D. 587.

(*n*) Williams' Conveyancing Statutes, 454.

(*o*) Stat. 32 Hen. VIII. c. 37 s. 3.

(*p*) *Prescott* v. *Boucher*, 3 B. & Ad. 849.

(*q*) *Hanson* v. *Keating*, 4 Hare 1. As to the question of the wife's equity to a settlement out of the rents and profits of hereditaments belonging to her for an equitable estate of freehold, see Williams R. P. 313 21st ed.

(*r*) It was formerly held that the wife's equity to a settlement did not extend to sums under 200*l*.; *Foden* v. *Finney*, 4 Russ.

Wife's equity for a settlement.

a provision was termed *the wife's equity for a settlement* (*s*). In fixing the proportion to be settled, a prior settlement was always taken into account (*t*). But where no settlement had previously been made, the proportion required to be settled on the wife was most frequently one-half (*u*); and sometimes the Court went so far as to require a settlement of the whole fund (*x*). Although the children were usually inserted in the settlement, yet the right was personal to the wife, and might be waived by her (*y*); nor would it survive to the children in case of her decease, before the Court had made its decree (*z*); but if she died after the decree, it would still have been carried into effect for the benefit of the children (*a*). The ultimate limitation in default of children was in favour of the husband absolutely; as, but for the equity to a settlement, the property would have been his own (*b*). This rule of the Court of Chancery, by which a settlement was enforced, was founded on one of the maxims of equity, that he who would have equity must do what is equitable (*c*); it could not, therefore, be enforced until the

428; but this distinction was afterwards abolished; *In re Cutler*, 14 Beav. 220; *Re Kincaid*, 1 Drew. 326.

(*s*) 1 Rop. Husb. and Wife, 256 *sq.*; *Re Briant*, 39 Ch. D. 471.

(*t*) *March* v. *Head*, 3 Atk. 720; *Lady Elibank* v. *Montolieu*, 5 Ves. 737; 5 R. R. 151; *Erskine's Trust*, 1 K. & J. 302; *Spirett* v. *Willows*, L. R. 1 Ch. 520.

(*u*) 1 Rop. Husb. and Wife, 260; *Archer* v. *Gardiner*, 1 C. P. Coop. 340.

(*x*) *Brett* v. *Greenwell*, 3 You. & Coll. 230; *Gardner* v. *Marshall*, 14 Sim. 575; *Scott* v. *Spashett*, 3 Mac. & G. 599; *Dunkley* v. *Dunkley*, 2 De Gex, M. & G. 390; *Marshall* v. *Fowler*, 16 Beav. 249; *Gent* v. *Harris*, 10 Hare, 383; *Re Welchman*, 1 Giff. 31; *Taunton* v. *Morris*, 11 Ch. D. 779; *Reid* v. *Reid*, 33 Ch. D. 220.

(*y*) *Murray* v. *Lord Elibank*, 13 Ves. 6; 7 R. R. 346. But the wife having once insisted on her right could not afterwards waive it; *Barker* v. *Lea*, 6 Mad. 330; *Whittem* v. *Sawyer*, 1 Beav. 593.

(*z*) *De La Garde* v. *Lemprière*, 6 Beav. 344; overruling *Steinmetz* v. *Halthin*, 1 Glyn. & Jam. 64; *Baker* v. *Bayldon*, 8 Hare, 210; *Wallace* v. *Auldjo*, 1 De Gex, J. & S. 643.

(*a*) *Groves* v. *Clarke*, 1 Keen, 132; *S. C.*, *Groves* v. *Perkins*, 6 Sim. 584.

(*b*) *Croxton* v. *May*, L. R. 9 Eq. 404; *Walsh* v. *Wason*, L. R. 8 Ch. 482.

(*c*) 2 P. Wms. 641.

time arrived when the fund became payable to the husband (*d*). If, however, as most frequently happened, the husband could obtain from the executor or trustee of the fund in question payment of it to himself, without the assistance of the Court, he had a right to do so, and in this case the wife's equity was at once excluded. And if the time of payment had arrived, the executor or trustee might safely pay over the fund to the husband, unless the wife should have already commenced a suit or an action to enforce her right to a settlement (*e*). The receipt of the fund by the husband, when it had become payable, was also an effectual bar to the wife's right by survivorship (*f*).

Effect of the husband's assignment.

If the husband, instead of obtaining payment of the fund, should have assigned it to a third person (*g*), or if he should have become bankrupt (*h*), his assignee or the trustee for his creditors would have taken subject to the wife's equity for a settlement, in the same manner as if no assignment had been made. But if the interest to which the wife was entitled consisted of an equitable estate for her life only, an assignee from the husband of such life interest for valuable consideration would have been entitled to hold it as against the wife's equity for a settlement (*i*); although she would have been entitled to a settlement as against his creditors'

(*d*) *Osborn* v. *Morgan*, 9 Hare, 432.

(*e*) 1 Rop. Husb. and Wife, 273; *Murray* v. *Lord Elibank*, 10 Ves. 90; 7 R. R. 346.

(*f*) 1 Rop. Husb. and Wife, 220; *Rees* v. *Keith*, 11 Sim. 388; *Cunningham* v. *Antrobus*, 16 Sim. 436.

(*g*) 1 Rop. Husb. and Wife, 271; *Malcolm* v. *Charlesworth*, 1 Keen. 73, 74; *Scott* v. *Spashett*, 3 Mac. & G. 599; *Carter* v. *Taggart*, 5 De Gex & Sm. 49; 1 De Gex, M. & G. 286. See *Ward* v. *Yates*, 1 Drew & S. 80.

(*h*) 1 Rop. Husb. and Wife, 268; *Taunton* v. *Morris*, 11 Ch. D. 779.

(*i*) *Elliott* v. *Cordell*, 5 Mad. 149; 21 R. R. 287; *Stanton* v. *Hall*, 2 Russ. & M. 175, 182; 34 R. R. 49; *Tidd* v. *Lister*, 10 Hare, 140, 154; 3 De Gex, M. & G. 857; *Re Duffy's Trust*, 28 Beav. 380.

trustee in bankruptcy (*k*). If the husband died before the assignee got possession of the fund, leaving his wife surviving, the wife's right by survivorship prevailed over the title of the creditors' trustee in bankruptcy (*l*) or the assignee for valuable consideration (*m*).

Assignment of wife's reversionary choses in action.

If the wife should have been entitled to any chose in action, whether legal or equitable, of a reversionary nature, the effect of an assignment by the husband was different in different circumstances. The wife could not assign (*n*); for by the act of marriage she deprived herself of all power so to do; and the husband could only assign to another the interest to which he might be entitled himself. Suppose, therefore, that the wife was entitled, on the death of A., a living person, to a sum of stock standing in the names of trustees, and that her husband made an assignment of this reversionary interest to B., a purchaser; the benefit which accrued to B. by virtue of this assignment, varied, according as the husband, the wife, or A., the tenant for life, happened to die first. If the husband died first, B. lost his purchase; for the wife having survived her husband, became on the death of A. entitled to the stock, which had never been reduced into the possession of her husband, or of B., his assignee (*o*). If A. died first, B. might then obtain a transfer of the stock, if the trustees chose to transfer it to him, and if the wife should not have brought a suit or an action to enforce her equity to a settle-

Example.

(*k*) *Wright* v. *Morley*, 11 Ves. 17; 8 R. R. 69; *Taunton* v. *Morris*, 11 Ch. D. 779.

(*l*) *Pierce* v. *Thornley*, 2 Sim. 167.

(*m*) *Hutchings* v. *Smith*, 9 Sim. 137; *Ellison* v. *Elwin*, 13 Sim. 309; *Ashby* v. *Ashby*, 1 Coll. 553; *Le Vasseur* v. *Scratton*, 14 Sim. 116; *Michelmore* v. *Madge*, 2 Giff. 183; *Prole* v. *Soady*, L. R. 3 Ch 220.

(*n*) Otherwise than under stat. 20 & 21 Vict. c. 57, stated below; *Seaton* v. *Seaton*, 13 App. Cas. 61.

(*o*) *Purdew* v. *Jackson*, 1 Russ. 1; 25 R. R. 1; *Honner* v. *Morton*, 3 Russ. 65; 27 R. R. 15.

ment (*p*). But if the trustees refused to transfer without the direction of the Court, or if the wife insisted upon her right, then, as we have seen (*q*), B. most probably obtained only half of the fund for his own benefit, and was obliged to settle the other half on the wife and children. If, however, the wife died first, then this chose in action, not having been reduced into possession, remained part of the wife's personal estate, like a legal chose in action under the same circumstances (*r*); and the husband, on taking out administration to his wife, was bound by his previous assignment. B. accordingly in this single event obtained the whole fund, subject, however, to the wife's debts, if any. It was once thought that if an assignment could be obtained from the tenant for life, of his life interest in a fund circumstanced as above mentioned, to the married woman entitled to the reversion, she would be in the same situation as if the whole fund had been originally held in trust for her absolutely; and that, after such an assignment, the whole fund might therefore be transferred to the husband (*s*). But it is contrary to the general principle of equity to allow the rights of parties to be affected by any merger or extinguishment of interests, and the doctrine in question was overruled (*t*).

Release of husband.

The same principles which applied to the assignment by a husband of his wife's reversionary interest in a chose in action, applied also to his release, which was as little binding on her as his assignment,

(*p*) *Greedy* v. *Lavender*, 13 Beav. 62.

(*q*) *Ante*, p. 539; and see *Roberts* v. *Cooper*, 1894, 2 Ch. 335.

(*r*) *Ante*, p. 537.

(*s*) *Creed* v. *Perry*, 14 Sim. 592; *Hall* v. *Hugonin*, *ib.* 595; *Bishopp* v. *Colebrook*, 11 Jur. 793.

(*t*) *Whittle* v. *Henning*, 11 Beav. 222; affirmed, 2 Phil. 731; *Hanchett* v. *Briscoe*, 22 Beav. 496.

in case of her being the survivor (*u*). If, however, the reversionary chose in action of the wife consisted of money charged on real estate, the wife's interest could either be released or assigned by a deed acknowledged by her, with the concurrence of her husband, under the provisions of the Fines and Recoveries Act, 1833 (*x*). The contrary was decided in a case (*y*), which may now be considered as overruled (*z*).

Money charged on real estate.

The Married Women's Reversionary Interests Act, 1857 (*a*), commonly called "Malins' Act," enabled every married woman, with the concurrence of her husband, by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate to which she should be entitled under any instrument (except her marriage settlement) *made after the 31st December*, 1857; also to release or extinguish any power in regard to any such personal estate; and also to release and extinguish her equity to a settlement out of her personal estate in possession under any such instrument as aforesaid. But every such disposition was required to be separately acknowledged by her in the manner required by the Fines and Recoveries Act, 1833 (*b*). And nothing therein contained was to extend to any reversionary interest to which she should become entitled under any instrument by which she should be restrained from alienating or

Disposition of wife's reversionary interests.

Release of powers.

Release of equity to a settlement.

To be separately acknowledged

(*u*) *Rogers* v. *Acaster*, 14 Beav. 445; *Harley* v. *Harley*, 10 Hare, 325.

(*x*) Stat. 3 & 4 Will. IV. c. 74. See Williams, R. P. 310, 21st ed.; 2 Wms. V. & P. 904, 905, 2nd ed.

(*y*) *Hobby* v. *Collins*, 4 De Gex & S. 289.

(*z*) Sugd. Real Property Statutes, 240, 1st ed.; 233, 2nd ed.; *Briggs* v. *Chamberlain*, 11 Hare, 69; *Tuer* v. *Turner*, 20 Beav. 560; see *Miller* v. *Collins*, 1896, 1 Ch. 573.

(*a*) Stat. 20 & 21 Vict. c. 57. See *Witherby* v. *Rackham*, 7 Times L. R. 380; *Re Elcom*. 1894, 1 Ch. 303; *Allcard* v. *Walker*, 1896, 2 Ch. 369.

(*b*) Stat. 3 & 4 Will. IV. c. 74. See Williams, R. P. 310, 21st ed.

affecting the same. Restraint on alienation is explained below (*c*). In the cases excepted from the operation of this Act a remedy is now provided by the Conveyancing Act, 1911 (*d*), which enables the Court, if it thinks fit and where it appears to the Court to be for the married woman's benefit, and with her consent, to bind by judgment or order any property or interest in property belonging to her, as to which she is restrained from anticipation or alienation, or which she is by law unable to bind or dispose of, including a reversionary interest arising under her marriage settlement.

Husband's liabilities at common law.

By the general rule of the common law, founded upon the same principle of the union of person in husband and wife (*e*), a married woman could not sue or be sued without her husband (*f*). It followed that, by the common law, a husband was liable to be sued jointly with his wife, during the continuance of her coverture, in respect of all contracts made by her before marriage (*g*), and all torts (*h*) committed by her either before or during the marriage (*i*). He might thus be made answerable for all the debts and liabilities of his wife, contracted previously to her marriage (*k*). But if judgment for any such debt, or in respect of any such liability, were not recovered during the continuance of the marriage, the husband's liability ceased, except to the extent of the assets to which he might be entitled as his wife's administrator (*l*); and if the wife survived she

(*c*) *Post*, p. 548.

(*d*) Stat. 1 & 2 Geo. V. c. 37, s. 7.

(*e*) *Ante*, p. 533.

(*f*) See Williams' Conveyancing Statutes, 396, and the authorities cited in notes (*h*), (*i*), thereto. For the exceptions to this rule, see *ib.* 396—398.

(*g*) See *ib.* 432—436.

(*h*) *Ante*, p. 162.

(*i*) See Williams' Conveyancing Statutes, 399 *sq.*

(*k*) Roper's Husband and Wife, 73; *Palmer* v. *Wakefield*, 3 Peav. 227; *Luard's case*, 1 De Gex, F. & J. 533; *Re Parkin*, 1892, 3 Ch. 510, 519, 520; *Cuenod* v. *Leslie*, 1909, 1 K. B. 880, 885, 887.

(*l*) *Heard* v. *Stamford*, 3 P. Wms. 409; *ante*, p. 538. See Williams' Conveyancing Statutes, 399, 400, 433, 454.

again became solely liable (*m*). The husband's liability for torts committed by his wife during her coverture also ceased when the marriage came to an end, unless judgment had been previously recovered (*n*). But as her administrator, he was liable to satisfy all her personal liabilities to the extent of the assets which he might acquire in that capacity (*o*), as we have seen (*p*). Besides the above liabilities of the husband, he was bound to maintain his wife and to supply her with necessaries suitable to her station in life (*q*).

Fraud on the husband's marital rights.

The burdens with which the husband was thus chargeable were regarded as the consideration which he paid for his marital rights in his wife's property. It was therefore a rule of law, that the husband should not, previously to the marriage, be defrauded of those rights by his intended wife (*r*). Accordingly, if the wife, after an engagement to marry, assigned away any of her property without the knowledge and consent of her intended husband, such assignment was void, as a fraud on his marital rights (*s*). And the circumstance of the intended husband's being ignorant of her possession of the property in question was immaterial (*t*).

The husband might authorise his wife to dispose of her personal estate by her will.

The right of the husband to the whole of his wife's personal estate, in the event of her decease in his lifetime, might be waived by his giving her authority

(*m*) See Williams' Conveyancing Statutes, 399, 432, 433.

(*n*) See *ib.*, 399, 400, 401, 433, and n. (*u*); *Cuenod* v. *Leslie*, ubi sup.

(*o*) See *ib.*, 456.

(*p*) *Ante*, p. 538.

(*q*) See *Manby* v. *Scott*, 1 Sid. 109, 120, 124, 125 (*S. C.*, 2 Smith, L. C.); Bayley, J., *Montague* v. *Benedict*, 3 B. & C. 631, 635; 27 R. R. 444; Bramwell, L. J., *Debenham* v. *Mellon*, 5 Q. B. D. 394, 398; Selborne, C., *S. C.*, 6 App. Cas. 24, 31; Blackburn, L. A., *ib.*, 35, 36.

(*r*) *Countess of Strathmore* v. *Bowes*, 1 Ves. jun. 22, 28; 1 R. R. 76.

(*s*) *England* v. *Downs*, 2 Beav. 522; *Taylor* v. *Pugh*, 1 Hare, 608; *Prideaux* v. *Lonsdale*, 4 Giff. 159; 1 De G., J. & S. 433; *Downes* v. *Jennings*, 32 Beav. 290.

(*t*) *Goddard* v. *Snow*, 1 Russ. 485; 25 R. R. 111.

to dispose of such estate, or any part of it, by her will; and such a will was valid and binding on the husband if he once allowed it to be proved (*a*). But during the wife's lifetime, and even after her death, until probate of the will, this authority might be revoked; and if the husband died before the wife, such a will was not binding on the wife's next of kin (*x*).

Wife's separate estate in equity.

So far we have mainly considered the rights arising out of the relation of husband and wife at common law. Let us now examine the rights which could be asserted by married women in Courts of equity. We have already noticed the wife's equity to a settlement (*y*). Besides this right, the jurisdiction of the Court of Chancery secured to married women other most important equitable rights in respect of property (*z*). For that Court enabled a married woman to enforce a *trust* imposed on any person with regard to property of any kind, of which he was the legal owner, to hold and apply the same for her *separate use* (*a*). And in that Court she was considered as a feme sole with respect to her *separate estate*, as her interest in property settled on trust for her separate use was generally called (*b*). Power to dispose of the equitable interest (*c*) in property of any kind might, therefore, be given to a married woman, independently of her husband, by means of a trust for her *separate use*. When personal estate was so given, in equity the wife had the same powers of ownership as if she were a feme sole; she might accordingly dispose of her interest in such

(*a*) 1 Rop. Husb. and Wife, 169, 170. See *Re Atkinson*, 1899, 2 Ch. 1.

(*x*) 15 Ves. 156; *Noble* v. *Willock*, L. R. 8 Ch. 778; L. R. 7 H. L. 580.

(*y*) *Ante*, p. 539.

(*z*) See James, L. J., *Ashworth* v. *Outram*, 5 Ch. D. 923, 941.

(*a*) *Bennet* v. *Davis*, 2 P. W. 386. See Williams' Conveyancing Statutes, 374, 396.

(*b*) See *Johnson* v. *Gallagher*, 3 De Gex, F. & J. 494; *Taylor* v. *Meads*, 4 De Gex, J. & S. 597.

(*c*) See *ante*, p. 26.

property without her husband's concurrence, either in her lifetime or by her will (*d*). But if she died in his lifetime without having made any disposition, her husband became entitled to it either in his marital right (*e*) or as her administrator (*f*), according as the property were in possession or in action (*g*). A trust for a woman's *separate use* was properly and technically created by means of the words "separate use." But a direction that her receipt alone should be a sufficient discharge (*h*), would also create a trust for her separate use. A gift, however, to a woman for her sole use was decided not to create a trust for her separate use, unless aided by the context (*i*). And a gift to a woman for her own use (*k*), or to be paid into her proper hands (*l*), or even to be paid into her proper hands for her own proper use and benefit (*m*), was not sufficient to exclude the rights of her husband.

Gifts of income for a woman's separate use.

A simple gift of property for a married woman's separate use has not been so usual as the gift of the income only of the property during her life or during the joint lives of herself and her husband. A gift of the income of property for a woman's separate use might be made either after her marriage, or in contemplation of marriage, or whilst she was sole; and the gift might be made either independently of her present husband, if any, or of any future husband.

(*d*) *Fettiplace* v. *Gorges*, 1 Ves. Jun. 46; 1 R. R. 79; *S. C.*, 3 Bro. C. C. 8; 2 Rop. Husb. and Wife, 182.

(*e*) *Molony* v. *Kennedy*, 10 Sim. 254; *Tugman* v. *Hopkins*, 4 Man. & Gran. 389.

(*f*) *Watt* v. *Watt*, 3 Ves. 246, 247; *Proudley* v. *Fielder*, 2 My. & Keen, 57.

(*g*) See Williams' Conveyancing Statutes, 452—454.

(*h*) *Lee* v. *Prideaux*, 3 Bro. C. C. 381.

(*i*) *Massy* v. *Hayes*, L. R. 4 H. L. 288; *Gilbert* v. *Lewis*, 1 De Gex, J. & S. 38. See Seton on Judgments, 859, 7th ed., and the cases there cited; *Bland* v. *Dawes*, 17 Ch. D. 794.

(*k*) *Roberts* v. *Spicer*, 5 Madd. 491; *Kensington* v. *Dollond*, 2 My. & K. 184.

(*l*) *Tyler* v. *Lake*, 2 Russ. & Myl. 183; 34 R. R. 53.

(*m*) *Blacklow* v. *Laws*, 2 Hare, 49.

When the gift was made to a woman's separate use, independently of any future husband, then in equity the act of her marriage conferred no interest in the property on her husband, but she enjoyed, after marriage, the same interest and power of disposition as she had before (*n*). It has been, however, more usual, when the income only of property has been given to a wife's separate use, to insert a condition that she shall not dispose of the same in any mode of anticipation. Conditions restraining the alienation of property are generally invalid, as being contrary to the policy of the law. But the Courts of Equity made an exception to this rule in favour of married women, and having once established a trust for a woman's separate use, they permitted such a trust to be made effectual by depriving the wife herself of the power of disposition (*o*). When the income of property was given to a woman's separate use, without power of anticipation, she was not thereby deprived of the power of alienation so long as she continued single (*p*). Previously to or in contemplation of marriage she might therefore make such disposition or settlement of such income as she might think proper. But if she married without a settlement, the restraint on alienation then attached, and so long as she remained under coverture she had no further power than that of receiving the income as it grew due (*q*). On her widowhood her power of alienation

Restraint on anticipation.

(*n*) *Tullett* v. *Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough* v. *Borman*, 1 Beav. 34; 4 Myl. & Cr. 377. If the gift were made to the woman directly for her separate use, without the intervention of trustees, the husband acquired his marital rights in the property at law, but was in equity a trustee thereof for her separate use; *Bennet* v. *Davis*, 2 P. W. 316; *Newlands* v. *Paynter*, 10 Sim. 377, 4 My. & Cr. 408, 418; *Gardner* v. *Gardner*, 1 Giff. 126.

(*o*) *Brandon* v. *Robinson*, 18 Ves. 434; 11 R. R. 226; *Robinson* v. *Wheelwright*, 6 De Gex, M. & G. 535; and see *Bateman* v. *Faber*, 1898, 1 Ch. 144.

(*p*) *Woodmeston* v. *Walker*, 2 Russ. & Myl. 197; 34 R. R. 56; *Brown* v. *Pocock*, 2 Russ. & Myl. 210.

(*q*) *Tullett* v. *Armstrong*, 1 Beav. 1; 4 Myl. & Cr. 390; *Scarborough* v. *Borman*, 1 Beav 34; 4 Myl. & Cr. 377; *Clive* v. *Carew*, 1 John. & H. 199.

again revived (*r*); but it ceased on her second marriage without having previously made any disposition (*s*), provided the restriction on alienation were not, by the terms of the gift, confined to her first marriage (*t*). The intention to restrain alienation ought always to have been clearly expressed. A direction to pay the income of property into the hands of a married woman, and not otherwise (*u*), or on her personal appearance and receipt (*x*) was held not to be sufficient to restrain her from disposing of her interest, the words being considered as intended only to exclude the marital claims of her husband. But if an intention could be collected from the terms of the instrument, not only to exclude the husband's claims, but also to prevent the wife from anticipating, such intention was allowed to prevail, although it might have been expressed rather in popular than in strictly technical language (*y*). A restraint on anticipation may be attached to a gift of the corpus of some fund, of the nature of personal estate, for the separate use of a married woman, so as to prevent her from alienating the fund, or the income thereof, during her coverture, otherwise than by will (*z*). But if a mere fund of money, not producing income, be given for the separate use of a married woman, with a restraint on anticipation, it appears that, unless the donor should also have declared an intention that she should enjoy the income only of the fund during her coverture, she

Restraint on anticipation attached to gift of corpus of property.

(*r*) *Barton* v. *Briscoe*, Jacob, 603.

(*s*) *Tullett* v. *Armstrong*, ubi supra; *Re Gaffee*, 1 Mac. & G. 541; *Hawkes* v. *Hubback*, L. R. 11 Eq. 5.

(*t*) *Moore* v. *Morris*, 4 Drew. 33.

(*u*) *Acton* v. *White*, 1 Sim. & Stu. 429; 24 R. R. 203.

(*x*) *Ross's Trusts*, 1 Sim. N. S. 196.

(*y*) *Brown* v. *Bamford*, 1 Phil. 620; *Moore* v. *Moore*, 1 Coll. 54; *Harrop* v. *Howard*, 3 Hare, 623; *Harnett* v. *Macdougall*, 8 Beav. 187; *Field* v. *Evans*, 15 Sim. 375; *Baker* v. *Bradley*, 7 De Gex. M. & G. 597; *Goulder* v. *Camm*, 1 De Gex, F. & J. 146. See *Stogdon* v. *Lee*, 1891, 1 Q. B. 661.

(*z*) See *Re Currey*, 32 Ch. D. 361; *Re Grey's Settlements*, 34 Ch. D. 85, 712.

will be entitled to have the money paid to her, and to dispose thereof as she may think fit (*a*). Under the Conveyancing Act, 1881 (*b*), a married woman might, if it appeared to the Court to be for her benefit, obtain an order of the Court enabling her to deal with any property of hers, notwithstanding that she were restrained from anticipation. This provision is now replaced by the above quoted enactment of the Conveyancing Act, 1911 (*c*).

Contract by married woman.

By the common law, a married woman was, as a general rule, incapable of binding herself by contract, and any contract, which she purported to make, was void as against her (*d*). In equity, however, a married woman had power to bind any separate estate (*e*), to which she was entitled *without* restraint on anticipation, by any general pecuniary engagements made by her with reference to such separate estate. And satisfaction of any such engagement could be enforced in a Court of equity out of any separate estate, to which she was entitled, without restraint on anticipation, at the time when she entered into the engagement (*f*).

General engagements binding separate estate.

Powers.

In addition to trusts for separate use, powers of appointment might, as we have seen (*g*), be given to married women independently of their husbands, by means of which they might be enabled to dispose of property without their husband's concurrence; and any appointment under a general power might be

(*a*) See *Re Ellis's Trusts*, L. R. 17 Eq. 409; *Re Creighton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Bown, O'Halloran* v. *King*, 27 Ch. D. 411; *Re Tippetts and Newbould's Contract*, 37 Ch. D. 414. As to the effect of a restraint on anticipation attached to a gift of real estate of inheritance, see *Baggott* v. *Mear*, 1 Ph. 627.

(*b*) Stat. 44 & 45 Vict. c. 41, s. 39; see *Re Pollard's Settlement*, 1896, 2 Ch. 552; *Re Blundell*, 1901, 2 Ch. 221.

(*c*) *Ante*, p. 544.

(*d*) *Ante*, p. 174.

(*e*) See *ante*, p. 546.

(*f*) See Williams' Conveyancing Statutes, 393, 394, 395, 414, and the cases there cited; *Re Lady Hastings*, 35 Ch. D. 94.

(*g*) *Ante*, pp. 406, 546, 547.

made by a married woman in favour of her husband, as well as of any other person.

Marriage settlements

In modern times the inconvenience of the common law rules respecting the property of married women was obviated in practice, amongst well-to-do people, by the custom of making a settlement in contemplation of marriage. Such settlements were made possible by the modern rules of equity before referred to (*h*), which enabled interests for life and in remainder to be created in any personal estate placed in the hands of trustees, and which enforced trusts for the separate use of married women. When personal property was settled on the part of an intended wife previous to her marriage, it was generally transferred to trustees, upon trust for investment and to pay the income of the invested funds for her separate use during the coverture, without power of anticipation (*i*). A provision was thus secured for her which was inalienable by any act or engagement either of her husband or herself; except, since the Conveyancing Act of 1881, with the approbation of the Court (*k*). After the determination of the coverture, the income of the settled funds was usually given in trust for the survivor of the husband and wife for life. After the death of the survivor, the capital and income of the trust funds were given in trust for the children or issue of the marriage in such shares as the parents, or the survivor of them, should appoint (*l*), and in default of appointment for the children in equal shares, as to sons on their attaining the age of twenty one, as to daughters on their attaining that age or marrying under it (*m*). In default of the children of the marriage, any personalty settled on the part of an

(*h*) *Ante*, pp. 395—397, 546.
(*i*) *Ante*, pp. 548—550.
(*k*) *Ante*, pp. 541, 550.
(*l*) *Ante*, pp. 106—110.
(*m*) *Ante*, p. 115.

intended wife was commonly given in trust for her absolutely, if she should survive her husband, but if he should survive her, then upon trust for such purposes as she should by will appoint (*n*), and in default of appointment for her next of kin, so as to exclude her husband from succeeding to the whole of the settled funds as her administrator (*o*). And the event of the acquisition by the wife of further property during the marriage was frequently provided for by an agreement for the settlement of such property upon the same trusts (*p*). In most marriage settlements of personalty a certain amount of property was settled on the part of the intended husband as well as of the intended wife. In such cases the property settled on the husband's part was most frequently limited in trust for himself for life, then for his wife for her life, if she should survive him, with remainder to the children as in the case of property settled by a wife. But in default of children, it was the practice to limit any property settled by the husband in trust for himself absolutely, whether he survived his wife or not; for it was not considered necessary to exclude the wife from her widow's share in his personalty in case he should die in her lifetime intestate and without children. And as the widow's share upon intestacy was the only interest given by law to a wife in her husband's personalty (*q*), there was no reason for any agreement for the settlement of property to be afterwards acquired by the husband; and such agreements were quite uncommon (*r*). Here it may be noted that, although the Married Women's Property Act, 1882, has made great changes in the law of husband and wife it has had little or no effect upon the custom of making

(*n*) *Ante*, p. 406.
(*o*) *Ante*, p. 524.
(*p*) *Ante*, p. 131.
(*q*) *Ante*, p. 533.
(*r*) *Ante*, p. 433. As to the trusts usual in settlements of personalty, see Davidson, Prec. Conv., III. pp. 68—220, 3rd ed.; Williams on Settlements, 123—169.

settlements before marriage. And the trusts, upon which it is usual so to settle property, are substantially the same as were in use before the Act. A form of marriage settlement of personalty, containing the usual clauses, is inserted in the Appendix; and if the reader will peruse this, he will see how such settlements are now carried out in practice.

Infant's marriage settlements.

Under the Infant Settlements Act, 1855 (*s*), every infant not under twenty, if a male, and not under seventeen if a female, was enabled to make a binding settlement, upon marriage, of his or her property, whether real or personal, provided the sanction of the Court of Chancery were obtained. This sanction must now be given by the Chancery Division of the High Court (*t*). Apart from the provisions of this Act, a marriage settlement made by an infant is, as a rule, voidable at his or her option within a reasonable time after coming of age (*u*). But in consequence of the common law, which made an absolute gift to the husband of his wife's choses in possession (*x*), when the intended wife only was an infant, a settlement made by her and her intended husband of her personal estate in possession was valid. For the settlement in such a case was in fact not made by the wife, but by the husband, who, being adult, was bound by its provisions to the extent of the interest, which he would have taken had no settlement been made (*y*). For the same reason a settlement executed by a female infant and her intended husband of her choses in action, or her personalty to be afterwards acquired, could not be avoided by her with respect

(*s*) Stat. 18 & 19 Vict. c. 43, extended to the Court of Chancery in Ireland by 23 & 24 Vict. c. 83. See *Re Dalton*, 6 De G., M. & G. 201; *Seaton* v. *Seaton*, 13 App. Cas. 61; 2 Wms. V. & P. 791.

(*t*) *Ante*, p. 161.

(*u*) *Ante*, pp. 101, 173; 2 Wms. V. & P. 871, and n. (*m*), 2nd ed.

(*x*) *Ante*, p. 535.

(*y*) *Trollope* v. *Linton*, 1 S. & S. 477, 485; 24 R. R. 211.

to such choses in action or personalty as fell into possession during the coverture (*z*): but she might avoid such a settlement after the coverture had come to an end, with regard to her choses in action, which had not been reduced into possession (*a*). When a female infant has covenanted to settle any property, which she may acquire after marriage, it is within her own choice either to confirm or avoid the settlement with regard to any separate estate (*b*) or property which she may afterwards acquire; and if she take no steps to avoid the covenant within a reasonable time after attaining her majority, it will remain binding on her. But if she elect to avoid her contract, any beneficial interest given to her by the settlement in any other property, except such as she is restrained from anticipating (*c*), is liable in equity to be impounded to compensate any other persons entitled under the settlement, who would suffer damage by her avoidance of her covenant (*d*).

Married Women's Property Act, 1870.

Although the rules of equity, which secured to married women the enjoyment of their separate estate (*e*), afforded a substantial protection against the rigour of the common law, their aid could not be invoked unless a trust for the separate use of a wife had been created. And such trusts could only

(*z*) See *ante*, pp. 536–543.

(*a*) *Ellison* v. *Elwin*, 13 Sim. 309; *Le Vasseur* v. *Scratton*, 14 Sim. 116.

(*b*) *Ante*, p. 546.

(*c*) See *Re Vardon's Trusts*, 31 Ch. D. 275; *Haynes* v. *Foster*, 1901, 1 Ch. 361.

(*d*) See *Smith* v. *Lucas*, 18 Ch. D. 531; *Balder* v. *Pigott*, 22 Ch. D. 263; *Hamilton* v. *Hamilton*, 1892, 1 Ch. 396; *Edwards* v. *Carter*, 1893, A. C. 360; *Viditz* v. *O'Hagan*, 1900, 2 Ch. 87, 96—98, 100. It has also been held that a female infant entering into such a covenant may elect, on attaining full age, to confirm or avoid it, although she be then under coverture and be entitled to the property to be bound by the covenant at common law, and not as her separate estate, and although there be no question of her election between that property and other property given to her by the settlement; *Re Hodson*, 1894, 2 Ch. 421. But the writer has endeavoured elsewhere to show that this decision was given on erroneous principles; see 2 Wms. V. & P. 940—942 and n. (*z*), 2nd ed.

(*e*) *Ante*, pp. 546—550.

arise by the express declaration either of the husband or of the parties from whom the wife derived her title to any property. But by the Married Women's Property Act, 1870 (*f*), certain particular kinds of property were declared to belong to married women for their separate use, independently of the existence of any express trust for that purpose (*g*). This Act

(*f*) Stat. 33 & 34 Vict. c. 93, passed 9th Aug., 1870.

(*g*) These were (1) the wages and earnings of any married woman acquired or gained by her after the passing of the Act in any employment, occupation, or trade, in which she was engaged or which she carried on separately from her husband, and any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of the same; sect. 1; see *Ashworth* v. *Outram*, 5 Ch. D. 923; *Re Poole's Estate*, 6 Ch. D. 739; *Lovell* v. *Newton*, 4 C. P. D. 7. (2) Any personal estate, to which any woman married after the passing of the Act, should become entitled during her marriage as one of the next of kin of an intestate. (3) Any sum of money, not exceeding 200*l*., to which any woman married after the passing of the Act should become entitled during her marriage under any deed or will; sect. 7; see *Howard* v. *Bank of England*, L. R. 19 Eq. 295; *Re Voss*, 13 Ch. D. 504. (4) The rents and profits of any freehold, copyhold, or customaryhold property, which should descend upon any woman married after the passing of the Act as heiress or co-heiress of an intestate; sect. 8; see Williams, R. P. 316, 317 and n. (*p*), 21st ed. In the last three cases, however, the property was only to belong to the wife for her separate use subject and without prejudice to the trusts of any settlement affecting the same; see sects. 7 and 8. (5) Any deposit or annuity made or granted after the Act, under the Savings Banks and Post Office Savings Banks Acts, in the name of a married woman or of a woman who afterwards married; sect. 2. The Act also gave to any married woman, or any woman about to be married, the right to have the following properties made to stand, or registered or entered in her name, or intended name, as a married woman entitled to her separate use, and declared that any property so made to stand, registered or entered should be deemed to be her separate property and should be transferable, and the dividends and profits thereof payable, as if she were an unmarried woman, viz.—(6) Any sum not less than 20*l*., forming part of the public stocks or funds, to which she was entitled; sect. 3; see *Re Butlin's Trusts*, 19 W. R. 241; *Howard* v. *Bank of England*, L. R. 19 Eq. 295. And see stats. 40 & 41 Vict. c. 51, s. 19; 42 & 43 Vict. c. 43, s. 10. (7) Any fully paid-up shares or any debenture or debenture stock, or any stock of any incorporated or joint stock company, to the holding of which no liability was attached, and to which she was entitled; sect. 4; see *R.* v. *Curnatic Rail Co.*, L. R. 8 Q. B. 209. (8) Any share, benefit, debenture, right or claim whatsoever in, to or upon the funds of any industrial and provident society, friendly society, benefit building society, or loan society, duly registered, certified or enrolled under the Acts relating to such societies respectively, to the holding of which share, benefit, or debenture no liability was attached, and to which she was entitled; sect. 5.

further gave to a married woman the right to maintain an action in her own name for the recovery of any property by the Act declared to be her separate property, or of any property belonging to her before marriage, and which her husband should, by writing under his hand, have agreed with her should belong to her after her marriage as her separate property; and gave to her the same remedies, both civil and criminal, in her own name, for the protection and security of such property, as if the same belonged to her as an unmarried woman (*h*). But it was held that this Act did not confer on a married woman any general capacity to bind herself by contract, or to hold property, independently of her husband, *at law* (*i*).

(*h*) Sect. 11; see *Summers* v. *City Bank*, L. R. 9 C. P. 580; Jessel, M.R., *Howard* v. *Bank of England*, L. R. 19 Eq. 295, 300, 301.

(*i*) See Williams' Conveyancing Statutes, 377—382. The Act rendered a wife, having separate property, liable to an order of justices for the maintenance of her husband, if he became chargeable to any union or parish; and subjected her to the same liability as a widow for the maintenance of her children; sects. 13, 14. The same Act provided that a husband should not by reason of any marriage which should take place after the Act had come into operation, be liable for the debts of his wife contracted before marriage, but the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy such debts as if she had continued unmarried; see *ante*, p. 534; stat. 33 & 34 Vict. c. 93, s. 12; *Sanger* v. *Sanger*, L. R. 11 Eq. 470; *London and Provincial Bank* v. *Bogle*, 7 Q. B. D. 337; *Mercier* v. *Williams*, 9 Q. B. D. 337; 10 App. Cas. 1; Williams' Conveyancing Statutes, 436. This provision was, however, repealed by the Married Women's Property Act, 1874, so far as it removed a husband's liability for his wife's ante-nuptial debts, and as respects marriages after the passing of that Act; and it was enacted that a husband and wife married after the passing of that Act might be jointly sued for any such debt; stat. 37 & 38 Vict. c. 50, s. 1, passed 30th July, 1874; see *De Greuchy* v. *Wills*, 4 C. P. D. 362; *Matthews* v. *Whittle*, 13 Ch. D. 811; *Williams* v. *Mercier*, 10 App. Cas. 1; *Downe* v. *Fletcher*, 21 Q. B. D. 11; *Axford* v. *Reid*, 22 Q. B. D. 548. But the liability of the husband in any such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by the wife before marriage, was limited to the value of his interest in any property which he had acquired in right of his wife at common law or from her by settlement in contemplation of the marriage, and of any property, real or personal, which the wife in contemplation of marriage should, with the husband's consent, have transferred to any person with the view

Liabilities of husbands under Married Women's Property Acts, 1870 and 1874.

§ 2. *Under the Married Women's Property Act*, 1882.

Married Women's Property Act, 1882.

The Married Women's Property Act, 1882 (*k*), came into operation on the 1st of January, 1883 (*l*), and, unlike the Act of 1870, completely changed the capacity of married women with respect to property. By this Act (*m*), a married woman is capable of acquiring, holding, and disposing by will or otherwise of any real or personal property (*n*) in the same manner as if she were a *feme sole*, without the intervention of any trustee. Every woman, who marries after the commencement of the Act, is entitled to hold and dispose of, as her separate property, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage (*o*). Every woman married before the commencement of the Act is entitled to hold and dispose of, as her separate property, all real and personal property, to which her title shall accrue after the commencement of the Act (*p*). The general effect of these provisions is to invest married women with a special capacity of acquiring and exercising *legal* rights of ownership, apart from their husbands (*q*), in respect of any property, which becomes their separate property by virtue of the Act (*r*); and to deprive a husband of

of defeating or delaying her existing creditors; see *ante*, pp. 544, 545: sects. 2—5, *Fear* v. *Castle*, 8 Q. B. D. 380. The above-mentioned Acts of 1870 and 1874 were repealed by the Married Women's Property Act, 1882, but without prejudice to any act done or right acquired while either of the repealed Acts was in force; and the liability of husbands married before the 1st of January, 1883, in respect of their wives' ante-nuptial contracts and torts was not affected by such repeal; see stat. 45 & 46 Vict. c. 75, ss. 14, 22; Williams' Conveyancing Statutes, 422—444, 449.

(*k*) Stat. 45 & 46 Vict. c. 75, amended by 56 & 57 Vict. c. 63.

(*l*) Stat. 45 & 46 Vict. c. 75, s. 25.

(*m*) Stat. 45 & 46 Vict. c. 75, s. 1, sub-s. 1.

(*n*) Including things in action; s. 24.

(*o*) Sect. 2.

(*p*) Sect. 5. Reversionary interests given to wives before the Act but falling into possession after the Act are not their separate property; *Reid* v. *Reid*, 31 Ch. D. 402; *Re Bacon*, 1907, 1 Ch. 475.

(*q*) Cf. *ante*, pp. 533, 534, 540, 541.

(*r*) See *Re Price*, 28 Ch. D.

all his common law marital rights (*s*) in respect of any personal property, which so becomes his wife's separate property (*t*), except only the right of administering and succeeding to her effects, in case she die intestate in his lifetime (*u*). It is, however, provided (*x*) that nothing in the Act contained shall interfere with or 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: and the construction placed upon this proviso was that such settlements were to have the same effect as if the Act had never passed. Thus, as we have seen (*y*), it was held that a covenant by a husband alone contained in a settlement made before the Act to settle his wife's after-acquired property would bind personal property, to which she might after the Act become entitled as her separate property, if not expressly given for her separate use. And it was also held that an ante-nuptial settlement made after the Act by an intended husband and infant wife of her personal estate in possession or in action should have the same effect as it would have had at common law (*z*), and was therefore completely binding on the wife as regards her choses in

709; *Re Cano*, 43 Ch. D. 12; deciding that a will made by a wife during coverture of her separate property was not effectual by virtue of the Act to pass property acquired by her after her husband's death. These decisions followed the law laid down before the Act in the case of wills made by wives of their separate estate and not re-executed after their husband's death; *Willock* v. *Noble*, L. R. 7 H. L. 580. But now, by the effect of stat. 56 & 57 Vict. c. 63, s. 3, the will of a married woman made during coverture is to take effect as if it had been executed immediately before her death, whether she had or had not any separate property at the time of making it, and need not be re-executed after her husband's death; *Re Wylie*, 1895, 2 Ch. 116; *Re James*, 1910, 1 Ch. 157. And see *Re Davenport*, 1895, 1 Ch. 361.

(*s*) *Ante*, pp. 534—546.

(*t*) Wearing apparel bought by the wife with money supplied by the husband for the purpose is now *primâ facie*, her separate property and not paraphernalia; *Masson, Templier & Co.* v. *De Fries*, 1909, 2 K. B. 831; cf. *ante*, p. 535

(*u*) *Ante*, pp. 524, 537, 547.

(*x*) Stat. 45 & 46 Vict. c. 75, s. 19.

(*y*) *Ante*, p. 432.

(*z*) *Ante*, pp. 553, 554.

possession (*a*), and with respect to such of her things in action as should fall into possession during the coverture (*b*). But the law made by the above provision of the Act of 1882 and these decisions was altered by the Married Women's Property Act, 1907 (*c*), as regards settlements or agreements for settlements made after that year by a husband or intended husband, whether before or after marriage, respecting the property of any woman he might marry or have married. And any such settlement or agreement is not to be valid unless it is executed by the woman, if she is of full age, or confirmed by her after she attains full age: though if she dies an infant, any covenant or disposition by the husband contained in the settlement or agreement will bind or pass any interest in any property of hers, to which he may become entitled on her death, and which he could have bound or disposed of if that Act had not been passed (*d*). Estates or interests directly limited to a wife in a settlement made after the Act of 1882 become her separate property; and there is no need to limit them to her separate use (*e*).

Restraint on anticipation.

The Act of 1882 (*f*) is not to interfere with or render inoperative any restriction against anticipation attached, or to be thereafter attached to the enjoyment of any property or income by a married woman. A restraint on anticipation may therefore still be annexed to a gift or limitation in favour of a married woman of the capital or income of any property, and will have the like effect as under the

(*a*) *Stevens* v. *Trevor-Garrick*, 1893, 2 Ch. 307.

(*b*) *Buckland* v. *Buckland*, 1900, 2 Ch. 534.

(*c*) Stat. 7 Edw. VII. c. 18, ss. 2, 4.

(*d*) Sect. 2, which is not to render invalid any settlement or agreement for a settlement made or to be made under the Infant Settlements Act, 1855 (*ante*, p. 553).

(*e*) *Re Lumley*, 1896, 2 Ch. 690.

(*f*) Stat. 45 & 46 Vict. c. 75, s. 19.

previous law (*g*). But when it is intended to restrain a married woman from alienating any property so given to her, the *corpus* or capital thereof should be vested in trustees, who should be directed to pay her the income only, and power to anticipate the payment of either capital or income should be expressly withheld from her. For if a married woman were to be invested with the whole legal ownership of any property, of which she was restrained from anticipating the income, she might be enabled to dispose of her legal ownership to a purchaser without disclosing the existence of the restraint; and as the restraint on wives' alienation is a provision of equity and not of law (*h*), it appears that, if a purchaser for value were to obtain the legal ownership of the property in good faith without notice of the restraint, he would be entitled to retain it (*i*).

As to the interest of a married woman in deposits in banks, annuities, stocks, and shares.

By the Act of 1882, all deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of the Act were standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of the Act were standing in her name (*k*), are to be deemed,

(*g*) *Ante*, p. 548; see *Re Lumley*, 1896, 2 Ch. 690; *Re Wheeler's Settlement*, 1899, 2 Ch. 717.

(*h*) *Ante*, p. 548.

(*i*) See *ante*, p. 27.

(*k*) See *ante*, p. 555, note (*g*).

unless and until the contrary be shown, to be the separate property of such married woman (*l*). Any similar property which after the commencement of the Act shall be allotted to or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable. But nothing in the Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company (*m*). Like provisions are made with respect to any similar property at the commencement of the Act, or afterwards standing or made to stand in the name of any married woman jointly with any persons or person other than her husband (*n*). And it shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such property as aforesaid, standing in her name either solely or jointly with any other person or persons not being her husband (*o*).

Investments in joint names of married women and others.

Husband need not join in transfer.

By the same Act, a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding

Contracts by, actions by and against, and liabilities of married women.

(*l*) Stat. 45 & 46 Vict. c. 75, s. 6.
(*m*) Sect. 7.
(*n*) Sect. 8.
(*o*) Sect. 9.

brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise (*p*). According to the judicial construction of this enactment, a married woman is not thereby enabled to render herself liable on any contract otherwise than in respect and to the extent of her separate property (*q*). Consequently, although a breach of a wife's contract to pay money or a judgment against her for breach of her contract made under the Act will result in a debt (*r*) due from her (*s*), she does not incur thereby the same personal liability to pay as is incumbent on an indebted man or single woman (*t*). She cannot therefore be imprisoned under the Debtors Act, 1869 (*u*), for failure to satisfy any such judgment (*x*). Nor is she liable to be made bankrupt by reason of any such debt or judgment (*y*); except by special provision of the Act, in the case of her carrying on a trade separately from her husband (*z*). Under such a judgment, it has been held, execution shall only issue against the wife's separate property; and as the Act is not to interfere with any restriction against anticipation (*a*), it has been held, by analogy to the previous law respecting a wife's general engagements (*b*), that the separate property which

(*p*) Stat. 45 & 46 Vict. c. 75, s. 1, sub-s. 2. See as to torts against a wife: *Weldon* v. *Winslow*, 13 Q. B. D. 784; *Weldon* v. *De Bathe*, 14 Q. B. D. 339; *Lowe* v. *Fox*, 15 Q. B. D. 667.

(*q*) *Scott* v. *Morley*, 20 Q. B. D. 120.

(*r*) *Ante*, pp. 31, 162, 213.

(*s*) See *Hobby* v. *Hodgson*, 21 Q. B. D. 103; *Jay* v. *Robinson*, 25 Q. B. D. 467; *Pelton* v. *Harrison*, 1892, 1 Q. B. 118; *Lady Aylesford* v. *Great Western Ry. Co.*, 1892, 2 Q. B. 626.

(*t*) *Re Turnbull*, 1900, 1 Ch. 180, 184.

(*u*) *Ante*, pp. 228—231.

(*x*) *Scott* v. *Morley*, 20 Q. B. D. 120.

(*y*) *Re Gardiner*, 20 Q. B. D. 219; not even after the coverture has ceased; *Re Hewett*, 1895, 1 Q. B. 328.

(*z*) *Ante*, p. 267; see *Re Handford*, 1899, 1 Q. B. 566.

(*a*) *Ante*, pp. 559, 560.

(*b*) *Ante*, p. 550.

can be taken to satisfy a wife's liability upon her contract, must be limited to that to which she is entitled without restraint on anticipation (*c*). It was further held, that a wife could not be made liable under the Act of 1882 in respect of any contract, unless she had some separate property to which she was entitled without restraint or anticipation, at the time when she made the contract (*d*); and that a wife's contract was not enforceable after the coverture had ended against any property which was not her separate property during the coverture (*e*). But in these last respects the law was altered by the Married Women's Property Act, 1893 (*f*), enacting that every contract thereafter entered into (*g*) by a married woman, otherwise than as agent (*h*), shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; and such contract shall bind all separate property which she may at that time or thereafter be possessed of or entitled to, and shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to; provided that these

(*c*) *Sco't* v. *Morley*, ubi supra; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422. It was held, under the Act of 1882, that arrears due but unpaid of income, which a wife was restrained from anticipating, might be taken to satisfy a judgment against her on her contract; *Hood Barrs* v. *Heriot*, 1896, A. C. 174; but not arrears of such income accruing due after the judgment; *Whiteley* v. *Edwards*, 1896, 2 Q. B. 48; *Bolitho* v. *Gidley*, 1905, A. C. 98; see *post*, p. 564, n. (*i*).

(*d*) *Pallister* v. *Gurney*, 19 Q. B. D. 519; *Leak* v. *Driffield* 24 Q. B. D. 98; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Re Fieldwick*, 1909, 1 Ch. 1.

(*e*) *Stogdon* v. *Lee*, 1891, 1 Q. B. 661; *Pelton* v. *Harrison*, 1891, 2 Q. B. 422; *Softlaw* v. *Welch*, 1891, 2 Q. B. 419.

(*f*) Stat. 56 & 57 Vict. c. 63 s. 1; passed 5th Dec., 1893, replacing with amendments 45 & 46 Vict. c. 75, s. 1, sub-ss. 3, 4, the latter of which provided that a wife's contract should bind all separate property which she might acquire after the contract.

(*g*) See *Re Wheeler*, 1901, 2 Ch. 66.

(*h*) See *Paquin* v. *Beauclerk*, 1906, A. C. 148.

amending enactments shall not render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating. It has been held that, by virtue of this proviso, where a married woman, entitled to separate property subject to a restraint on anticipation, has made a contract, and judgment in an action thereon has been obtained against her after the determination of the coverture, neither the capital of that property nor any arrears of the income thereof accrued due at the date of the judgment, can be taken or attached in execution of the judgment (*i*). The same Act gives jurisdiction to the Court, before which any action or proceeding instituted by a woman, or by a next friend on her behalf is pending, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and to enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just (*k*).

Costs against married women.

The Act of 1882 also gives to every married woman the same civil and criminal remedies against all persons, including her husband, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole* (*l*): provided

(*i*) *Barnett* v. *Howard*, 1900, 2 Q. B. 784; *Brown* v. *Dimbleby* 1904, 1 K. B. 28; see *Sprange* v. *Lee*, 1908, 1 Ch. 424, 432, as to the effect of a direction in the wife's will that her debts shall be paid. The construction so placed on the Act of 1893 seems to alter the law laid down in *Hood Barrs* v. *Heriot*, *ante*, p. 563, n. (*e*), and to preclude the satisfaction of a judgment obtained against a married woman on her contract during the coverture out of any arrears accrued due or savings made after the date of the contract of any income, which she is restrained from anticipating.

(*k*) Stat. 56 & 57 Vict. c. 63, s. 2, amending the law laid down in *Re Glanvill*, 31 Ch. D. 532; *Cox* v. *Bennett*, 1891, 1 Ch. 617; but not retrospective; *Re Lumley*, 1894, 3 Ch. 135. A counterclaim is such a proceeding; *Hood Barrs* v. *Cathcart*, 1895, 1 Q. B. 873. See *Gordon* v. *Gordon*, 1904, P. 163; *Pawley* v. *Pawley*, 1905, 1 Ch. 593; *Drosd* v. *Ellis*, 1905, 1 K. B. 574.

(*l*) See *Larner* v. *Larner*, 1906, 2 K. B. 539.

that, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort; and provided that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife (*m*). The Act makes a married woman having separate property liable to an order of justices in petty sessions for the maintenance of her husband out of such separate property, if he becomes chargeable to any union or parish (*n*); and subjects her to all such liability for the maintenance of her children and grandchildren as the husband is by law subject to (*o*).

Wife's antenuptial debts and liabilities.

By the same Act (*p*) a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and

(*m*) Stat. 45 & 46 Vict. c. 75, s. 12, which made husbands and wives competent witnesses against each other in any proceeding thereby authorised; see also 47 Vict. c. 14.

(*n*) Sect. 20; see Williams' Conveyancing Statutes, 448, 449.

(*o*) Sect. 21; see *ib.*, p. 449, and n. (*h*).

(*p*) Sect. 13.

as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts thereby repealed or otherwise, if this Act had not passed. No restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property since the Act made or entered into by herself (*q*) shall have any validity against debts contracted by her before marriage (*r*). And no settlement or agreement for a settlement shall have any greater force or validity against creditors of a married woman than a like settlement or agreement made or entered into by a man would have against his creditors (*s*).

Married woman executrix or trustee.

A wife is enabled by means of the power of contracting conferred by the Act of 1882 (*t*) to accept any trust or the office of executrix or administratrix without her husband's consent or concurrence (*u*); and the provisions of the Act as to wives' liabilities extend to all liabilities by reason of any breach of trust or *devastavit* (*x*) committed by any wife either

(*q*) See *Birmingham, &c., Society* v. *Lane*, 1904, 1 K. B. 35.

(*r*) Sect. 19; *Jay* v. *Robinson*, 25 Q. B. D. 467; *Robinson* v. *Lynes*, 1894, 2 Q. B. 577.

(*s*) Sect. 19; see *ante*, pp. 433, 434.

(*t*) *Ante*, pp. 561, 562.

(*u*) Sect. 24; see *ante*, p. 484.

(*x*) A *devastavit* is the name given in law to any wasting of the assets of a testator or intestate, for which the executor or administrator is responsible, 2 Wms. Exors. 1796, 7th ed.; 1434, 10th ed.

before or after her marriage; and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration (*y*). The same Act expressly empowers a married woman who is an executrix, administratrix or trustee, either alone or jointly, to sue and be sued and to transfer any such annuity, deposit, stock, shares, or other property as before mentioned (*z*), in that character, without her husband, as if she were a *feme sole* (*a*). But with regard to any other property, of which a married woman is trustee, it was decided, under the Act of 1882, that she could only dispose thereof in accordance with the previous law; for it was held, as we have seen (*b*), that the capacity given by the Act to wives to hold and dispose of property at law (*c*) did not extend to property which in equity they held in trust. The husband therefore continued to acquire the estate or interest given to him by the common law in all property which belonged to his wife as trustee. And though in equity he was bound by the trust, it was necessary that he should concur in any conveyance of such trust property in order to pass his legal interest therein (*d*). As above mentioned (*e*) by the Married Women's Property Act 1907 (*f*), a married woman is able, without her husband, to dispose of, or join in disposing of, real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a *feme sole*. This Act also validated and confirmed all such dispositions made

(*y*) Sect. 24; *see Re Turnbull*, 1908, 1 Ch. 180; Williams' Conveyancing Statutes, 460–463.

(*z*) *Ante*, p. 560.

(*a*) Sect. 18.

(*b*) *Ante*, p. 485, n. (*a*).

(*c*) *Ante*, p. 552.

(*d*) *Re Hitchman and Illingsworth's Contract*, 1896, 2 Ch. 358; *see* 2 Wms. V. & P. 919–921, 2nd ed.; Williams, R. P. 321, 322, 21st ed.

(*e*) *Ante*, pp. 485, 486.

(*f*) 7 Edw. VII. c. 18, s. 1, sub-s. 1. This Act came into operation on the 1st Jan., 1908, s. 4.

after the year 1883, saving the prevalence against them of any title or right acquired through or with the concurrence of the husband before the year 1908 (*g*). This Act does not appear to prevent husbands from taking the same legal interests as before in their wives' trust property: but it is thought that it confers on the wife a *power* to dispose alone of such property (including the husband's legal interest therein), and that the husband's concurrence in such a disposition cannot now be required (*h*).

Succession to wife's goods on her death.

If a wife should bequeath her separate personal property by will (*i*), her executor will take it subject to all such liabilities as she herself would have been bound to satisfy thereout (*k*). And upon the execution by a wife of a general power of appointment by will, the property appointed is made subject to her debts (*l*) and other liabilities in the same manner as her own separate estate (*m*). If a wife should die intestate leaving any separate personalty, her husband will become entitled thereto, as to her chattels real and choses in possession in his marital right without the necessity of taking out administration to her (*n*), and as to her choses in action on taking out administration to her as under the previous law (*o*). But he will take any such personalty subject to all the liabilities which she would have been bound to satisfy thereout (*p*).

(*g*) Stat. 7 Edw. VII., c. 18, s. 1, subs. 2.

(*h*) See the discussion of the question raised by this Act in 2 Wms. V. & P. 922–924, 2nd ed.

(*i*) *Ante*, p. 557.

(*k*) Stat. 45 & 46 Vict. c. 75, s. 23.

(*l*) See *ante*, p. 562, and cases cited in n. (*s*) thereto.

(*m*) Sect. 4; see Williams' Conveyancing Statutes, 119–121; *Re Roper*, 39 Ch. D. 482; *Re De Burgh Lawson*, 41 Ch. D. 568; *Re Fiddwick*, 1909, 1 Ch. 1.

(*n*) *Surman* v. *Wharton*, 1891, 1 Q. B. 491.

(*o*) *Re Lambert's Estate*, 39 Ch. D. [illegible]; *ante*, pp. 537, 538, 547.

(*p*) Stat. 45 & 46 Vict. c. 75, s. 23; *Surman* v. *Wharton*, 1891, 1 Q. B. 491.

Liability of husband married after 1882 for wife's ante-nuptial contracts and wrongs.

A husband married after the commencement of the Act of 1882 is liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, 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 therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs; but not further or otherwise (*q*).

Suits for ante-nuptial liabilities.

Such a husband may be sued, in respect of any contract or wrong made or done by his wife before marriage, either alone or jointly with her; but if not found liable, he shall have judgment for his costs of defence (*r*). If in any such action against husband and wife jointly it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only (*s*).

Husband's liability for wife's torts committed during marriage.

The liability of husbands who were married before the year 1883, in respect to their wives' ante-nuptial contracts and wrongs is still regulated by the previous law (*t*). It has been held that a husband (whatever be the date of his marriage) is still liable to be sued jointly with his wife in respect of any tort committed by her *during*

(*q*) Stat. 45 & 46 Vict. c. 75, s. 14; see Williams' Conveyancing Statutes, 412–444.

(*r*) Sect. 15; *Beck v. Pierce*, 23 Q. B. D. 316.

(*s*) Sect. 15. See Williams' Conveyancing Statutes, pp. 407–410, 432, 439–441, 443.

(*t*) See sects. 14, 22; *ante*, pp. 544, 545, 556 n. (*i*.)

the marriage (*u*); but that his liability for such torts ceases in the same circumstances as before (*x*).

Loans by wife to husband.

By the Act of 1882 (*y*) any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

Fraudulent investments with money of husband.

Investments in any such deposit, annuity, stock, shares or other property as aforesaid (*z*), made by a married woman by means of moneys of her husband, without his consent, may be ordered to be transferred or paid to the husband; and nothing in this Act contained shall give validity, as against creditors of the husband, to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband (*a*), or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not

(*u*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 117; *Earle* v. *Kingscote*, 1900, 1 Ch. 203, 205; 2 Ch. 585; *Beaumont* v. *Kaye*, 1904, 1 K. B. 292, 293; see *Cucuod* v. *Leslie*, 1909, 1 K. B. 880, 888, 889; 16 L. Q. R. 191 (by the present editor).

(*x*) *Cucuod* v. *Leslie*, ubi sup.; see *ante*, pp. 544, 545; *post*, p. 579, and n. (*a*).

(*y*) 45 & 46 Vict. c. 75, s. 3; held not to apply to loans for other purposes: *Re Clark* 1898, 2 Q. B. 330; *Re Croumire*, 1901, 1 Q. B 480. This rule is, as we have seen, now imported into the administration in the Chancery Division of the insolvent estates of deceased persons; *ante*, pp. 243, n. (*z*), 244 and Table. If the wife be her husband's executrix or administratrix, she may retain such a debt as would otherwise be postponed by the above enactment; *Re Ambler*, 1905, 1 Ch 697; *ante*, p. 244 (*c*).

(*z*) See sects. 6—9, *ante*, p. 560.

(*a*) See *ante*, p. 281.

passed (*b*). A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband (*c*). In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid (*d*) in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or in Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the County Court of the district, or in Ireland to the Chairman of the Civil Bill Court of the division in which either party resides, and such order may be made with respect to the property in dispute, and as to the costs of the application as the judge thinks fit (*e*).

Criminal proceedings against wife by husband.

Questions between husband and wife as to property to be decided in a summary way.

When husband and wife are living together, the management of the household is very commonly intrusted to the wife. And in such cases the wife is generally authorised by the husband to purchase articles of household or family use, and to act as his agent in making such purchases. The husband, like any other principal, is liable in respect of all contracts which he may have authorised his wife to

Husband's liability on contracts made by his wife.

(*b*) Stat. 45 & 46 Vict. c. 75, s. 10. See Williams' Conveyancing Statutes, 391, 392, 428.

(*c*) Sect. 16; see sect. 12, *ante*, p. 564. By stat. 47 Vict. c. 14, in any such criminal proceedings against a wife, the husband was made a competent witness.

(*d*) See sects. 6–9, *ante*, p. 560.

(*e*) Sect. 17, held not to preclude the wife's remedy by action against her husband for the recovery of her separate property detained by him; *Larner* v. *Larner*, 1905, 2 K. B. 539; *ante*, p. 564.

make on his behalf: but he is not liable in respect of contracts which his wife may have made without his authority (*f*). When, therefore, a husband is sued in respect of a contract made by his wife, the principal question to be determined is whether he gave her authority to contract on his behalf. This is a question of fact for a jury (*g*). This question may be decided upon evidence that the husband *expressly* authorised his wife so to contract; or else it may be *implied* from the circumstances of the case, that the wife was invested with such an authority. As a general rule, when an action is brought against any man upon a contract made by his agent, the *onus* of proving that the contract was made by the agent, as agent for and by the authority of the principal, lies on the party who brings the action (*h*). But an important exception to this rule occurs in the case of actions against husbands on contracts made by their wives. For since the husband is bound to maintain the wife and to supply her with necessaries suitable to her station in life (*i*), when they are living together, a presumption arises that the wife has the husband's authority to pledge his credit for the purchase of necessary articles of household or family use in a manner and to an extent which is usual among people of the same station in life. So that in actions against the husband upon the wife's contract, if it be proved that the husband and wife were living together, and that the wife contracted for the purchase of such necessaries, the *onus* is upon the husband to adduce evidence to rebut this presump-

(*f*) F. N. B. 120, G.; *Manby* v. *Scott*, 1 Sid. 109, 120; *S. C.*, 2 Smith L. C.; *Etherington* v. *Parrott*, 1 Salk. 118; *Montague* v. *Benedict*, 3 B. & C. 631; 27 R. R. 444; *Jolly* v. *Rees*, 15 C. B. N. S. 628; *Debenham* v. *Mellon*, 5 Q. B. D. 394; 6 App. Cas. 24.

(*g*) See *Freestone* v. *Butcher*, 9 Car. & P. 643; *Lane* v. *Ironmonger*, 13 M. & W. 368; *Reid* v. *Teakle*, 13 C. B. 627.

(*h*) See *Montague* v. *Benedict*, 3 B. & C. 631; 27 R. R. 444; *Brady* v. *Todd*, 9 C. B. N. S. 592, 605; *Phillipson* v. *Hayter*, L. R. 6 C. P. 38.

(*i*) *Ante*, p. 545.

tion. And it will be rebutted if he prove that he forbade his wife to pledge his credit, or that she was otherwise sufficiently supplied with such necessaries or with money for their purchase (*k*). The presumption in question can only arise with regard to necessaries; and the question, what are necessaries? is in each case one of fact for a jury (*l*). But the husband will, of course, be liable in respect of contracts made by his wife for the purchase of articles which are not necessaries, if the party who seeks to charge him can prove that she was authorised so to contract on his behalf (*m*). The husband may also be made liable on contracts made by his wife, because he held her out as his agent (*n*). For instance, if the husband should have been in the habit of paying tradesmen's bills for articles purchased by his wife, and should then revoke the authority given to his wife to pledge his credit, he may be made liable to pay for articles subsequently ordered by his wife, unless the tradesmen should have had notice that the wife's authority was revoked (*o*).

When husband and wife are living apart.

The husband is of course liable in respect of all contracts made by his wife on his behalf *by his authority* while they are living apart, as well as on contracts so made while they are living together. But when the husband and wife are living apart, there is no presumption of the husband's assent to the wife's contracts for procuring necessaries; so that the *onus* lies on the person, who seeks to charge the husband, to prove that the husband authorised

(*k*) *Jolly* v. *Rees*, 15 C. B. N. S. 628; *Debenham* v. *Mellon*, 5 Q. B. D. 394; 6 App. Cas. 24; *Morel* v. *Westmorland*, 1904, A. C. 11; see also *Benaux* v. *Teakle*, 8 Ex. 680.

(*l*) See the cases cited in notes (*f*), (*g*) above; and *Phillipson* v. *Hayter*, L. R. 6 C. P. 38.

(*m*) See *Petty* v. *Anderson*, 3 Bing. 170; *Montague* v. *Benedict*, 3 B. & C. 631; 27 R. R. 444.

(*n*) Cf. *ante*, p. 468.

(*o*) See *Drew* v. *Nunn*, 4 Q. B. D. 661.

the wife to contract on his behalf, or to prove circumstances which import the husband's liability (*p*). For in certain special circumstances the husband is liable upon contracts made by the wife, even though he should have expressly forbidden her to pledge his credit, or given notice to others that would not be answerable on her contracts. Thus, if the husband desert the wife, or turn her out of doors, or treat her so cruelly that she is compelled to leave him, she has a right, consequent upon his obligation to maintain her (*q*), to pledge his credit for procuring necessaries suitable to her station in life (*r*). In such cases it appears that "necessaries" will include all such things as it is reasonable that the wife should have under the circumstances (*s*). The husband may, however, absolve himself from liability in respect of contracts made by his wife for necessaries under the special circumstances described by proving that she is possessed of means, derived either from an allowance made by him or from separate estate or property of her own, sufficient to supply her with everything she can reasonably require (*t*). In such cases the sufficiency of the wife's means is a question of fact for a jury (*u*). If the wife leave the husband against his will and without the excuse of cruelty on his part, or if the husband and wife separate by consent, she has no right to pledge his credit without

Necessaries.

(*p*) *Mainwaring* v. *Leslie*, M. & M. 18; 31 R. R. 691; *Clifford* v. *Laton*, 3 Car. & P. 15; *Johnston* v. *Sumner*, 3 H. & N. 261.

(*q*) *Ante*, p. 545.

(*r*) *Thompson* v. *Harvey*, 4 Burr. 2177; *Boulton* v. *Prentice*, 2 Str. 1214; *Houliston* v. *Smyth*, 3 Bing. 127; 28 R. R. 609; *Hunt* v. *De Blacquiere*, 5 Bing. 550; 30 R. R. 737; *Bazeley* v. *Forder*, L. R. 3 Q. B. 559, 562; *Wilson* v. *Glossop*, 20 Q. B. D. 379. And see *Deare* v. *Soutten*, L. R. 9 Eq. 151.

(*s*) See *Wilson* v. *Ford*, L. R. 3 Ex. 63; *Bazeley* v. *Forder*, L. R. 3 Q. B. 559, 563, 564; *Ottaway* v. *Hamilton*, 3 C. P. D. 393, 401; *Re Wingfield & Blew*, 1904, 2 Ch. 665; *Sheppard* v. *Sheppard*, 1905, P. 185.

(*t*) See *Liddlow* v. *Wilmot*, 2 Stark. N. P. 86; 19 R. R. 684; *Holder* v. *Cope*, 3 Car. & K. 437; Pollock, C. B., *Johnston* v. *Sumner*, 3 H. & N. 261, 266.

(*u*) See the same cases: and see *Baker* v. *Sampson*, 14 C. B. N. S. 383; *Eastland* v. *Burchell*, 3 Q. B. D. 432, 436.

his authority (*x*). When husband and wife agree to live apart, he may of course expressly authorise her to contract on his behalf, or such an authority may be implied from the circumstances of the case (*y*). But such an authority cannot be implied when the husband and wife have agreed to separate upon terms which the husband has observed, and one of the terms is, that the wife shall not pledge her husband's credit (*z*). As the Married Women's Property Act, 1882 (*a*), does not absolve a husband from the obligation of maintaining his wife (*b*), it does not take away the presumption of the husband's assent to his wife's contracts for necessaries while they are living together (*c*), or the husband's liability in case he desert or turn away his wife, or compel her to leave him (*d*). It has been held that, if a wife, having no separate property, contract for necessaries as her husband's agent, she cannot, under the Married Women's Property Act, 1893 (*e*), be made liable on the contract, even though the other contractor were

(*x*) *Manby* v. *Scott*, 1 Sid. 109; *Johnston* v. *Sumner*, 3 H. & N. 261, 266—268; *Eastland* v. *Burchell*, 3 Q. B. D. 432.

(*y*) See *Emmett* v. *Norton*, 8 Car. & P. 506, 511; Pollock, C.B., *Johnston* v. *Sumner*, 3 H. & N. 261, 267.

(*z*) *Biffin* v. *Bignell*, 7 H. & N. 877; *Eastland* v. *Burchell*, 3 Q. B. D. 432. As to the case of a separation by agreement, of which the husband has not observed the terms, see *Ozard* v. *Darnford*, 1 Selwyn N. P. 229, 13 ed.; *Nurse* v. *Craig*, 2 Bos. & P. N. R. 148.

(*a*) Stat. 45 & 46 Vict. c. 75.

(*b*) See *ante*, p. 545.

(*c*) See *Paquin* v. *Beauclerk*, 1906, A. C. 148.

(*d*) See *Wilson* v. *Glossop*, 20 Q. B. D. 354. Under stats. 58 & 59 Vict. c. 39, and 2 Edw. VII. c. 28, s. 5 (1), a married woman, whose husband has been convicted of a serious assault on her, or has deserted her, or has been guilty of persistent cruelty to her or of wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally liable to maintain, and has by such cruelty or neglect caused her to leave and live apart from him, or is a habitual drunkard, may apply to a court of summary jurisdiction and obtain an order for him to pay to her or for her use such weekly sum not exceeding 2*l.* as the court shall, having regard to the means both of the husband and the wife, consider reasonable; see *Earnshaw* v. *Earnshaw*, 1896, P. 160; *Cobb* v. *Cobb*, 1900, P. 294; *Hill* v. *Hill*, 1902, P. 140 Any sum so ordered to be paid cannot be attached by the wife's creditors; *Paquine* v. *Snary*, 1909, 1 K. B. 688.

(*e*) Stat. 56 & 57 Vict. c. 63, s. 1; *ante*, p. 563.

not aware that she was a married woman (*f*). If a married woman, possessed of separate property, contract for necessaries subsequently to the Act of 1893, it appears that the *onus* lies on the other contractor of proving that she contracted in respect of her separate property and not as her husband's agent.

§ 3. *Of Judicial Separation and Divorce.*

Matrimonial causes.

The ecclesiastical courts, which, as we have seen (*g*), formerly had jurisdiction in causes relating to the validity of a will or the administration of the effects of an intestate, also had jurisdiction over matrimonial causes. Of these the principal were suits for the restitution of conjugal rights, or to compel a husband or wife, who had withdrawn from cohabitation with the other, to return thereto; suits for nullity of marriage, where the marriage was either void, as in the case of an existing previous marriage, or voidable, as in the case of impotence; and suits for a divorce *a mensa et thoro* for adultery or cruelty (*h*). By the Matrimonial Causes Act, 1857 (*i*), the jurisdiction of the ecclesiastical courts over matrimonial causes (*k*) was transferred to a new Court, called the Court for Divorce and Matrimonial Causes. By this Act (*l*), a sentence of judicial separation, obtainable by either husband or wife on the ground of adultery, cruelty, or two years' desertion without cause, was substituted for the ancient decree for a divorce *a mensa et thoro*,

(*f*) *Paquin* v. *Beauclerk*, 1906, A. C. 148, *diss.* Lords Robertson and Atkinson.

(*g*) *Ante*, pp. 475, 515.

(*h*) 1 Black. Comm. ch. 15; 3 Black. Comm. 92–94; Burn's Eccl. Law, ii. 500, 9th ed.

(*i*) Stat. 20 & 21 Vict. c. 85, ss. 2, 6. This Act has been amended by stats. 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 25 & 26 Vict. c. 81; 29 & 30 Vict. c. 32; 31 & 32 Vict. c. 77; 36 Vict. c. 31; 41 Vict. c. 19; 47 & 48 Vict. c. 68.

(*k*) Except in respect of marriage li[illegible]s; stat. 20 & 21 Vict. c. 85, s. [illegible].

(*l*) S[illegible]. 7, 16, 17; 21 & 22 Vict. c. [illegible], s. 9; see *Armytage* v. *Armytage*, P. 178.

with the same force and consequences. And the new Court was further empowered to pronounce a decree for dissolution of a marriage on the ground, principally, of adultery on the part of the wife, or of adultery coupled with cruelty or two years' desertion without excuse on the part of the husband (*m*). But every such decree is required to be in the first instance a decree *nisi*, or provisional on cause to reverse it not being shown, and is not to be made absolute, as a rule, within six months after it has been pronounced (*n*). Before the Act of 1857 took effect, dissolution of a marriage on the ground of adultery could only be obtained by Act of Parliament (*o*); so that the power of obtaining a divorce was practically enjoyed by the richer classes only. In 1875, as we have seen (*p*), the jurisdiction of the Court for Divorce and Matrimonial Causes was transferred to the High Court of Justice, and matters, which were previously within its exclusive cognizance, were assigned to the Probate, Divorce, and Admiralty Division. Both judicial separation and divorce have important consequences with regard to the property of the parties concerned.

Alimony.

In the first place, where application for judicial separation is made by the wife, the Court may make any order for alimony which may be deemed just (*q*). Alimony is an allowance ordered to be paid by the husband for the separate maintenance of the wife, and was formerly decreed of ecclesiastical jurisdiction only (*r*). The grant of alimony, though now

(*m*) Stat. 20 & 21 Vict. c. 85, ss. 27—31.

(*n*) Stat. 23 & 24 Vict. c. 144, s. 7, made perpetual by 25 & 26 Vict. c. 81, and amended by 29 & 30 Vict. c. 32.

(*o*) 1 Black. Comm. 429; *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162, 1867. This is still the law in Ireland; see *Westropp's Divorce Bill*, 11 App. Cas. 294.

(*p*) *Ante*, pp. 160, 225, n. (*i*), 489.

(*q*) Stats. 20 & 21 Vict. c. 85, ss. 17, 24; 21 & 22 Vict. c. 108, s. 1; see *Judkins* v. *Judkins*, 1897, P. 138.

(*r*) See 2 Roper on Husb. and Wife, p. 338, note (*d*), 2nd ed.

made by the Divorce Division of the High Court, is still subject to the principles applied in the Ecclesiastical Courts (*s*). Alimony is not assignable by the wife (*t*), nor is it liable, as her separate property, to her debts (*u*). By the Matrimonial Causes Act, 1857, in every case of a judicial separation, the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her after the sentence (*x*); and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that, if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate (*y*). And in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purpose of con-

Effect of judicial separation.

Vandergucht v. *De Blacquiere*, 8 Sim. 315; 5 My. & Cr. 229, 241; *Stones* v. *Cooke*, 8 Sim. 321, note; stat. 20 & 21 Vict. c. 85, s. 5; *Gooden* v. *Gooden*, 1892, P. 1.

(*s*) See *Robins* v. *Robins*, 1907, 2 K. B. 13, deciding that no action lies in the King's Bench Division for arrears of permanent alimony; *Leslie* v. *Leslie*, 1908, P. 99; *Leslie* v. *Leslie*, 1911, P. 203. A husband's liability to pay alimony cannot be barred by his bankruptcy, *Linton* v. *Linton*, 15 Q. B. D. 239; *Re Hawkins*, 1894, 1 Q. B. 25; cf. *Victor* v. *Victor*, 1912, 1 K. B. 247 (*secus* as to a husband's covenant in a separation deed).

(*t*) *Re Robinson*, 27 Ch. D. 160.

(*u*) *Anderson* v. *Lady Hay*, 7 Times L. R. 113.

(*x*) *Wait* v. *Morland*, 38 Ch. D. 135; *Re Hughes*, 1898, 1 Ch. 529. She cannot therefore dispose as a *feme sole* of property to which she was entitled, but was restrained from anticipating, at the date of the sentence; *Hill* v. *Cooper*, 1893, 2 Q. B. 85.

(*y*) Stat. 20 & 21 Vict. c. 85, s. 25, extended by 21 & 22 Vict. c. 108, ss. 7, 8, to property to which the wife has or shall become entitled as executrix, administratrix, or trustee since the sentence of separation, and to the wife's property in remainder or reversion at the date of the decree. See *Re Insole*, 35 Beav. 92; L. R. 1 Eq. 470; *Johnson* v. *Lander*, L. R. 7 Eq. 228; *Dawes* v. *Creyke*, 30 Ch. D. 500.

tract and wrongs and injuries, and suing and being sued in any civil proceeding (*z*); and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her (*a*), or for any costs she may incur as plaintiff or defendant; provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use (*b*); provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband (*c*). By the same Act, a wife deserted by her husband may obtain an order to protect any money or property she may acquire by her own lawful industry and property which she may become possessed of after such desertion: and if such an order of protection be made, such earnings and property shall belong to the wife as if she were a *feme sole*, and the wife shall during the continuance thereof be, and be deemed to have been, during such desertion of her, in the like position in all respect, with regard to property and contracts, and suing and being sued, as she would be under the same Act if she obtained a decree for judicial separation (*d*). And under an Act of

Protection order.

(*z*) *Ramsden* v. *Brearley*, L. R. 10 Q. B. 147; *Re Hughes*, 1898, 1 Ch. 529.

(*a*) See *Cuenod* v. *Leslie*, 1909, 1 K. B. 880, deciding that, in an action against husband and wife for the wife's tort (*ante*, pp. 569, 570), his liability ceases if a decree for judicial separation be pronounced before judgment.

(*b*) Cf. p. 574, *ante*; and see *Wilson* v. *Smyth*, 1 B. & Ad. 801; *Hunt* v. *De Blaquiere*, 5 Bing. 550; 30 R. R. 737; *Re Bringfield and Blew*, 1901, 2 Ch. 665.

(*c*) Stat. 20 & 21 Vict. c. 85, s. 26.

(*d*) Stat. 20 & 21 Vict. c. 85, s. 21, amended by stats. 21 & 22 Vict. c. 108, ss. 6—10; 27 & 28 Vict. c. 44. See *Re Kingsley's Trusts*, 26 Beav. 84; *Cooke* v. *Fuller*, ib., 99; *Re Whittingham*, 10 Jur. N. S. 848; *Midland Rail. Co.* v. *Pye*, 30 L. J. (N. S.) C. P. 314; S. C., 9 W. R. 658; *In the goods of Elliott*, L. R. 2 P. & M. 274; *Re Coward and Adam's Purchase*, L. R. 20 Eq. 179; *Nicholson* v. *Drury Building Estates Co.*, 7 Ch. D. 48.

Separation order.

1895 (*c*), in the cases already mentioned (*f*), of the husband's conviction for a serious assault on his wife, his desertion of her (*g*), her being forced to leave him through his cruelty or neglect to maintain her, and his being a habitual drunkard, she may obtain from a court of summary jurisdiction an order that she be no longer bound to cohabit with him, and such order while in force shall have the effect in all respects of a decree for judicial separation on the ground of cruelty. In addition to the rights so conferred, wives, who have obtained a decree for judicial separation, or have been deserted by their husbands, now possess the rights conferred upon married women by the Married Women's Property Act, 1882 (*h*), and retain any rights which they may have acquired under the Married Women's Property Act, 1870 (*i*).

Consequences of divorce.

When a decree for the dissolution of a marriage has been made absolute, the parties are at liberty to marry again (*k*). And all the rights, which husband and wife enjoy in respect of each other's property, independent of settlement (whether in each other's lifetime or by way of succession after death), cease

(*c*) Stat. 58 & 59 Vict. c. 39, ss. 1, 5, extended to the husband's habitual drunkenness by 2 Edw. VII. c. 28, s. 5 (1). By s. 5 (2) of the latter Act, a married man, whose wife is a habitual drunkard, may obtain similar orders against her.

(*f*) *Ante*, p. 575, n. (*d*).

(*g*) See *Heard* v. *Heard*, 1896, P. 188; *Froud* v. *Froud*, 1901, P. 177; *Dodd* v. *Dodd*, 1906, P. 189; *Harriman* v. *Harriman*, 1909, P. 123.

(*h*) Stat. 45 & 46 Vict. c. 75; *ante*, pp. 557 *sq.*

(*i*) Stat. 33 & 34 Vict. c. 93; see *ante*, pp. 554—556.

(*k*) Stat. 20 & 21 Vict. c. 85, s. 57; see *ante*, p. 577, and n. (*b*). In the interval between the decree *nisi* and the decree absolute, the wife remains a married woman and the *coverture* continues; though the husband is not entitled to exercise his marital rights in respect of her property to her prejudice; but when the decree absolute is pronounced, the marriage is dissolved as from the date of the decree *nisi*; *Norman* v. *Villars*, 2 Ex. D. 359; *Sinclair* v. *Fell*, 1913, 1 Ch. 155; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Allcard* v. *Walker*, 1896, 2 Ch. 369, 384; *Tremayne* v. *Rashleigh*, 1908, 1 Ch. 681, 694.

upon dissolution of the marriage (*l*). But it is now established that a decree for dissolution of marriage does not deprive either party of any interest in any property, which is limited by settlement to him or her by name (*m*). On any decree for the dissolution or nullity (*n*) of marriage, the Court may order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money (*o*), or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable (*p*); and the Court may make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable (*q*). Whenever the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, it has power to order a settlement to be made of her property, whether in possession or reversion, for the benefit of the innocent party, and the children of the marriage or either or any of them (*r*). And any instrument executed pursuant to any order of the

Settlement of the guilty wife's property on divorce or judicial separation.

(*l*) *Wells* v. *Malbon*, 31 Beav. 48; *Wilkinson* v. *Gibson*, L. R. 4 Eq. 162; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Codrington* v. *Codrington*, L. R. 7 H. L. 854; *Re Nurse*, 13 P. D. 35; *Thornley* v. *Thornley*, 1893, 2 Ch. 229; *Re Wallas*, 1905, P. 326; 2 Wms. V. & P. 911, 912, 2nd ed.

(*m*) *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; *Barton* v. *Sturgeon*, 2 Ch. D. 318; and see *Re Crawford's Settlement*, 1905, 1 Ch. 11. Cf. *Re Morrieson*, 10 Ch. D. 30.

(*n*) As to the effect of a decree of nullity of marriage, see 2 Wms. V. & P. 913, 914, 2nd ed.

(*o*) See *Twentyman* v. *Twentyman*, 1903, P. 82.

(*p*) Stat. 7 Edw. VII. c. 12, s. 1 (1), replacing and extending to nullity of marriage 20 & 21 Vict. c. 85, s. 32: *Lister* v. *Lister*, 15 P. D. 4; see *Bishop* v. *Bishop*, 1897, P. 135.

(*q*) Stat. 7 Edw. VII. c. 12, s. 1 (2), replacing and extending to nullity of marriage 29 Vict. c. 32, s. 1; see *De Lossy* v. *De Lossy*, 15 P. D. 115. Such an allowance is not alienable; *Watkins* v. *Watkins*, 1896, P. 222.

(*r*) Stat. 20 & 21 Vict. c. 85, s. 45; *Midwinter* v. *Midwinter*, 1892 P. 28; *Lorrimate* v. *Lorrimate*, 1908, P. 282. But the Court cannot order such a settlement to be made out of the wife's property, which she is restrained from alienating; *Lorraine* v. *Lorraine*, 1912, P. 222.

Court made under this enactment, at the time of or after the pronouncing of a final decree of divorce or judicial separation, is to be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof (*s*). And after a decree of nullity or dissolution of marriage, the Court may inquire into the existence of ante-nuptial or post-nuptial settlements (*t*) made on the parties whose marriage is the subject of the decree, and may make such order with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit (*u*). Such orders are commonly known as orders for the variation of settlements.

Variation of settlements on dissolution or nullity of marriage.

Under the Matrimonial Causes Act, 1884 (*x*), a decree for restitution of conjugal rights is no longer enforceable by attachment, as was previously the case (*y*): but where the application is by the wife, the Court may, at the time of making such decree, or at any time afterwards (*z*), order that in the event of such decree not being complied with within any

Powers of Court on application for restitution of conjugal rights.

(*s*) Stat. 23 & 24 Vict. c. 144, s. 6, made perpetual by stat. 25 & 26 Vict. c. 81.

(*t*) See *Hubbard* v. *Hubbard*, 1901, P. 157.

(*u*) Stat. 22 & 23 Vict. c. 61, s. 5; *Ponsonby* v. *Ponsonby*, 9 P. D. 58, 122; *M.* v. *M.*, 10 P. D. 178; *Noel* v. *Noel*, *ib.* 179; *Bengough* v. *Bengough*, 15 P. D. 54; *Pollard* v. *Pollard*, 1891, P. 172; *Hastopp* v. *Hastopp* 1899, P. 65; *Blood* v. *Blood*, 1902, P. 190; *Constantinidi* v. *Constantinidi*, 1905, P. 253, and see as to removing the effect of a restraint on anticipation contained in the settlement: *Churchward* v. *Churchward*, 1910, P. 195; *Loraine* v. *Loraine*, 1912, P. 222. This provision was held not to apply if there was no child of the marriage living at the date of the order: *Corrance* v. *Corrance*, L. R. 1 P. & D. 495. But by stat. 41 Vict. c. 19, s. 3, the Court may exercise the powers so vested in it, notwithstanding that there are no children of the marriage: *Ansdell* v. *Ansdell*, 5 P. D. 138; see also *Meredyth* v. *Meredyth*, 1895, P. 92; *Thomson* v. *Thomson*, 1896, P. 263; *Dormer* v. *Ward*, 1901, P. 20.

(*x*) Stat. 47 & 48 Vict. c. 68, s. 2.

(*y*) *Weldon* v. *Weldon*, 9 P. D. 52.

(*z*) See *Leslie* v. *Leslie*, 1908, P. 99.

time in that behalf limited by the Court, the respondent shall make to the petitioner such periodical payments as may be just, and such order may be enforced in the same manner as an order for alimony in a suit for judicial separation; and the Court may, if it shall think fit, order that the husband shall, to the satisfaction of the Court, secure to the wife such periodical payments. Where the application for restitution of conjugal rights is by the husband, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, or in receipt of any profits of trade or earnings, the Court may, if it shall think fit, order a settlement to be made to the satisfaction of the Court of such property or any part thereof, for the benefit of the petitioner and of the children of the marriage, or either or any of them, or may order such part as the Court may think reasonable of such profits of trade or earnings to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them (*a*). But the Court has no jurisdiction to order any such settlement to be made out of property which the wife is restrained from anticipating (*b*). To obtain an order under this Act is now the only remedy in the case of a withdrawal from cohabitation by either husband or wife; for neither party is entitled to keep the other in confinement, if the other desires to live apart (*c*).

Agreements for separation.

Separation between husband and wife is not encouraged by the law. A clause in a marriage settlement providing for the event of a separation has been considered to be void (*d*); and so has a condi-

(*a*) Stat. 47 & 48 Vict. c. 68, s. 3.

(*b*) *Mitchell* v. *Mitchell*, 1891, P. 208.

(*c*) *R.* v *Jackson*, 1891, 1 Q. B. 671.

(*d*) *Cocksedge* v. *Cocksedge*, 14 Sim. 244; *Cartwright* v. *Cart-*

tion in a gift of personal estate to a woman living apart from her husband, that the gift should cease in case she should cohabit with him (*e*). But a trust in a post-nuptial settlement of the husband's property to pay the income thereof to his wife, so long as she should continue to be his cohabiting wife or his widow, has been upheld as a valid limitation (*f*). It is, moreover, now settled that an agreement for an immediate separation between husband and wife is not void for illegality (*g*); and any contract by a husband or wife to live apart from and not to molest the other, or not to sue the other for any breach of conjugal duty, will be enforced by the Court (*h*). A married woman's power of entering into such a contract formed a notable exception to her former incapacity to contract (*i*). As she might sue or be sued by her husband in any matrimonial cause (*k*), it was held that she might enter into a binding agreement to compromise any such proceedings (*l*). Upon the same principle, it was further decided that a wife might make a valid contract to live apart from her husband founded upon other valuable consideration than a compromise of such proceedings (*m*). But on the occasion of a com-

wright, 3 De G., M. & G. 982; *H.* v. *W.*, 3 K. & J. 382; see also *Hindley* v. *Marquis of Westmeath*, 9 B. & C. 200; *Merryweather* v. *Jones*, 4 Giff. 499; *Wilson* v. *Carnley*, 1908, 3 K. B. 729, 740, 743.

(*e*) *Wren* v. *Bradley*, 2 De G. & S. 49; and see *Re Moore*, 39 Ch. D. 316.

(*f*) *Re Hope Johnstone*, 1904, 1 Ch. 470.

(*g*) *Jones* v. *Waite*, 4 Man. & Gr. 1104; *Wilson* v. *Wilson*, 1 H. L. C. 538.

(*h*) *Sanders* v. *Rodway*, 16 Beav. 207; *Hamilton* v. *Hector*, L. R. 13 Eq. 511; *Marshall* v. *Marshall*, 5 P. D. 39; *Besant* v. *Wood*, 12 Ch. D. 605; *Gandy* v. *Gandy*, 7 P. D. 168; *Rose* v. *Rose* 8 P. D. 98; *Clark* v. *Clark*, 10 P. D. 188; *Gandy* v. *Gandy*, 30 Ch. D. 57; *Aldridge* v. *Aldridge*, 13 P. D. 210; *McGregor* v. *McGregor*, 20 Q. B. D. 529; *Kennedy* v. *Kennedy*, 1907, P. 49; *Harrison* v. *Harrison*, 1910, 1 K. B. 35; see *Bishop* v. *Bishop* 1897, P. 338. Cf. *Norman* v. *Norman*, 1908, P. 6; *Balcombe* v. *Balcombe*, *ib.*, 176.

(*i*) *Ante*, p. 550.

(*k*) *Ante*, p. 576.

(*l*) *Rowley* v. *Rowley*, L. R. 1 H. L. Sc. App. 63; Jessel, M.R., *Besant* v. *Wood*, 12 Ch. D. 605, 621; *Rose* v. *Rose*, 8 P. D. 98; *Cahill* v. *Cahill*, 8 App. Cas. 420, 429, 435, 436.

(*m*) *Hunt* v. *Hunt*, 4 De G., F. & J. 221; *Marshall* v. *Mar-*

promise of any proceedings in a matrimonial cause, or the execution of an agreement for separation, a married woman had no greater capacity to dispose of property or to contract in respect thereof than she had at any other time (*n*). So that a woman married under the rule of the common law could not, on separating from her husband, make a valid disposition of her reversionary chose in action (*o*), except under the provisions of Malins' Act (*p*), or of her real estate, otherwise than as provided by the Fines and Recoveries Act (*q*). But a wife agreeing to separate from her husband might dispose of or bind by engagement any property settled on trust for her separate use without restraint on anticipation (*r*), and may of course now deal with or contract in respect of her separate property, which she is not restrained from alienating (*s*).

shall, 5 P. D. 19; *Besant* v. *Wood*, 12 Ch. D. 605; *Clark* v. *Clark*, 10 P. D. 188; *Aldridge* v. *Aldridge*, 13 P. D. 210; *McGregor* v. *McGregor*, 20 Q. B. D. 529; *Re Weston*, 1900, 2 Ch. 164.

(*n*) *Stamper* v. *Barker*, 5 Madd. 157; *Slatter* v. *Slatter*, 1 Y. & C. 28; *Vansittart* v. *Vansittart*, 4 K. & J. 62; *Cahill* v. *Cahill*, 8 App. Cas. 420; *Hart* v. *Jarman*, 1895, 2 Ch. 419.

(*o*) *Stamper* v. *Barker*, 5 Madd. 157; see *ante*, p. 541.

(*p*) *Ante*, p. 543.

(*q*) *Cahill* v. *Cahill*, 8 App. Cas. 420; see Williams, R. P. 310, 21st ed.

(*r*) *Cahill* v. *Cahill*, 8 App. Cas. 420, 429, 431; *ante*, pp. 546, *sq.*

(*s*) *Ante*, pp. 557, *sq.*

PART IV.

OF TITLE.

§ 1. *To Choses in Possession.*

We have seen (*a*) that there are two ways of acquiring the ownership of goods, which are quite irrespective of any previous title. One is under an exercise of sovereign authority, of which several instances have been given (*b*); the other is by occupancy (*c*). Any person who acquires goods in either of these ways obtains a valid title to them, as against all the world. For the occupant of any goods enjoys the original ownership of them (*d*), and when a new ownership is conferred under sovereign authority, all other claims are effectually extinguished. These modes of acquisition are however exceptional; and we will proceed to consider what title is obtained when goods are acquired in other ways, not independent of previous ownership (*e*), as upon sale, gift or succession after death.

General rule as to title.

The general rule of the common law is that if a man dispose of a chattel, whether for value or otherwise, he can confer no better title thereto than he has himself (*f*). Thus if any one obtain possession of a watch, for instance, by theft or finding, and then sell it, but not in market overt, the buyer will not be entitled to retain it as against the owner (*g*). Nor

(*a*) *Ante*, pp. 48, 49.

(*b*) *Ante*, p. 49, and p. 26, n. (*f*).

(*c*) *Ante*, p. 49.

(*d*) *Ante*, p. 49.

(*e*) See *ante*, p. 48.

(*f*) *Cole* v. *North Western Bank*, L. R. 10 C. P. 354, 362.

(*g*) *White* v. *Spettigue*, 13 M. & W. 603, establishing that there is no rule of law to prevent the owner of stolen goods from suing an innocent purchaser for their recovery before conviction of the thief (see *ante*, p. 54); *Cundy* v. *Lindsay*, 3 App. Cas. 459; *Peters* v. *London and County Bank*, 18 Q. B. D. 515; *Farquharson* v

can the buyer require repayment of the price paid by him before delivering up the watch to its owner; for a refusal to give it up, except on such conditions, would be a conversion of the chattel to the buyer's own use, and would render him liable to be sued for its recovery or value (*h*). And it makes no difference that the buyer purchased the watch in good faith without notice of any defect of title in the person from whom he took it (*i*). And if the seller had obtained possession of the watch on a loan of it by the owner, the buyer would take it equally subject to the owner's rights. For as we have seen (*k*), the common law does not enable a bailee to confer any title to the chattels bailed as against the owner claiming them after the determination of the bailment. We have taken an absolute sale by a thief or finder as the strongest instance of the rule which we are considering; but of course a pledge (*l*) or gift of chattels by one so possessed of them confers no better title than a sale. The above general rule of the common law applies to dispositions of all goods, other than money or negotiable securities (*m*).

King, 1902, A. C. 325; stat. 56 & 57 Vict. c. 71, s. 23; and see *ante*, pp. 7—10, 15, 24, 52—55.

(*h*) *Lee* v. *Bayes*, 18 C. B. 599; *ante*, pp. 17, 53, 54. A re-sale by the buyer, however innocently, would also be a conversion of the chattel to his own use, and render him liable in trover to the owner; see cases cited in previous note, and in n. (*q*) to p. 53, *ante*. The innocent purchaser of stolen goods may, however, obtain an order for his reimbursement out of any moneys taken from the thief on his apprehension; stat. 30 & 31 Vict. c. 35, s. 9.

(*i*) *Farquharson* v. *King*, 1902, A. C. 325; *Oppenheimer* v. *Frazer*, 1907, 2 K. B. 50, 59, 67.

(*k*) *Ante*, pp. 23, 59.

(*l*) *Hartop* v. *Hoare*, 1 Wils. 8; 2 Str. 1187; *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37, 42. Under the Pawnbrokers Act, 1872, stat. 35 & 36 Vict. c. 93, s. 30, goods unlawfully pawned with a pawnbroker may be ordered to be delivered to their owner, *either on payment to the pawnbroker of the amount of the loan or any part thereof*, or without such payment, as to the Court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting. But this enactment does not interfere with the owner's common law rights, or deprive him of his civil remedy: *Leicester* v. *Chapman*, 1907, 2 K. B. 101.

(*m*) *Great Western Ry.* v. *London and County Bank*, 1901, A. C. 414, deciding that cheques crossed "not negotiable" (*ante*, p. 207) are governed by the general rule.

These form the subject of one of the exceptions to the rule. As may be supposed, when title is transmitted by act of law, as upon succession after death, or the exercise of some creditor's right, it is no better than it was before, either at law or in equity (*n*). Thus an executor (*o*) or a trustee in bankruptcy (*p*) has no better right to goods wrongfully obtained by the testator or bankrupt than he himself had. And if the sheriff under a writ of *fi. fa.* (*q*) seize and sell goods, of which the judgment debtor is apparently but not really the owner, the sheriff is liable for their wrongful seizure (*r*), or the goods may be recovered from the purchaser (*s*).

Exceptions.

The exceptions to the above general rule have been already indicated in stating the limitations of ownership (*t*). They arise some by the common law, and others by statute. But in most cases their object is the same, namely, to protect persons who purchase goods in good faith and for value in the ordinary course of commerce, without notice of any defect in the title of those from whom they obtained them. We will first notice the common law exceptions, of which the principal relates to sales in market overt.

Sale in market overt.

The law of sale in market overt has been already noticed (*u*); it is now codified by the Sale of Goods Act, 1893 (*x*), as follows:—Where goods are sold in market overt, according to the usage of the market the buyer acquires a good title to the goods, provided he buys them in good faith and without notice

(*n*) See Lewin on Trusts, 215, 216, 6th ed.; 275, 276, 12th ed.

(*o*) Wms. Saund. 217, n. (1).

(*p*) *Load* v. *Green*, 15 M. & W. 216, 221; *Ex parte Drake, Re Ware*, 5 Ch. D. 866; *Re Eastgate*, 1905, 1 K. B. 465; *Tilley* v. *Bowman, Ld.*, 1910, 1 K. B. 745.

(*q*) *Ante*, p. 107.

(*r*) *Glasspoole* v. *Young*, 9 B. & C. 696; 33 R. R. 294; *Legg* v. *Evans*, 6 M. & W. 36; *Freeman* v. *Cooke*, 2 Ex. 654; *Scott* v. *Shorey*, 74 L. T. N. S. 200; *Hayward*, 1905, 2 K

(*s*) *Farrant* v. *Thom* B. & A. 826; 21 R. R *Crane* v. *Ormerod*, 1903, 2 37.

(*t*) *Ante*, p. 24.

(*u*) *Ante*, pp. 15, 24.

(*x*) Stat. 56 & 57 Vict. s. 22 (1).

of any defect or want of title on the part of the seller. As we have seen, however, there is one case in which even a sale in market overt will not protect a purchaser, namely, where the goods sold were stolen, and the thief has been prosecuted to conviction. For in this case the ownership of the goods is revested by statute in the party robbed, who may then recover them from any person in whose possession they are, whether the latter obtained them by purchase in market overt or otherwise (*y*). With regard to horses, a sale in market overt will not confer on the purchaser any further title than is possessed by the vendor, unless the sale be made according to the directions of certain statutes (*z*); and even then the true owner may, at any time within six months after his horse has been stolen, recover his property on tender to the person in possession of the price he *bonâ fide* paid for it (*a*). Every shop in the city of London, where goods are openly sold, is considered as a market overt for such things as by the trade of the owner are put there for sale (*b*). But the shops at the west end of the town do not appear to possess this privilege.

Horses.

Shops in the City of London.

The second common law exception relates to money and negotiable securities, of which the delivery in the ordinary course of business for valuable consideration and in good faith confers a good title thereto as against all the world. If therefore any money or negotiable securities be stolen, the owner cannot recover them after they

Money and negotiable securities.

pp. 9, 10, and n. (*z*).
k). If, however, the of stolen goods in overt resell them *before* conviction of the thief, he is not liable as for their conversion, s. 587, n. (*h*)); for when he resell, he was their lawful owner *Horwood* v. *Smith*, 2 T. R. 750 and see *Walker* v. *Matthews*, 8 Q. B. D. 109.

(*z*) Stats. 2 & 3 P. & M. c. 7; 31 Eliz. c. 12; 56 & 57 Vict. c. 71, s. 22 (2); 2 Black. Comm. 450.

(*a*) Stat. 31 Eliz. c. 12, s. 4.

(*b*) *The Case of Market Overt*, 5 Rep. 83 b; *Lyons* v. *De Pass*, 11 A. & E. 326; see *Hargreave* v. *Spink*, 1892, 1 Q. B. 25; *Clayton* v. *Le Roy*, 1911, 2 K. B. 1031.

have been so transferred (*c*); nor does the ownership of any negotiable instrument stolen and so transferred revest in the party robbed upon conviction of the thief (*d*). And no title at all is required to be shown by the payer or deliverer of any money or negotiable securities in any *bonâ fide* business transaction. Thus, if a sovereign or a banknote be offered in payment of a debt, it is no part of the duty of the creditor, under ordinary circumstances, to ask the debtor how he came by it. But if there be any *mala fides* on the part of the person receiving any money or negotiable security, or such gross negligence as may amount in itself to evidence of *mala fides*, the true owner may recover such property, provided its identity can be ascertained (*e*).

Dispositions by persons having a voidable title to goods.

Thirdly, both at common law and in equity, if any one acquire goods, or any equitable interest therein, under a conveyance voidable for fraud, misrepresentation, duress, or undue influence, and dispose of the same for value to another, who takes in good faith and without notice of the defect in the title, the original conveyance to the former party can no longer be set aside as against the latter, who thus acquires an indefeasible title to the property (*f*).

(*c*) *Ante*, pp. 24, 25, 202, 204, 207, 343, 344. But a rare coin sold by a thief as a curiosity and never passed into circulation has been held to be recoverable according to the general rule; *Moss* v. *Hancock*, 1899, 2 Q. B. 111.

(*d*) See stat. 24 & 25 Vict. c. 96, s. 100; *London and County Bank* v. *London and River Plate Bank*, 21 Q. B. D. 535, 540; *ante*, p. 10, n. (*z*) 15, 24, n. (*i*).

(*e*) *Clarke* v. *Shee*, Cowp. 197; *Foster* v. *Pearson*, 1 C. M. & R. 849; *S. C.*, 5 Tyrw. 255; *Goodman* v. *Harvey*, 4 A. & E. 870. And see *Raphael* v. *Bank of England*, 17 C. B. 161; *Jones* v. *Gordon*, 2 App. Cas. 616.

(*f*) See 2 Wms. V. & P. 757, 832, 851, 872, 873 and n. (*o*), 892, 2nd ed.; and, as to the rule of common law, *White* v. *Garden*, 10 C. B. 919; *Kingsford* v. *Merry*, 25 L. J. (N. S.) Ex. 166, reversed on another ground, 26 L. J. (N. S.) Ex. 83; *Pease* v. *Gloahec*, L. R. 1 P. C. 219, 229, 230; *Cundy* v. *Lindsay*, 3 App. Cas. 459, 461; *Valmont* v. *Bentley*, 18 Q. B. D. 322, 330; 12 App. Cas. 171, 177, 183 (this decision gave rise to the amending stat. 56 & 57 Vict. c. 71, s. 24 (2); *ante*, p. 19, n. (*z*)); *Tilley* v. *Bowman, Ld.*, 1910, 1 K. B. 745, 749; *Hotchkiss* v. *Davison*, 1911, 1 K. B. 463 (the last two cases relate to pawning goods procured through purchase

And by the Sale of Goods Act, 1893 (*g*), when the seller of goods (*h*) has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title. This enactment extends in terms to every kind of voidable title (*i*): but it remains to be decided whether it applies to titles, which are voidable on account of the personal incapacity of the conveying party, such as the title acquired under a voidable conveyance by an infant or a lunatic (*k*). These cases were not comprehended in the common law doctrine above stated (*l*).

Estoppel.

Fourthly, a valid title to goods may be acquired from one who is not their owner, in consequence of the law of estoppel. For, as we have seen (*m*), if a man has acted so as to induce the belief that another was the owner or had power to dispose of his goods, he will be estopped by his conduct from recovering the goods from parties who have acquired them from the other for value to the belief so induced.

induced by fraud); as to the rule of equity, *Sturge* v. *Starr*, 2 My. & K. 195; *Phillips* v. *Phillips*, 4 De G., F. & J. 208, 218; *Hunter* v. *Walters*, L. R. 7 Ch. 75; *National Provincial Bank of England* v. *Jackson*, 33 Ch. D. 1, 13; *Lloyd's Bank* v. *Bullock*, 1896, 2 Ch. 192, 197; cf. *Cave* v. *Cave*, 15 Ch. D. 639, 647.

(*g*) Stat. 56 & 57 Vict. c. 71, s. 23.

(*h*) *Ante*, p. 77, n. (*p*).

(*i*) *Ante*, pp. 84, 85, 92.

(*k*) *Ante*, p. 101.

(*l*) See 2 Wms. V. & P. 872, 873, 892, 2nd ed. It should be noted that statutes purporting to codify the law are construed primarily according to the expressions used therein, and not by reference to the previous law: *Bank of England* v. *Vagliano*, 1891, A. C. 107, 129, 141, 145, 160, 161.

(*m*) *Ante*, p. 25, n. (*p*); *Henderson* v. *Williams*, 1895, 1 Q. B. 521; see *Farquharson* v. *King*, 1902, A. C. 325, 341. Upon this principle it has been held that, if one intrust another with securities appearing on the face of them to be transferable by delivery, though not recognised as negotiable by law (see *ante*, pp. 343, 344), and the latter fraudulently deal with them as negotiable, the former will be estopped from denying their negotiability in an action to recover them from a third party, who has taken them in the ordinary course of business for value and in good faith; *Goodwin* v. *Roberts*, 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194.

Transactions as to chattels taken into foreign countries.

Fifthly, if any chattels be taken into a foreign country, a good title thereto may be acquired by any transaction, with regard to them, which by the law of that country confers a title valid against all the world; and the title so acquired will remain valid in the event of the chattels being brought back to England (*n*).

Indorsement for value of bill of lading.

The remaining common law exception to the rule, which prevents the disposer of a chattel from conferring any greater right than he has himself, occurs in the case of the *bonâ fide* indorsement and delivery for value of a bill of lading by a buyer of goods forwarded by sea, who has not paid for them. In such a case, as we have seen (*o*), the right of stoppage *in transitu*, which might have been exercised against the buyer himself, is either altogether defeated, or postponed to the claim of the transferee of the bill of lading, according as the transfer of the same were by way of sale or pledge.

Statutory exceptions.

The most important statutory exceptions to the above-mentioned general rule are those existing under the Factors Act, 1889 (*p*). These have been already noticed (*q*). As we have seen, their effect is to enable mercantile agents intrusted with the possession of goods to make valid sales or pledges of them without the owner's authority (*r*); to enable a person intrusted with the possession of goods for the purpose of consignment or sale, or in whose name goods are shipped, to give a valid lien on them for

(*n*) *Ante*, p. 25.
(*o*) *Ante*, pp. 89—91.
(*p*) Stat. 52 & 53 Vict. c. 45.
(*q*) *Ante*, pp. 23, n. (*g*), 87—91.
(*r*) By the common law a factor or agent in the possession of goods could not give any further title to the goods than he was authorised to give by his principal, either expressly or by implication arising from the usual course of his employment; *Pickering* v. *Busk*, 15 East, 38, 43; 13 R. R. 361; *Williams* v. *Barton*, 3 Bing. 139; 24 R. R. 448; and this is still the law in cases not governed by the Factors Act; *Oppenheimer* v. *Frazer*, 1907, 2 K. B. 50.

advances made to or for him by the consignee of the goods; to enable the seller or buyer of goods in possession of them to make valid dispositions of them, each as against the other; and to enable the buyer of goods in possession of any delivery order or other document of title to the goods to defeat or postpone the vendor's lien or right of stoppage *in transitu* by transferring over the document for value. But in each case the Act confers a valid title only upon persons acting in good faith. Other statutory exceptions occur in the case of the alienation of goods by an owner, against whom a writ of *fi. fa.* has been delivered to the sheriff, or who has committed an act of bankruptcy, to a person taking the goods in good faith, for value and without notice of the delivery of any writ of execution or of any available act of bankruptcy, as the case may be (*s*).

Restrictive conditions cannot be annexed to goods.

Here it may be mentioned that restrictive conditions, such as may be annexed in equity to land (*t*), cannot, as a rule, be annexed to goods. Thus if one sell goods to another with a stipulation that the purchaser shall not re-sell them under a certain price, or shall observe any other condition as to their use, the condition is not binding, either at law or in equity, on any person who acquires the goods from the purchaser, whether for value or gratuitously: for the stipulation only imposed a contractual obligation on the purchaser, and did not affect the goods (*u*). Where, however, some particular chattel is the subject of a patent, restrictive conditions can be annexed thereto, because no one is entitled to sell or use a patented article without the

Except in the case of a patented article.

(*s*) *Ante*, pp. 107, 292.

(*t*) See Williams, R. P. 188, 21st ed.; 1 Wms. V. & P. 491 *et seq.*, 2nd ed.

(*u*) *Taddy* v. *Sterious*, 1904, 1 Ch. 354; *McCrutther* v. *Pitcher*, 1904, 2 Ch. 306; *National Phonograph Co. of Australia, Ld.* v. *Menck*, 1911, A. C. 336, 347; cf. *National Phonograph Co., Ld* v. *Edison Bell, &c., Co., Ld.*, 1908, 1 Ch. 335.

licence of the patentee (*x*). If the patentee sell the patented article without imposing any restrictions on its use, that implies a licence for the purchaser to use it in any manner he thinks fit. But where the patentee does impose restrictions (as with respect to the price at or other conditions on which the article may be sold), a purchaser from any other person than the patentee, including a licensee of the patentee, is bound by the restrictions, if he bought the article with knowledge of the restrictions clearly brought home to himself at the time of such purchase: though otherwise not (*y*).

Warranty of title.

In ancient times the sale of lands was usually accompanied by a warranty of their title. Warranties, however, fell into disuse, and the purchasers of land acquired a right to covenants for the title, varying in their stringency according to the nature of the title of the vendor (*z*). But, upon the sale of chattels personal, there may still be a warranty of title, either express or implied. And every affirmation made by the vendor at the time of sale respecting the goods is an express warranty, if it appear to have been so intended (*a*): but a warranty made subsequently to the sale is void for want of consideration (*b*). And if the vendor state that the goods are his own, this amounts to an express warranty of his title (*c*).

Implied warranty of title on sale.

According to the modern common law rule, moreover, the act of selling goods implies an assertion of ownership in the goods sold. A warranty of title was therefore implied on the sale of goods, unless it appeared from the circumstances of the transaction

(*x*) *Ante*, pp. 362, 363.

(*y*) *National Phonograph Co. of Australia, Ld.* v. *Menck*, 1911, A. C. 336, 349 *sq.*

(*z*) See Williams, R. P. 588, 607, 21st ed.

(*a*) See *Richardson* v. *Brown*, 1 Bing. 344; 25 R. R. 648; *Shepherd* v. *Kain*, 5 B. & Ald. 240; 24 R. R. 344; *Power* v. *Barham*, 4 Ad. & Ell. 473; *Carter* v. *Crick*, 4 H. & N. 412; Benjamin on Sale, 499, 2nd ed.; 650, 5th ed.

(*b*) Finch, L. 189; *Roscorla* v. *Thomas*, 3 Q. B. 234. See *ante*, p. 181.

(*c*) *Furniss* v. *Leicester*, Cro. Jac. 474; *Medina* v. *Stoughton*, 1 Salk. 210.

that the intention of the parties to the contract was merely to transfer such interest as the vendor had in the goods sold (*d*). On this subject the law is now codified in the Sale of Goods Act, 1893 (*e*), as follows: –

(Sect. 12) In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is –

(1.) An implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell (*f*) he will have a right to sell the goods at the time when the property is to pass:

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

Warranty of quality.

By the general rule of the common law, upon the sale of goods, no warranty is implied as to the quality of the goods sold (*g*). But affirmations made at the time of sale may amount to an express warranty of quality, as in the case of warranty of title (*h*). And a warranty of quality may be implied from the circumstances of the transaction (*i*). The law as to the implication of a warranty of quality is now codified in the Sale of Goods Act, 1893 (*k*), as follows: –

(Sect. 14) Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or con-

(*d*) See *Chapman* v. *Spiller*, 14 Q. B. 621; *Morley* v. *Attenborough*, 3 Ex. 500; *Eichholz* v. *Bannister*, 17 C. B. N. S. 708; *Bagueley* v. *Hawley*, L. R. 2 C. P. 625; *R.* v. *Sampson*, 52 L. T. N. S. 772; *Edwards* v. *Pearson*, 6 Times L. R. 220; Benjamin on Sale, 511—523, 2nd ed.; 597 *sq.*, 5th ed.

(*e*) Stat. 56 & 57 Vict. c. 71, s. 12.

(*f*) See sect. 1 (3); *ante*, p. 77.

(*g*) See Benjamin on Sale, 498, 525, 2nd ed.; 623, 658, 5th ed.; *Jones* v. *Just*, L. R. 3 Q. B. 197, 202.

(*h*) See Benjamin on Sale, 490, 2nd ed.; 659, 5th ed.; *Heilbut, Symons & Co.* v. *Buckleton*, 1913, A. C. 30.

(*i*) See Benjamin on Sale, 525 *sq.*, 2nd ed.; 623 *sq.*, 5th ed.; *Jones* v. *Just*, L. R. 3 Q. B. 197; *Drummond* v. [illegible] *Ingen*, 12 App. Cas. 284; *Jo* v. *Padgett* 24 Q. B. D. 650.

(*k*) Stat. 56 & 57 Vict. c. 71.

dition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (*l*):

(2.) Where goods are bought by description (*m*) from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality (*n*): provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed (*o*):

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Implied warranty as to genuineness of trade mark or trade description.

By the Merchandise Marks Act, 1887 (*p*), on the sale or in the contract for the sale of any goods to which a trade mark, mark, or trade description (*q*) has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade

(*l*) See *Gillespie* v. *Cheney*, 1896, 2 Q. B. 59; *Preist* v. *Last*, 1903, 2 K. B. 148; *Frost* v. *Aylesbury Dairy Co.*, 1905, 1 K. B. 608; *Bristol Tramways, &c., Co., Ld.* v. *Fiat Motors, Ld.*, 1910, 2 K. B. 831.

(*m*) It is important to note that a sale of goods by description implies a condition that the goods shall correspond with the description. If they do not, they may be rejected; or in case the goods should have been accepted in the belief that they answered the description, the purchaser can sue for damages for breach of the condition as on a warranty to the same effect: *Wallis* v. *Pratt*, 1911, A. C. 394.

(*n*) See *Jackson* v. *Rotax, &c., Co.*, 1910, 2 K. B. 937.

(*o*) See *Wren* v. *Holt*, 1903, 1 K. B. 610; *Bristol Tramways, &c., Co. Ld.* v. *Fiat Motors, Ld.*, 1910, 2 K. B. 831.

(*p*) Stat. 50 & 51 Vict. c. 28 s. 17, replacing the provisions of an Act of 1862.

(*q*) See sect. 3.

description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee.

Statute of Limitations.

If goods and chattels should have come into the possession of persons having no title to them, such persons will, in course of time, be quieted in their enjoyment by virtue of the Limitation Act, 1623. By this statute all actions of trespass, detinue, trover and replevin for taking away goods and cattle must be brought within *six* years next after the cause of such action: but if the person entitled to any such action be under age, *feme covert*, or *non compos mentis*, such person shall be at liberty to bring the same action within *six* years after the disability is removed (*r*). As we have seen (*s*), however, this Act only bars the action for the recovery of the goods, and does not extinguish the owner's title. If one intrust his goods to a simple bailee, time does not begin to run against him under the statute until he has demanded and been refused their return (*t*).

Disabilities

§ 2. *To Choses in Action.*

Title to choses in action.

Choses in action, whether legal or equitable, differ from choses in possession in this, that the title to them is endangered rather than strengthened by the Statutes of Limitation. This difference arises from the nature of the property. Choses in action, properly so called, appear to consist, not of any right or title to any definite tangible thing in another's possession, but of the right of one person

(*r*) Stat. 21 Jac. I. c. 16, ss. 3, 7. The disabilities of absence beyond seas and imprisonment were abolished by stat. 19 & 20 Vict. c. 97, ss. 10, 12.

(*s*) *Ante*, p. 25.

(*t*) *Wilkinson* v. *Verity*, L. R. 6 C. P. 206; *Miller* v. *Dell*, 1891, 1 Q. B. 468

to the performance of a *duty* owed to him by another to do or refrain from doing some particular act; which duty, if not voluntarily rendered, can only be exacted by action at law or in equity (*u*). The duty to make compensation for a wrong or for a breach of contract are the best examples; especially the duty arising from breach of a contract to pay a definite sum of money, which is a debt (*x*). Choses in action, properly so called, have no existence independently of the *obligations* (*y*) of the parties liable to render and entitled to receive them. Thus tangible goods may exist without an owner, as in the case of fish in the sea or goods abandoned (*z*): but if there cease to be a person entitled to a debt, and the law provides no substitute, the debt itself ceases to exist (*a*). The time within which these obligations are enforceable by action is in almost all cases limited by statute; and the law on this subject is difficult and very complicated, owing to its being contained in three principal Acts of Parliament, the Limitation Act, 1623 (*b*), the Real Property Limitation Act, 1833 (*c*), and the Civil Procedure Act, 1833 (*d*), the two latter being amendments of the first, all three having been amended by the Mercantile Law Amendment Act, 1856 (*e*), and the second having been partly replaced by the Real Property Limitation Act, 1874 (*f*).

Statutes of Limitation to choses in action.

Actions *ex delicto*.

First, as to obligations to make compensation for a wrong (*g*):—Under the Limitation Act, 1623.

(*u*) See *ante*, pp. 29 and n. (*u*), 31 *sq.*, 42, 43, 158, 159, 161, 162, 172.

(*x*) *Ante*, pp. 29—32, 161, 162, 172, 179, 212, 213, and n. (*b*).

(*y*) *Ante*, pp. 158, 161, 162; cf. pp. 40—44; and as to the true nature of the benefit of a trust, see Williams, R. P. 181—183, 21st ed.; *ante*, p. 27.

(*z*) *Ante*, pp. 25, 49, 50.

(*a*) See *Re Higginson* v. *Dean*, 1899, 1 Q. B. 325, 330 *sq.*; 2 Wms. V. & P. 964, 965, 2nd ed.; *ante*, pp. 30—32, and nn. (*r*), (*s*), 162—166.

(*b*) Stat. 21 Jac. I. c. 16.

(*c*) Stat. 3 & 4 Will. IV. c. 27.

(*d*) Stat. 3 & 4 Will. IV. c. 42.

(*e*) Stat. 19 & 20 Vict. c. 97.

(*f*) Stat. 37 & 38 Vict. c. 57.

(*g*) *Ante*, pp. 158, 161, 162.

actions *ex delicto*, including those for the detention or conversion of goods (*h*), must generally be brought within *six years* after the cause of action or the removal of the disability of infancy, coverture or lunacy, if attaching at the time of the cause of action on the party entitled thereto: but the time for bringing actions of assault, battery, wounding or imprisonment is limited to *four years*, and that for bringing actions of slander for words actionable of themselves (*i*) is limited to *two years* after the same events (*k*).

Actions for damage done by a ship or for salvage of a ship.

By the Maritime Conventions Act, 1911, no action is maintainable to enforce any claim or lien against a vessel (*l*) or her owners in respect of any damage or loss to another vessel, her cargo or freight, or any property on board her, or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel (*m*), or in respect of any salvage services (*n*), unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused or the salvage services were rendered. But any Court having jurisdiction to deal with any such action *may*, in accordance with the rules of Court, extend any such period, to such extent and on such conditions as it thinks fit; and *shall*, if satisfied that there has not during such period been any reasonable opportunity

(*h*) *Ante*, p. 597.

(*i*) Slander for words not actionable of themselves may be brought within six years after the date of the special damage; *Saunders* v. *Edwards*, 1 Sid. 95; *Browne* v. *Gibbons*, 1 Salk. 206.

(*k*) Stat 21 Jac. 1. c. 16, ss. 3, 7, amended by 19 & 20 Vict. c. 97, s. 10, removing absence beyond seas and imprisonment from the list of disabilities.

(*l*) A maritime lien on a ship is of course not the mere right to the performance of a duty by another person, but a right attaching on the ship itself; see *ante*, pp. 125—130.

(*m*) See *ante*, pp. 126, 129, 130, 153, 164, and n. (*l*).

(*n*) See *ante*, pp. 126, 127, 129, 130.

of arresting the defendant vessel (*o*) within the jurisdiction of the Court, or within the territorial waters of the country to which the plaintiff's ship belongs or in which the plaintiff resides or has his principal place of business, extend any such period to an extent sufficient to give such reasonable opportunity (*p*).

Obligations from contract or not from tort.

Simple contract debts.

Secondly, with respect to obligations arising from contract or otherwise than from tort, including those enforceable under equitable jurisdiction only (*q*):—Under the Limitation Act, 1623, a simple contract debt must be sued for within *six years* (*r*) next after the cause of action or after the removal of any of the disabilities of infancy, coverture or lunacy, if attaching at the time of the cause of action (*s*), or if the debtor were beyond seas at the time of the accrual of the cause of action against him, within *six years* after his return (*t*). But as already mentioned (*u*), it is held that a simple contract debt barred by the Statute of Limitations may be revived by an express promise or an acknowledgment amounting to an implied promise to pay it (*x*). And such promise or acknowledgment may

Acknowledgment reviving a simple contract debt.

(*o*) See *ante*, p. 126.

(*p*) Stat. 1 & 2 Geo. V. c. 57, s. 8, also limiting to one year from the date of payment the time for commencing any proceedings to enforce any contribution under sect. 3 of the Act in respect of an overpaid proportion of any damages for loss of life or personal injuries.

(*q*) See *ante*, pp. 29—32, 35, 36, 161, 162, 172, 598, and n. (*y*).

(*r*) See *Gelmini* v. *Moriggia*, 1913, 2 K. B. 549.

(*s*) Stat. 21 Jac. 1. c. 16, ss. 3, 7, amended by 19 & 20 Vict. c. 97. ss. 10, 12, removing absence beyond seas and imprisonment from the list of the creditors' disabilities. The time is six years, although the money due be also charged upon some land or rent; *Barnes* v. *Glenton*, 1899, 1 Q. B. 885. But if the *debt* were so barred, the *charge* would nevertheless remain until barred under the Real Property Limitation Act, 1874, as mentioned below.

(*t*) Stat. 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 19 (1); see *Musurus Bey* v. *Gadban*, 1894, 2 Q. B. 352, 355.

(*u*) *Ante*, pp. 182, 188, 189.

(*x*) *Tanner* v. *Smart*, 6 B. & C. 603; *Chasemore* v. *Turner*, L. R. 10 Q. B. 500; *Green* v. *Humphreys*, 26 Ch. D. 474; *Cooper* v. *Kendall*, 1909, 1 K. B. 405.

be made, either (1) by part payment of principal or interest on account of the debt so made that a promise to pay the remainder of the debt can be inferred therefrom (when no writing is necessary (*y*)), or else, (2) by words only, in which case it must be made by or contained in some writing signed by the party chargeable or his agent (*z*). Other actions liable to be barred within six years under the Limitation Act, 1623, are those to recover back money paid under a mistake of fact (*a*); to enforce the obligation of an executor or administrator *at common law* to pay out of his own pocket the amount of the loss caused by a *devastavit*, that is, any wasting by him of the dead man's assets (*b*); and for payment of the compensation due under an award made by an arbitrator for lands taken or injuriously affected under the Lands Clauses Act, 1845 (*c*).

Recovering money paid by mistake of fact.

Devastavit.

By the Real Property Limitation Act, 1874 (*d*), no action or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment (*e*) or lien (*f*), or otherwise charged

Money secured by mortgage, judgment, or lien, or otherwise charged on any land or rent, and legacies.

(*y*) *Waugh* v. *Cope*, 6 M. & W. 824, 829; *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493; *Re Boswell*, 1906, 2 Ch. 359, settled on appeal 1907, 2 Ch. 331; *Marreco* v. *Richardson*, 1908, 2 K. B. 584; and see *Re Chant*, 1905, 2 Ch. 225; *ante*, p. 188, and n. (*n*).

(*z*) Stat. 9 Geo. IV. c. 14, s. 1, amended by 19 & 20 Vict. c. 97, s. 13; *ante*, pp. 188, 189.

(*a*) *Baker* v. *Courage*, 1910, 1 K. B. 56; *Re Robinson*, 1911, 1 Ch. 502. As to this right, see *Kelly* v. *Solari*, 9 M. & W. 54; *Re Bodega Co., Ld.*, 1904, 1 Ch. 276; *Baylis* v. *Bishop of London*, 1913, 1 Ch. 127.

(*b*) *Lacons* v. *Warmoll*, 1907, 1 K. B. 350; but cf. *Re Hyatt*, 38 Ch. D. 509; *Re Blow*, 1913, 1 Ch. 358; and see *ante*, pp. 220, 566, n. (*x*).

(*c*) *Turner* v. *Midland Ry. Co.*, 1911, 1 K. B. 832; see *ante*, p. 328.

(*d*) Stat. 37 & 38 Vict. c. 57, s. 8, which came into operation on the 1st January, 1879 (s. 12), and replaced the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 40, under which the time of limitation was *twenty* years.

(*e*) This is held to mean judgments generally, and not those operating as charges on land only; *Jay* v. *Johnstone*, 1893, 1 Q. B. 25, 189; *Taylor* v. *Hellard*, 1902, 1 K. B. 676, 678.

(*f*) *Lien* here means a charge on land by way of equitable

upon or payable out of any land (*g*) or rent at law or in equity, or any legacy (*h*), but within *twelve years* next after a present right to receive the same (*i*) shall have accrued to some person capable of giving a discharge for or release of the same; unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*k*), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his

lien, such as the equitable lien of a vendor of land for unpaid purchase money; see Williams, R. P. 567, 21st ed.; 2 Wms. V. & P. 1026 *sq.*, 1047, 2nd ed. It does not include any possessory lien at common law (*ante*, pp. 62 *sq.*, 86), or a vendor's lien for unpaid purchase money of any personal chattels of an incorporeal nature, such as a reversionary interest in settled personalty; *Re Stucley*, 1906, 1 Ch. 67, deciding that the time for enforcing a vendor's lien of this kind is not limited by any statute; see also *Lery* v. *Stogdon*, 1899, 1 Ch. 5, deciding the same as to the lien of a purchaser of such property for a deposit paid by him.

(*g*) *Land* here includes any share, estate or interest in corporeal hereditaments or tithes whether the same shall be a freehold or chattel interest, and whether freehold or copyhold or held according to any other tenure: stats. 3 & 4 Will. IV. c. 27, s. 1; 37 & 38 Vict. c. 57, s. 9; and extends to an interest in the proceeds of sale of land settled on trust for sale; *Kirkland* v. *Peatfield*, 1903, 1 K. B. 756; *Re Hazeldine's Trusts*, 1908, 1 Ch. 34; *Re Fox*, 1913, 2 Ch. 75. It may be noted that the time for bringing an action to foreclose a mortgage of land (in the sense of corporeal hereditaments) is not regulated by the enactment above stated in the text; see Williams, R. P. 563, 564, 21st ed. But this enactment limits every action to enforce the *charge* where money is charged *otherwise* than by mortgage (as by settlement or will or Act of Parliament) on any land (in the above extended meaning), and also where money is charged by way of mortgage on any interest in land consisting of the proceeds of sale of land settled on trust for sale or of money charged on or payable out of land; see the cases last cited; *Hornsey Local Board* v. *Monarch Investment Bdg. Socy.*, 24 Q. B. D. 1; *Skene* v. *Cook*, 1902, 1 K. B. 682, 689.

(*h*) This applies to all legacies, including those payable out of personalty only; *Sheppard* v. *Duke*, 9 Sim. 567; and includes any share of a testator's residuary estate; *Re Davis*, 1891, 3 Ch. 119; *Re Mackay*, 1906, 1 Ch. 25; and bars any proceeding by the legatee against the executor (see *ante*, p. 496), except where the legacy is a charge on any land and is secured by an express trust (as to which, see *post*, p. 610; see *Sheppard* v. *Duke*; *Re Davis*, *ubi sup.*

(*i*) See *Re Owen*, 1894, 3 Ch. 220; *Re Pardoe*, 1906, 1 Ch. 265.

(*k*) See *Re Clifden*, 1900, 1 Ch. 774; *Re Lacey*, 1907, 1 Ch. 330.

agent (*l*), to the person entitled thereto, or his agent (*m*); and in such case no such action or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. It has been held that this enactment limits to *twelve years* and otherwise regulates the right to sue upon any special contract (*n*) by a mortgagor of land or of any interest therein to pay the money secured by the mortgage (*o*); and this is equally the case whether the special contract be contained in the mortgage deed itself, or in a separate instrument (*p*). The same enactment also limits the time for suing upon any special contract to pay any money otherwise charged upon or payable out of any land or rent (*q*). By the Law of Property Amendment Act, 1860 (*r*), any proceeding to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, must be brought within *twenty years* after the same events as above specified with regard to legacies.

Special contract to pay money secured by mortgage of or charged on land or rent.

Personal estate of an intestate.

(*l*) *Lord St. John* v. *Boughton*, 9 Sim. 219.

(*m*) *Blair* v. *Nugent*, 3 Jones & Lat. 673, 677.

(*n*) See *ante*, pp. 177, 233, 600, n. (*s*).

(*o*) *Sutton* v. *Sutton*, 22 Ch. D. 511; *Kirkland* v. *Peatfield*, 1903, 1 K. B. 756; see Williams, R. P. 544, 563, 564, 21st ed. It appears that the term "money secured by mortgage" in this enactment is restricted to money secured by a mortgage of land or rent, or some interest therein, and that this enactment does not affect the right to recover or any special contract to pay the money secured by a mortgage of personal chattels; see *Henry* v. *Smith*, 2 Dru. & War. 381, 387, 388; *Re Lake*, 63 L. T. 416 (where note that the remedy on the covenant had been merged in the judgment and so barred); *ante*, pp. 226, n. (*a*), 601, and n. (*e*); *Re Fox*, 1913, 2 Ch. 75, 78; *ante*, p. 602, and n. (*g*); *Smith* v. *Hill*, 9 Ch. D. 143, 150. As to the question whether the action against a surety by special contract for a mortgage of land or some interest therein is barred by this enactment, see *Re Powers*, 30 Ch. D. 291; *Re Frisby*, 43 Ch. D. 106.

(*p*) *Fearnside* v. *Flint*, 22 Ch. D. 579.

(*q*) *Re England*, 1895, 2 Ch. 820; *Shaw* v. *Crompton*, 1910, 2 K. B. 370 (covenant to pay a rentcharge).

(*r*) See 23 & 24 Vict. c. 38, s. 13; see *Re Johnson*, 29 Ch. D. 964; *ante*, p. 496.

Rent secured by indenture and money secured by bond, specialty or recognizance.

Any action to recover rent due upon an indenture of demise, or money secured by bond or other specialty but not secured by mortgage of or otherwise charged upon or payable out of any land (*s*) or rent (*t*), or to recover money secured by a recognizance must, under the Civil Procedure Act, 1833, be brought within *twenty years* after the cause of such action (*u*), or within twenty years after the removal of any of the disabilities of infancy, coverture or lunacy attaching on the person entitled to the action at the time of the cause of action accrued (*x*).

Debtor's absence beyond seas.

And if any person, against whom there is any such cause of action, shall be beyond the seas at the time such cause of action accrued, the person entitled to any such cause of action may bring the same against him within twenty years after his return (*y*).

Acknowledgment.

If any acknowledgment shall have been made, either by writing signed by the party liable, or his agent, or by part payment or part satisfaction on account of any principal or interest then due (*z*), the person entitled may bring his action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment, or within twenty years after any of the above-mentioned disabilities shall have ceased, or the party liable shall have returned from beyond the seas, as the case may be (*a*).

Arrears of dower.

By the Real Property Limitation Act, 1833, no arrears of dower, nor any damages on account thereof can be recovered or

(*s*) In the extended meaning above mentioned; *ante*, p. 602, n. (*g*).

(*t*) *Re Powers*, 30 Ch. D. 291; see *ante*, p. 603, and nn. (*o*), (*p*), (*q*).

(*u*) Stat. 3 & 4 Will. IV. c. 42, s. 3.

(*x*) Stat. 3 & 4 Will. IV. c. 42, s. 4, amended by 19 & 20 Vict. c. 97, s. 10, removing absence beyond seas from the list of the *creditor's* disabilities; *Pardo* v. *Bingham*, 17 W. R. 419.

(*y*) Stat. 3 & 4 Will. IV. c. 42, s. 4.

(*z*) See *Reddam* v. *Morley*, 1 De G. & J. 1; *Moodie* v. *Bannister*, 4 Drew. 432; *Cope* v. *Cresswell*, L. R. 2 Ch. 112; *Dibb* v. *Walker*, 1893, 2 Ch. 429; *Re England*, 1895, 2 Ch. 859.

(*a*) Stat. 3 & 4 Will. IV. c. 42, s. 5; *Kemp* v. *Gibbon*, 9 Q. B. 699.

obtained by any action for a longer period than *six years* next before the commencement of such action (*b*). And under the same Act, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, can be recovered by any distress or action, but within *six years* next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent (*c*). This enactment limits the recovery of rent or interest on money charged on land in respect of the *charge* on the land to six years' arrears (*d*). But it was decided before the Real Property Limitation Act, 1874, took effect that if such rent or interest were secured to the claimant (*e*) by indenture of demise (*f*), or by bond or other specialty (*g*), an action of debt or covenant might be brought to recover the same at any time within twenty years. Since this Act, such an action must, it seems, be brought within twelve years, at least as regards the interest of money charged on land (*h*). Thus a mortgagee of lands seeking to foreclose can only obtain an order for foreclosure absolute in default of payment of the principal money secured together with six years' arrears of

Arrears of rent and interest.

(*b*) Stat. 3 & 4 Will. IV. c. 27, s. 41.

(*c*) Stat. 3 & 4 Will. IV. c. 27, s. 42; *Francis* v. *Grover*, 5 Hare, 39; *Humfrey* v. *Gery*, 7 C. B. 567; *Toft* v. *Stevenson*, 5 De Gex, M. & G. 735; *Bowyer* v. *Woodman*, L. R. 3 Eq. 313; *Astbury* v. *Astbury*, 1898, 2 Ch. 111.

(*d*) *Hunter* v. *Nockolds*, 1 Mac. & G. 640.

(*e*) *Hughes* v. *Kelly*, 3 Dru. & Warren, 482.

(*f*) *Paget* v. *Foley*, 2 New Ca. 679.

(*g*) *Sims* v. *Thomas*, 12 A. & E. 536.

(*h*) *Ante*, pp. 603, and n. (*o*), 604, and n. (*t*). It is a question whether the principle of the cases there cited does not apply to the recovery by action of debt or covenant of rent secured by an indenture of demise; for rent is money payable out of land; see L. Q. R. xiii. 288. *Darley* v. *Tennant*, 53 L. T. N. S. 257, appears to show that such rent is still so recoverable within twenty years; *sed quære*.

unpaid interest (*i*): but he can recover twelve years' arrears by suing on the mortgagor's covenant to pay interest (*k*). By the Civil Procedure Act, 1833, actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates (*l*), or for an escape, or for money levied on any *fieri facias*, must be brought within *six years* after the cause of action, with a similar saving in respect of disabilities to that applicable in the case of actions on indentures of demise, bonds or other specialties (*m*). And by the same Act, actions for penalties, damages or sums of money given to the party grieved by any statute then or thereafter to be in force, must be brought within *two years* after the cause of such actions, with the like saving in respect of disabilities, unless the time for bringing such action is or shall be by any statute specially limited (*n*). The Crown is not bound by the Limitation Act, 1623 (*o*); nor by the above stated provisions of the Civil Procedure Act, 1833, and the Real Property Limitation Act, 1874 (*p*).

Awards, fines for copyholds, etc.

Penalties, etc., given to the party grieved.

Crown not bound by above Statutes of Limitation.

(*i*) *Hodges* v. *Croydon Canal Co.*, 3 Beav. 86; *Sinclair* v. *Jackson*, 17 Beav. 405; *Dingle* v. *Coppen*, 1899, 1 Ch. 726, 729.

(*k*) See *Eley* v. *Norwood*, 5 De G. & S. 240; Williams, R. P. 544, 557, 21st ed. But a mortgagee who has sold the mortgaged property under his power of sale may retain all arrears of interest, and a mortgagor seeking to redeem the mortgaged property can only do so on the terms of paying all the arrears of interest; *Re Marshfield*, 34 Ch. D. 721; *Dingle* v. *Coppen*, 1899, 1 Ch. 726; *Re Lloyd*, 1903, 1 Ch. 385; see Williams, R. P. 558, 561, 562, 21st ed. And it is provided that where a mortgagee or other incumbrancer shall have been in possession of any land, or in receipt of the rents and profits thereof, within one year next before the action of a subsequent mortgagee or incumbrancer, the latter may recover the arrears of interest which may have become due to him during the whole time that the prior mortgagee or incumbrancer was in possession; stat. 3 & 4 Will. IV. c. 27, s. 42.

(*l*) See *Monckton* v. *Payne*, 1899, 2 Q. B. 663.

(*m*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4; see *ante*, pp. 604, 605.

(*n*) Stat. 3 & 4 Will. IV. c. 42, ss. 3, 4. See *Thomson* v. *Clanmorris*, 1900, 1 Ch. 718.

(*o*) *Lambert* v. *Taylor*, 4 B. & C. 138, 152; cf. *R.* v. *Morrall*, 6 Price, 24.

(*p*) *Bustamjee* v. *R.*, 1 Q. B. D. 487, 491, 492; *Re J.*, 1909, 1 Ch. 574, 576; see *ante*, p. 219, n. (*k*).

Absence beyond seas of one of several joint debtors.

Where any cause of action, with respect to which the time of limitation is fixed by the enactments above cited (*q*) lies against two or more joint debtors (*r*), the absence of one of them beyond the seas does not prevent time from running in favour of the others, who may not be beyond the seas; and the recovery of judgment against them does not prevent the creditor from suing the absent debtor on his return (*s*). With respect to actions against joint debtors by simple contract, no joint contractor is to lose the benefit of the Limitation Act, 1623 (*t*), by reason of any written acknowledgment or promise made and signed by any other joint contractor (*u*), or by payment of any principal or interest by any co-contractor or co-debtor (*x*). But as regards joint debtors by *deed*, a *written acknowledgment* signed by one of them or his agent preserves the liability of all from being defeated by the lapse of time under the Civil Procedure Act, 1833 (*y*), or (as it seems), in the case of a specialty debt charged on some land or rent, under the Real Property Limitation Act, 1874 (*z*). And in the case of a specialty debt *charged on some land or rent*, a *payment* by one of several joint debtors on account of principal or interest due also prevents the liability of all from being barred by time under the last mentioned Act (*a*). Where, however, a specialty debt is *not* charged on some land or rent, such a payment by one joint debtor does not deprive the others of the

Acknowledgment or payment by one of several joint debtors by simple contract.

Acknowledgment by one of joint debtors by deed.

Payment by one joint debtor by deed.

(*q*) Stats. 21 Jac. I. c. 16, s. 3; 4 & 5 Anne, c. 3 (c. 16 in Ruffhead), s. 19 (1); 3 & 4 Will. IV. c. 27, ss. 40—43, amended by 37 & 38 Vict. c. 57, s. 8; 3 & 4 Will. IV. c. 42, s. 3; *ante*, pp. 600, 606.

(*r*) See *ante*, pp. 460, *sq.*

(*s*) Stat. 19 & 20 Vict. c. 97, s. 11.

(*t*) See *ante*, pp. 600, 601.

(*u*) Stat. 9 Geo. IV. c. 14, s. 1.

(*x*) Stat. 19 & 20 Vict. c. 97, s. 14.

(*y*) Stat. 3 & 4 Will. IV. c. 42, s. 5; *ante*, p. 604; *Read* v. *Price*, 1909, 2 K. B. 724.

(*z*) Stat. 37 & 38 Vict. c. 57, s. 8; *ante*, pp. 600—603; see cases cited in next note.

(*a*) See *Re Lacey*, 1907, 1 Ch. 330, 337, 342, 345 *sq.*; *Read* v. *Price*, 1909, 2 K. B. 724, 735, 739; *ante*, p. 603.

benefit of the time limit set to their liability by the Civil Procedure Act, 1833 (*b*).

Death of creditor.

When a cause of action accrues to a person in his lifetime, the time limited by the Statutes of Limitation will run on after his decease from the period that the cause of action accrued, and will not be reckoned from the time that administration was taken out to his effects (*c*). But if the cause of action accrue after the death of the party, the time limited by the statute will run only from the grant of the letters of administration (*d*). On the other hand, the death of the debtor and the absence of any personal representative to his effects, will not prevent the time limited by the statute from continuing to run on. For if there be once a cause of action, a plaintiff that can sue, and a defendant that can be sued in England, the time limited by the statute will begin to run, and will not be stopped by the decease of either party (*e*).

Death of debtor.

Effect of Statutes of Limitation

The Statutes of Limitation bar the remedy or right of action to recover a debt, but do not entirely extinguish the *obligation* arising from the contract to pay (*g*). For example, a statute-barred debt may be revived, as we have seen, by acknowledgment (*h*

(*b*) *Ante*, pp. 600, 604; this is by the express provision of stat. 19 & 20 Vict. c. 97, s. 14.

(*c*) 2 Wms. Saund. 63 k.

(*d*) *Murray* v. *East India Company*, 5 B. & Ald. 204; 24 R. R. 325; *Perry* v. *Jenkins*, 1 My. & Cr. 118; see also *Atkinson* v. *Bradford, &c., Building Society*, 25 Q. B. D. 377.

(*e*) *Rhodes* v. *Smethurst*, 6 M. & W. 351; *Freake* v. *Cranefeldt*, 3 My. & Cr. 499. See *Swindell* v. *Bulkeley*, 18 Q. B. D. 253.

(*f*) *Ante*, pp. 172, 173, 598.

(*g*) *Courtenay* v. *Williams*, 3 Hare 539, 551 *sq.*; *London and Midland Bank* v. *Mitchell*, 1899 2 Ch. 161, 168; *Re Lloyd*, 1903 1 Ch. 385, 401; *Re Stuchey*, 1904 1 Ch. 67, 81; cf. *Re Bruce*, 1905 2 Ch. 682. It should be noted, however, that where the action to enforce a *charge* on some land or rent has been barred under the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8, the title to the charge becomes extinguished under the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27), s. 34; see *ante*, pp. 601, 602, and notes thereto, and cases there cited.

(*h*) *Ante*, pp. 182, 188, 600

Executor or administrator not bound to plead the statute.

And an executor or administrator is not bound to plead the Statute of Limitations to any debt or demand, but may, if he please, pay the same notwithstanding that the time limited by the statute has expired (*i*). But if the estate be administered, or the question of the liability to pay be raised by originating summons in the Chancery Division of the High Court (*k*), any party to the proceedings is competent to take the objection, although the executor may not have insisted on it (*l*); except as against a creditor at whose suit an order for administration has been obtained (*m*). And after it has been judicially decided that a debt is statute-barred, it would be wrong for the debtor's executor or administrator to pay it (*n*). A statute-barred debt cannot, as a rule, be set off against an enforceable debt or claim (*o*): but if two persons having cross demands against each other, of which some are statute-barred, come to an agreement as to the balance payable by one of them, their agreement is equivalent to actual payment of the statute-barred debts and is unimpeachable accordingly (*p*). And in equity, a statute-barred debt may be required to be brought into account before the debtor is allowed to partici-

(*i*) *Norton* v. *Frecker*, 1 Atk. 526; *Ex parte Dewdney*, 15 Ves. 498; *Lowis* v. *Rumney*, L. R. 4 Eq. 451. See *Stahlschmidt* v. *Lett*, 1 Sma. & Giff. 415.

(*k*) *Ante*, pp. 222, 496.

(*l*) *Shewen* v. *Vanderhorst*, 1 Russ. & M. 347; 2 Russ. & M. 75; 32 R. R. 219; *Re Wenham*, 1892, 3 Ch. 59.

(*m*) *Briggs* v. *Wilson*, 5 De G. M. & G. 12; *Fuller* v. *Redman* (No. 2), 26 Beav. 614; *Adams* v. *Waller*, 35 L. J. Ch. 727. Except as above mentioned, a creditor's remedy by following the assets of his deceased debtor, when they have been distributed without payment of his debt (*ante*, pp. 114, 498), cannot be asserted in respect of a debt barred by one of the Statutes of Limitation: *Re Bruce*, 1908, 2 Ch. 682, 684; but if the debt were not so barred, this remedy will not be lost by mere delay in asserting it; *Re Eustace*, 1912, 1 Ch. 561; and see *Re Lacey*, 1907, 1 Ch. 330.

(*n*) *Midgley* v. *Midgley*, 1893, 3 Ch. 282.

(*o*) *Remington* v. *Stevens*, 2 Str. 1271; stat. 9 Geo. IV. c. 14, s. 4; *Walker* v. *Clements*, 15 Q. B. 1046; *Dingle* v. *Coppen*, 1899, 1 Ch. 720; *Smith* v. *Betty*, 1903, 2 K. B. 317, 323; *ante*, p. 257.

(*p*) *Ashby* v. *James*, 11 M. & W. 542; *Turner* v. *Willis*, 1905, 1 K. B. 468.

pate in any fund which should have been increased by payment of the debt when due (*q*). Thus if one who seeks to obtain payment of a legacy or a share of residue or of an intestate's estate, were indebted to the testator or intestate, the amount of the debt must in equity be accounted for and taken in satisfaction *pro tanto* of the fund claimed, even though the debt were barred by statute (*r*).

Charge of real estate for payment of debts.

Notwithstanding the period of six years limited for the payment of simple contract debts, the debtor may, by charging his real estate by his will with the payment of his debts, and, *à fortiori*, by creating an express trust for their payment out of his real estate, prevent the operation of the statute on all such debts as have not been barred by the statute in his lifetime (*s*). Real estate, it will be remembered, was not formerly liable to the payment of any debts which were not secured by specialty binding the heirs (*t*): and the alteration, which in this respect has been made in the law, affects only such real estates as have not been charged by the deceased with the payment of his debts. The creditors therefore in whose favour the charge is made acquire, as before the alteration, the character of *cestui que trusts*; and in equity they will not be allowed to lose their debts, because they do not go to law to enforce payment when they have a trustee to pay them (*u*) But after twelve years the charge, if not enforced, will be barred like any other charge (*x*). An express

(*q*) See cases cited in next note; *Re Brown and Gregory, Ld.*, 1904, 1 Ch. 627, 631.

(*r*) *Courtenay* v. *Williams*, 3 Hare, 539, 551 *sq.*; *Re Cordwell's Estate*, L. R. 20 Eq. 644; *Re Akerman*, 1891, 3 Ch. 212; *Re Wheeler*, 1904, 2 Ch. 66, 71; cf. *Re Abrahams*, 1908, 2 Ch. 69; *Re Bruce*, *ib.*, 682.

(*s*) *Burke* v. *Jones*, 2 V & B. 275; 13 R. R. 83; *Hughes* v. *Wynne*, T. & R. 307; *Crallan* v. *Oulton*, 3 Beav. 1; *Re Stephens*, 43 Ch. D. 39; *Re Balls*, 1909, 1 Ch. 791.

(*t*) See Williams, R. P. 280 21st ed.; *ante*, p. 233.

(*u*) Turn. & Russ. 309.

(*x*) *Dundas* v. *Blake*, 11 Ir. Eq. Rep. 138; Sug. Real Prop. Stat. p. 107; *Jacquet* v. *Jacquet*, 27 Beav. 322; *Dickinson* v. *Teasdale*, 31 Beav. 511; stat. 37 & 38

trust for the payment of a man's debts out of his real estate was formerly proof against any length of time (*y*). For, by the general rule of equity, lapse of time cannot be pleaded as a bar to any claim by a *cestui que trust* to recover trust property or compensation for its loss from his trustee under an *express* trust, or from any one who is in the position of such a trustee (*z*). But as personal estate has always been primarily liable to the payment of all debts, a trust created by a testator for the payment of his debts out of his personal estate will not prevent the operation of the Statute of Limitations (*a*). And now by the Real Property Limitation Act, 1874 (*b*), no action, suit or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. So that an express trust for payment of a deceased testator's debts out of his real estate is now barred after twelve years, equally with a mere charge of debts (*c*). As we have seen, by the Trustee Act, 1888, trustees are now enabled to plead any statute of limitation, and where no statute of limitation is applicable, the same lapse of time as would bar a simple contract debt, as a bar to any proceeding against them, except where

Claim for breach of trust.

Vict. c. 57, s. 8; see *ante*, pp. 602, 603.

(*y*) See the author's Essay on Real Assets, p. 40.

(*z*) *Soar* v. *Ashwell*, 1893, 2 Q. B. 390; *North American Land, &c., Co.* v. *Watkins*, 1904, 1 Ch. 242; stat. 36 & 37 Vict. c. 66, s. 25 (2); *Pullan* v. *Koe*, 1913, 1 Ch. 9; cf. *Henry* v. *Hammond*, 1813, 2 K. B. 515.

(*a*) *Scott* v. *Jones*, 4 Cl. & Fin. 382; *Franke* v. *Cranefeldt*, 3 My. & Cr. 499; *Re Ralli*, 1909, 1 Ch. 791, 794.

(*b*) Stat. 37 & 38 Vict. c. 57, s. 10; *Hughes* v. *Coles*, 27 Ch. D. 231.

(*c*) *Ante*, p. 610.

the claim is founded upon any fraud or fraudulent breach of trust, to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee or previously received by him and converted to his own use (*d*).

Unclaimed dividends on stock.

When the dividends upon any stock subject to the National Debt Act, 1870 (*e*), including the £2 10*s*. per cent. Consolidated Stock (*f*), have not been claimed for ten years, such stock, together with the unclaimed dividends, is transferred to the account of the commissioners for the reduction of the national debt (*g*), and such dividends, together with all the future dividends on the stock, are invested by the commissioners in the purchase of like stock, so as to accumulate (*h*). And the governor or deputy governor of the bank for the time being may order the transfer of such stock and the payment of the dividends to any person showing, to his satisfaction, a right thereto; but in case such governor or deputy governor shall not be satisfied of the justice or legality of the claim, an order for transfer and payment may be obtained from the Chancery Division of the High Court by petition in a summary way, stating and verifying the claim (*i*). Like provisions are now enacted for the transfer to an unclaimed stock account, and the re-transfer to any person showing right thereto of India Stock and Consolidated Stock of the London County Council, whereon dividend has not been claimed for ten years or more (*k*), and for dealing with East Indian

(*d*) See *ante*, p. 428, and cases cited in notes (*o*), (*q*), (*r*) thereto.

(*e*) Stat. 33 & 34 Vict. c. 71, ss. 3, 68; *ante*, p. 315.

(*f*) *Ante*, pp. 314, 315.

(*g*) Stat. 33 & 34 Vict. c. 71, s. 51. The former Acts on this subject, stats. 56 Geo. III. c. 60, 8 & 9 Vict. c. 62, and 24 Vict. c. 3, s. 8, were repealed by stat. 33 & 34 Vict. c. 69.

(*h*) Stat. 33 & 34 Vict. c. 71, s. 54.

(*i*) See sects. 55—58; *Ex parte Ram*, 3 My. & Craig, 25; *Hunt* v. *Peacock*, 6 Hare, 361.

(*k*) Stats. 48 & 49 Vict. c. 25, ss. 1—16; 48 & 49 Vict. c. 50, ss. 27 *seq.*; 51 & 52 Vict. c. 41, s. 40 (8), (9).

Railway Annuities unclaimed for a period of ten years, and money paid for the discharge of East Indian Railway Debentures unclaimed for one year or more, and for subsequent payment thereof to any person establishing his right thereto (*l*). The right to recover unclaimed dividends on shares is barred by the Statute of Limitations in twenty years from the time when the dividend was declared (*m*).

On shares.

As we have seen (*n*), when a chose in action, whether legal or equitable, is transferred from one person to another, notice of the assignment should be given by the transferee to the person liable (*o*) to the action, the right to bring which is the subject of the transfer (*p*). Thus if a debt be assigned, notice of the assignment should be given to the debtor (*q*). If the subject of the assignment be the right to stock standing in the name of a trustee, notice of the assignment should be given to such trustee; and if there be more trustees than one, notice should be given to all of them (*r*). Until such notice be given, it is evident that the debtor may innocently pay the debt, or the trustee transfer the stock to the transferor; or the transferor may fraudulently transfer his right over again to a third person. The transferee, therefore, until he has given notice to the party liable, has not done all that lies in his power to perfect his title. The chose in action

Notice of assignment of *choses in action*.

(*l*) Stat. 48 & 49 Vict. c. 25, ss. 17—20.

(*m*) *Re Severn, &c., Ry. Co.*, 1896, 1 Ch. 559; *Re Artisans', &c., Corporation*, 1904, Ch. 796.

(*n*) *Ante*, pp. 37—40.

(*o*) Not to his solicitor: see *Saffron Walden, &c., Building Society* v. *Rayner*, 14 Ch. D. 406.

(*p*) *Dearle* v. *Hall*, *Loveridge* v. *Cooper*, 3 Russ. 1; 27 R. R. 1; *Re Bright's Trusts*, 21 Beav. 430; *Re Freshfield's Trust*, 11 Ch. D. 198; *English and Scottish Investment Co.* v. *Brunton*, 1892, 2 Q. B. 1; *Ward* v. *Duncombe*, 1893, A. C. 369; *Stephens* v. *Green*, 1895, 2 Ch. 148; *Re Dallas*, 1904, 2 Ch. 385; *Kelly* v. *Selwyn*, 1905, 2 Ch. 117.

(*q*) See *Wigram* v. *Buckley*, 1894, 3 Ch. 483.

(*r*) See *Re Wasdale*, 1899, 1 Ch. 163; *Re Phillips' Trusts*, 1903, 1 Ch. 183.

Bankruptcy of transferor.

still remains the apparent property of the transferor; and in the event of his bankruptcy it was formerly held to pass to his creditor's assignees as property in his order and disposition with the consent of the true owner thereof (*s*). But this law is now only applicable to debts due to the bankrupt in the course of his trade or business (*t*); for in the Bankruptcy Acts, 1869 and 1883, things in action, other than such debts, were expressly excepted from the operation of the "reputed ownership" clause (*u*). And things in action (other than such debts) assigned without notice being given to the party liable do not now pass to the creditor's trustee on the assignor's bankruptcy (*x*); for, as we have seen (*y*), in equity the assignment of a chose in action is complete as against the assignor, though no notice of the assignment be given. It appears, however, that the title of a trustee in bankruptcy to the bankrupt's equitable choses in action (*z*) is not entirely complete, unless notice of the bankruptcy be given to the party liable; and that if such notice be not given, the trustee's title is liable to be postponed to the claim of an assignee from the bankrupt subsequently to but without notice of the bankruptcy (*a*). But it seems that this rule is not applicable to debts due to the bankrupt *at law*, as the legal title to and the right to sue for such debts appears to be vested, immediately upon the adjudication of bankruptcy,

(*s*) *Ex parte Munro*, Buck, 300; *Williams* v. *Thorpe*, 2 Sim. 257; 29 R. R. 96; *Thompson* v. *Spiers*, 13 Sim. 469; *Bartlett* v. *Bartlett*, 1 De G. & J. 127; *Re Hughes's Trusts*, 2 H. & M. 89; *Re Webb's Policy*, 15 W. R. 529; *ante*, p. 254.

(*t*) *Rutter* v. *Everett*, 1895, 2 Ch. 872; *Re Goetz, Jonas & Co.*, 1898, 1 Q. B. 787.

(*u*) Stats. 32 & 33 Vict. c. 71, s. 15, par. (5); 46 & 47 Vict. c. 52, s. 44; *ante*, pp. 254, 281, 322, 343, 392.

(*x*) *Ex parte Fletcher, Re Bainbridge*, 8 Ch. D. 218; *Ex parte Ibbetson, Re Moore*, ib., 519.

(*y*) *Ante*, p. 37 and n. (*r*).

(*z*) See *ante*, p. 254.

(*a*) *Palmer* v. *Locke*, 18 Ch. D. 381; *Re Stone's Estate*, 9 Times L. R. 346; and see *Re Beall*, 1899, 1 Q. B. 688, as to a bankrupt's choses in action acquired after the bankruptcy (*ante*, p. 299).

in the trustee (*b*). The trustee cannot by giving such notice gain any priority over an assignee of the chose in action under an assignment made previously to the bankruptcy; for the rule is that the trustee takes the bankrupt's property subject to all equities affecting it (*c*).

Inquiry as to prior assignments.

The importance of giving notice suggests the precaution that every person about to accept an assignment of a chose in action should inquire of the person liable to the action or suit, whether he has had notice of any prior assignment (*d*). And if there be two or more persons liable, inquiry should be made of every one of them; for notice by a prior assignee to any one of them might be equivalent to notice to all (*e*). It is also advisable that a written answer should be obtained to every such inquiry, in order that if the assignee should be misled by a false answer, he may be enabled to recover damages for the misrepresentation (*f*). For it has been doubted whether the answer to such an inquiry be not a representation concerning the ability of the intended assignor within the meaning of Lord Tenterden's Act, which requires that all such representations be made in writing signed by the party to be charged therewith (*g*). The inquiry, however, thus recommended will not of itself strengthen the title of the assignee, further than by assuring him that no

(*b*) See *ante*, pp. 253, 254, 279, 280, and n. (*t*); Lewin on Trusts, 580, 6th ed.; 904, 12th ed.

(*c*) *Re Wallis*, 1903, 1 K. B. 719; *Re Anderson*, 1911, 1 K. B. 896.

(*d*) The person liable is not, however, bound to answer such an inquiry, even though he be a trustee for the intending assignor; *Love* v. *Bowerie*, 1891, 3 Ch. 82.

(*e*) *Smith* v. *Smith*, 2 Cr. & M. 231; *Meux* v. *Bell*, 1 Hare, 73, 87. See *Browne* v. *Savage*, 4 Drew. 635, 640; *Ward* v. *Duncombe*, 1893, A. C. 369; *Lloyd's Bank* v. *Pearson*, 1901, 1 Ch. 865; *Re Phillips' Trusts*, 1903, 1 Ch. 183; *Re Wallis*, 1904, 2 Ch. 385.

(*f*) As to the assignee's position in the case of an innocent misrepresentation, see *Low* v. *Bowerie*, 1891, 3 Ch. 82; *Porter* v. *Moore*, 1904, 2 Ch. 367.

(*g*) *Lyde* v. *Barnard*, 1 M. & W. 101; *Swann* v. *Phillips*, 8 Ad. & E. 457; see *ante*, p. 189.

previous assignment has been made. In order to obtain a good title, he must himself give notice to the person or persons liable to the debt or demand assigned to him. When this has been done his title will be secure, and will prevail over that of any unknown prior assignee who may have omitted to give such notice (*h*).

Stop order.

If the property consist of money, stock, or securities (*i*) lodged in Court, an order of the Court should be obtained restraining transfer or payment without notice to the assignee. This order is called a stop order, and will have the same effect as notice of assignment given to any private debtor (*k*). If the property be stock standing in the name of a trustee, who has died without any administration having been taken out to his effects, a *distringas* obtained by the assignee to restrain the transfer of the stock would have conferred on him the same priority as notice to the trustee would have done had he been living (*l*). And it appears that the same effect may be obtained by service of the office copy of the affidavit and of the duplicate of the filed notice now substituted for the writ of *distringas* (*m*). Notice of the transfer of a policy of life assurance should be given to the insurance office, the deposit of the policy with the assignee not being sufficient to afford him complete protection against a subsequent assignment (*n*).

Distringas

Life policies

(*h*) See the cases cited in note (*p*) to p. 613, *ante*.

(*i*) *Williams* v. *Symonds*, 9 Beav. 523.

(*k*) *Greening* v. *Beckford*, 5 Sim. 195; *Swayne* v. *Swayne*, 11 Beav. 463; *Re Holmes*, 29 Ch. D. 786; *Mutual Life Assurance Society* v. *Langley*, 32 Ch. D. 460; *Mack* v. *Postle*, 1894, 2 Ch. 449; *Bath* v. *Bath*, 1901, 1 Ch. 460; *Montefiore* v. *Guedalla*, 1903, 2 Ch. 26; see *Stephens* v. *Green*, 1895, 2 Ch. 148.

(*l*) *Etty* v. *Bridges*, 2 Y. & C. C. C. 486; see *ante*, p. 319.

(*m*) R. S. C., 1883, Ord. XLVI. r. 8; see *ante*, p. 320.

(*n*) *Williams* v. *Thorpe*, 2 Sim 257; 29 R. R. 96; *Thompson* v. *Spiers*, 13 Sim. 469; *West* v. *Reid*, 2 Hare, 249; but see *Re Weiniger's Policy*, 1910, 2 Ch. 291; and see *ante*, p. 307, and n. (*s*).

Shares in companies

Shares in companies were formerly considered to partake so far of the nature of choses in action that it was necessary for an assignee of the shares to give notice of assignment to the company, in order to protect himself against the effect of the former bankruptcy law of "reputed ownership" (*o*). But it is now held, with regard to shares in companies incorporated under the Companies Act, 1862, that, as they are transferable in manner provided by the regulations of the company (*p*), and as no notice of any trust is to be entered in the register of the company (*q*), giving notice of assignments to the company is not necessary for perfecting the title of an assignee of such shares (*r*). The same reasoning is applicable in the case of shares in companies regulated by the Companies Clauses Act, 1845 (*s*), or governed by a similar rule (*t*). As we have seen, the title of a transferee of shares in companies registered under the Companies Act, 1862, is not generally complete at law until the transfer is registered at the office of the company (*u*); and the

(*o*) *Ex parte Agra Bank, Re Worcester*, L. R. 3 Ch. 555; *Ex parte Union Bank of Manchester, Re Jackson*, L. R. 12 Eq. 354. In the latter case it was decided that the shares there in question were not *choses in action* so as to be excepted from the reputed ownership clause of the Bankruptcy Act, 1869 (*ante*, p. 614), *and* that notice of assignment was necessary to complete the title of a mortgagee of the shares. But if the shares were not choses in action, how could there have been any necessity for the mortgagee to perfect his title by giving notice of the assignment? The learned judge appears to have overlooked this consideration; though it is fair to state that he seems to have based his judgment entirely on his view of the policy of the Bankruptcy Act, 1869. This view was overruled in *Colonial Bank* v. *Whinney*, 11 App. Cas. 426; see *ante*, p. 343. It has also been considered that notice of an assignment of shares must be given to the company in order to protect the assignee against subsequent assignments of the same shares; *Martin* v. *Sedgwick*, 9 Beav. 333 (the actual decision in this case was clearly erroneous; see *Murray* v. *Pinkett*, 12 Cl. & Fin. 764).

(*p*) *Ante*, p. 338.

(*q*) *Ante*, p. 342.

(*r*) *Société Générale de Paris* v. *Walker*, 14 Q. B. D. 424; 11 App. Cas. 20.

(*s*) *Ante*, p. 329.

(*t*) See *Roots* v. *Williamson*, 38 Ch. D. 485; *Powell* v. *London and Provincial Bank*, 1893, 2 Ch. 555; Lindley on Companies, 454, 5th ed.

(*u*) *Ante*, p. 338.

title of a transferee of shares in companies regulated by the Companies Clauses Act, 1845, is not complete until a deed of transfer duly executed and otherwise in order has been delivered to the secretary of the company for registration (*x*). But in either case the shares may be assigned in equity in the same manner as other chattels (*y*), or charged in equity by a deposit of the share certificates (*z*). When several equitable assignments of the same shares are made, they have priority, as a rule, according to the order of time in which they were created (*a*). But any equitable assignee may be postponed to a subsequent assignee on the ground of fraud or negligence (*b*). If, however, any assignee of shares for valuable consideration should obtain a complete legal title thereto, without notice of any prior equity, he will be entitled to retain them as against any person claiming under a merely equitable title, though prior in point of time (*c*). Upon the sale or mortgage of shares in companies regulated by the Companies Clauses Act, 1845, or registered under the Companies Act, 1862, the most important evidence of title to be obtained is the production of the share certificates (*d*). It appears that, as a rule, the vendor of shares in a joint stock company is bound to give such evidence of the constitution of the company as will show that the proposed transfer will give a valid title to the shares sold, but is not required to give any evidence of the title to any property held by the company (*e*).

Title through deeds, wills, &c.

The title to personal property sometimes depends upon deeds, wills or other documents of title of the

(*x*) *Ante*, p. 329.
(*y*) *Ante*, p. 96.
(*z*) *Ante*, p. 341.
(*a*) *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20, and other cases cited *ante*, p. 340, n. (*q*).
(*b*) See Williams, R. P. 572, and n. (*k*), 21st ed.
(*c*) See *Roots* v. *Williamson*, 38 Ch. D. 485, 491; *Powell* v. *London and Provincial Bank*, 1893, 2 Ch. 555, 564.
(*d*) *Ante*, pp. 329, 337, 338, and n. (*d*); and see *Société Générale de Paris* v. *Walker*, 11 App. Cas. 20.
(*e*) *Curling* v. *Flight*, 2 Ph. 613

like nature, and cannot be shown without their production. Thus a reversionary interest in money in the funds, settled by deed, or will, may be mortgaged and sold again and again before it becomes an interest in possession. In these cases the purchaser is entitled to an abstract of the deeds, wills, &c., which compose the title, in the same manner as if the subject of the contract had been real estate; and the original deeds and the probates or office copies of the wills must also in like manner be produced for the verification of the abstract (*f*). The purchaser is also entitled either to the possession of the deeds, or, if this cannot be had, to an acknowledgment in writing of his right to production of them and to delivery of copies thereof (*g*). And when an assignment of any kind of personal property is made by deed, it is usual for the assignor to enter into covenants for the title similar to those entered into under the like circumstances by the grantor of real estate (*h*).

Abstract of title.

Covenants for title.

The Law of Property Amendment Act, 1859, provides that any person shall have power to assign personal property, now by law assignable, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another (*i*). Before this Act an assignment by A. to himself and B. of leasehold property or choses in possession vested the whole of the property in B. (*k*). The same Act renders criminally punishable the concealment, with intent to defraud, of any deed or instrument material to a title or of any incumbrance or the falsification of any pedigree

A person may assign to himself and another

(*f*) See Williams, R. P. 575, 580, 21st ed.; *Hobson* v. *Bell*, 2 Beav. 17.

(*g*) See Williams, R. P. 597, 600, 21st ed.; Williams' Conveyancing Statutes, 94–103.

(*h*) See Williams, R. P. 607, *sq.*, 21st ed.; Williams' Conveyancing Statutes, 74–93.

(*i*) Stat. 22 & 23 Vict. c. 35, s. 21; see Williams' Conveyancing Statutes, 224.

(*k*) See Williams, R. P. 209 21st ed.

on which a title depends (*l*). By the Conveyancing Act of 1881 (*m*), a thing in action may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person (*n*).

Comparison of the title to real and personal estate.

From what has been said it will appear that the title to personal property is far more simple than that to real estate. And amongst the plans which have appeared for the amendment of the law has been one for adapting the machinery of the funds to the transfer of landed property. Upon consideration, however, it will perhaps appear that the greater complexity of the title to lands arises partly from the nature of the property, and partly from the more full power of disposition to which lands are subject. Lands, unlike stock, may be converted from arable to pasture, may be cut up into roads, canals or railways, may be sold by the foot for building purposes, may be let upon lease for terms absolute or determinable, may be held for life, or in tail, as well as in fee, and may be disposed of by contingent remainders, shifting uses and executory devises, without the intervention of any trustees. Personal property, on the contrary, cannot be settled without the intervention of trustees, in whom a great degree of personal confidence must necessarily be placed: but when so settled, the title to it is sometimes as long and intricate as that to real estate. If the nature of lands could be altered, or if landowners were willing, in order to save themselves expense, to give up some of their powers of disposition,

(*l*) Stat. 22 & 23 Vict. c. 35, s. 24, extended by 23 & 24 Vict. c. 38, s. 8.

(*m*) Stat. 44 & 45 Vict. c. 41, s. 50, which applies only to conveyances made after the 31st Dec., 1881.

(*n*) See Williams' Conveyancing Statutes, 223—225, 391, 392.

the title to real estate might doubtless be rendered as simple as that to personal property. To the latter alternative, however, few, if any, would be inclined to submit. Whilst, therefore, much might be done to simplify and improve our laws of property by an assimilation of the rules of real and personal estate, where the history of each forms the only ground of variety, care should be taken to preserve untouched such distinctions as are founded on the broad basis of practical difference.

APPENDIX (A).

(Referred to, *ante*, pp. 75, 76, 84, 95, 96 98, 117.)

—◆—

Bills of sale at common law.

"At common law," observed Lord Blackburn (*a*), "a man might take a security upon goods without carrying away the goods, or taking possession of them—he might take a sale of them out and out (*b*), and he might take the legal property in them subject to the power to redeem them (what is commonly called a mortgage), without taking possession of them (*c*). The law on the subject will be found in *Twyne's Case* (*d*), and the notes upon *Twyne's Case* (*d*), but this rule got established that when the goods were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud (*e*): and if a man came forward suddenly, when there was an execution, for instance, issued against the person in possession of the goods, and said, at an antecedent time, I had a security upon these goods, and I left them in the possession of the debtor all that time, the not having taken possession was evidence that the thing was a sham; it was not conclusive; it was not a matter of law, but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were. In the first place it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions

(*a*) *Cookson* v. *Swire*, 9 App. Cas. 664.
(*b*) See *ante*, pp. 75 *sq.*
(*c*) See *ante*, p. 93.
(*d*) 3 Rep. 80; 1 Sm. L. C. 1.
(*e*) See *ante*, p. 115.

which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided. For those reasons it was thought, and reasonably and properly so, that it was desirable to put a stop to this. That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854." Before this Act, if a bill of sale were not avoided as fraudulent under stat. 13 Eliz. c. 5, the chattels comprised therein could not be seized upon an execution levied against the mortgagor (*f*); but if the mortgagor became bankrupt, they were liable to be sold by his assignees as being in his reputed ownership (*g*).

By the Bills of Sale Act of 1854 (*h*), every bill of sale of personal chattels, whereby the grantee should have power to take possession of any effects therein comprised, was required to be registered in the office of the Court of Queen's Bench within 21 days after the making thereof; otherwise such bill of sale was rendered void so far as regards any of the goods remaining in the apparent possession of the grantor, as against the grantor's assignee in bankruptcy (*i*), and as against the assignees under any assignment for the benefit of his creditors (*k*), and as against all sheriffs' officers and other persons seizing the effects in execution of any process of any Court of law or equity issued against the goods of the grantor (*l*). This Act did not give to such bills of sale as were registered under it any greater validity than they had before; so that chattels comprised in a registered bill of sale were still liable to be sold by the grantor's assignees in bankruptcy as being in his reputed ownership (*m*). And if the bill of sale was not registered, it was rendered void under this Act

(*f*) *Martindale* v. *Booth*, 3 B. & Ad. 498; 37 R. R. 485; *ante*, p. 115.

(*g*) *Ante*, p. 113 and n. (*b*).

(*h*) Stat. 17 & 18 Vict. c. 36.

(*i*) See *ante*, p. 279, n. (*o*).

(*k*) See *ante*, p. 260.

(*l*) *Richards* v. *James*, L. R. 2 Q. B. 285. But see *Re Artistic Colour Printing Company, Ex parte Fourdrinier*, 24 Ch. D. 500, 512; and compare *Ex parte Blaiberg, Re Tanner*, 23 Ch. D. 254.

(*m*) *Stansfield* v. *Cubitt*, 2 De G. & J. 222; *Badger* v. *Shaw*, 2 Ell. & Ell. 472; *Ex parte Hartung*, L. R. 15 Eq. 223.

by the grantor committing an Act of bankruptcy before the grantee took possession of the goods (*n*); and it was also rendered void as against an execution. The expression "personal chattels" was interpreted by the Act (*o*) to mean goods, furniture, *fixtures*, and other articles capable of complete transfer by delivery. But the Act did not apply to fixtures, when they passed by a conveyance of the premises to which they were affixed; and there was no difference in this respect between freeholds and leaseholds; for in each case fixtures, so long as they remain fixed, form part of the premises (*p*). It was, however, held that if there were a power to sell or take possession of the fixtures apart from the premises, or if the fixtures were separately assigned, they would not pass, unless the deed were registered (*q*). The Bills of Sale Act, 1866 (*r*), provided for the renewal every five years of the registration of bills of sale, without which the prior registration ceased to be of any effect.

Fixtures.

Registration to be renewed every five years.

The Acts of 1854 and 1866 were repealed by the Bills of Sale Act, 1878 (*s*), which came into operation on the 1st of January, 1879 (*t*), and was to apply to every bill of sale executed on or after that day whereby the holder or grantee should have power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale (*u*). The Act of 1878 originally governed all such bills of sale, whether made by way of absolute assignment or of mortgage; but it now applies only to bills of sale conferring such power to seize or take possession and given *otherwise* than by way of security for the

The Bills of Sale Act, 1878.

(*n*) *Ex parte Attwater, In re Turner*, 5 Ch. D. 27.

(*o*) 17 & 18 Vict. c. 36, s. 7.

(*p*) *Mather* v. *Fraser*, 2 Kay & J. 536; *Waterfall* v. *Pennystone*, 6 E. & B. 876; *Boyd* v. *Shorrock*, L. R. 5 Eq. 72; *Ex parte Barclay, In re Joyce*, L. R. 9 Ch. 576; *Meux* v. *Jacobs*, L. R. 7 H. L. 484; *ante*, pp. 142—150.

(*q*) *Ex parte Dugleh, In re Wild*, L. R. 8 Ch. 1072; *Fenwick* v. *Bagbie*, L. R. 8 Ch. 1075; *Hawtry* v. *Butlin*, L. R. 8 Q. B. 290; *In re Trethowan, Ex parte Tweedy*, 5 Ch. D. 559; *Ex parte Brown, Re Reed*, 9 Ch. D. 389.

(*r*) Stat. 29 & 30 Vict. c. 96.

(*s*) Stat. 41 & 42 Vict. c. 31, s. 23, except as regards bills of sale executed before the commencement of the Act of 1878.

(*t*) Sect. 2.

(*u*) For note (*u*), see p. 626.

payment of money (*x*). And all bills of sale given by way of security for the payment of money are regulated by the amending Act of 1882 (*y*). The following are the main provisions of the Act of 1878 :—

Meaning of term "bill of sale."

By sect. 4, the expression "bill of sale" shall include bills of sale, assignments, (*z*), transfers, declarations of trust without transfer (*a*), inventories of goods with receipts thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred (*b*); but shall not include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same (*c*), marriage settlements (*d*), transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods or any other documents used in the ordinary course of business, as proof of the possession or control of goods (*e*), or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented (*f*).

(*a*) 41 & 42 Vict. c. 31, s. 3. See *Ex parte Parsons, Re Townsend*, 16 Q. B. D. 532. The Act does not apply to documents accompanying transactions in which the *possession* of goods is transferred as a security for a debt, as in the case of a pledge; *ante*, p. 95; or affect sales or mortgages of goods which are valid and complete without the aid of writing; *ante*, pp. 81–96.

(*x*) See *Swift* v. *Pannell*, 21 Ch. D. 30; *Casson* v. *Churchley*, 53 L. J. Ch. 335.

(*y*) Stat. 45 & 46 Vict. c. 43, s. 3, stated *post*, p. 633; see *ante*, pp. 75, 93—98.

(*z*) See *ante*, p. 75.

(*a*) *Ante*, p. 97.

(*b*) *Ante*, p. 97.

(*c*) *Hadley* v. *Beedom*, 1895, 1 Q. B. 646.

(*d*) *Wenman* v. *Lyon & Co.*, 1891, 2 Q. B. 192.

(*e*) See *ante*, p. 98 and n. (*f*).

(*f*) By stat. 54 & 55 Vict. c. 39, s. 1, instruments charging or creating any security on or de-

Meaning of term "personal chattels."

The expression "personal chattels" shall mean goods, furniture and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action (*g*), nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

Apparent possession.

Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person (*h*).

Application of act to trade machinery.

By sect. 5, trade machinery shall, for the purposes of the Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of the Act (*i*). For the purposes

Meaning of term "trade machinery."

claring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being re-shipped for export, or delivered to a purchaser not being the person giving or executing such instrument, are not to be deemed bills of sale within the Bills of Sale Acts.

(*g*) See *Re Thynne*, 1911, 1 Ch. 282; *ante*, p. 393.

(*h*) Stat. 41 & 42 Vict. c. 31, s. 4.

(*i*) See *Re Yates*, 38 Ch. D. 112; *Small* v. *National Provincial Bank of England*, 1894, 1 Ch. 686; *Re Brooke*, 1894, 2 Ch. 600.

of the Act, "trade machinery" means the machinery used in or attached to any factory or workshop, exclusive of (1) the fixed motive power, such as the water-wheels and steam engines, and the steam boilers, donkey engines and other fixed appurtenances of the said motive power, (2) the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose, and (3) the pipes for steam, gas and water in the factory or workshop. The machinery or effects so excluded shall not be deemed to be personal chattels within the meaning of the Act.

"Factory or workshop."

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say, (a) the making any article or part of an article, or (b) the altering, repairing, ornamenting, finishing of any article, or (c) the adapting for sale any article.

Certain instruments giving powers of distress to be subject to the Act.

(Sect. 6) Every attornment, instrument or agreement not being a mining lease (*j*), whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress (*k*). Provided that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent (*l*).

(*j*) See *Re Roundwood Colliery Co.*, 1897, 1 Ch. 373.

(*k*) See *Stevens* v. *Marston*, 60 L. J. Q. B. 192 (power for landlord of tied licensed house to distrain for moneys due for liquors supplied by him, held void).

(*l*) An attornment clause in a mortgage of land whereby the mortgagor attorns tenant to the mortgagee, has been held to be a bill of sale within the above section; *Re Willis*, 21 Q. B. D. 384;

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument.

(Sect. 7) No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person. The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of the Act, and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any court, which shall take place or be issued after the commencement of the Act (*m*).

Avoidance of unregistered bill of sale in certain cases.

(Sect. 8) Every bill of sale to which the Act applies shall be duly attested, and shall be registered under the Act within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given (*n*), otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as

Green v. *Marsh*, 1892, 2 Q. B. 330; see *Hall* v. *Comfort*, 18 Q. B. D. 11; *Mumford* v. *Collier*, 25 Q. B. D. 279.

(*m*) See *Ex parte Moore and Robinson's Banking Co., In re Armytage*, 14 Ch. D. 379; *Re Yates*, 38 Ch. D. 112; *Climpson* v. *Coles*, 23 Q. B. D. 465; *ante*, pp. 147, 148, 152.

(*n*) See *Ex parte National Mercantile Bank, Re Haynes*, 15 Ch. D. 42; *Ex parte Charing Cross Advance and Deposit Bank, Re Parker*, 16 Ch. D. 35; *Ex parte Challinor, Re Rogers*, 16 Ch. D. 260; *Credit Co.* v. *Pott*, 6 Q. B. D. 295; *Hamilton* v. *Chaine*, 7 Q. B. D. 1, 319; *Ex parte Rolph, Re Spindler*, 19 Ch. D. 98; *Ex parte Firth, Re Cowburn*, 19 Ch. D. 419; *Ex parte Popplewell, Re Storey*, 21 Ch. D. 73; *Ex parte Bolland, Re Roper*, 21 Ch. D. 543; *Ex parte Johnson, Re Chapman*, 26 Ch. D. 338; *Re Cann*, 13 Q. B. D. 36; *Richardson* v. *Harris*, 22 Q. B. D. 268.

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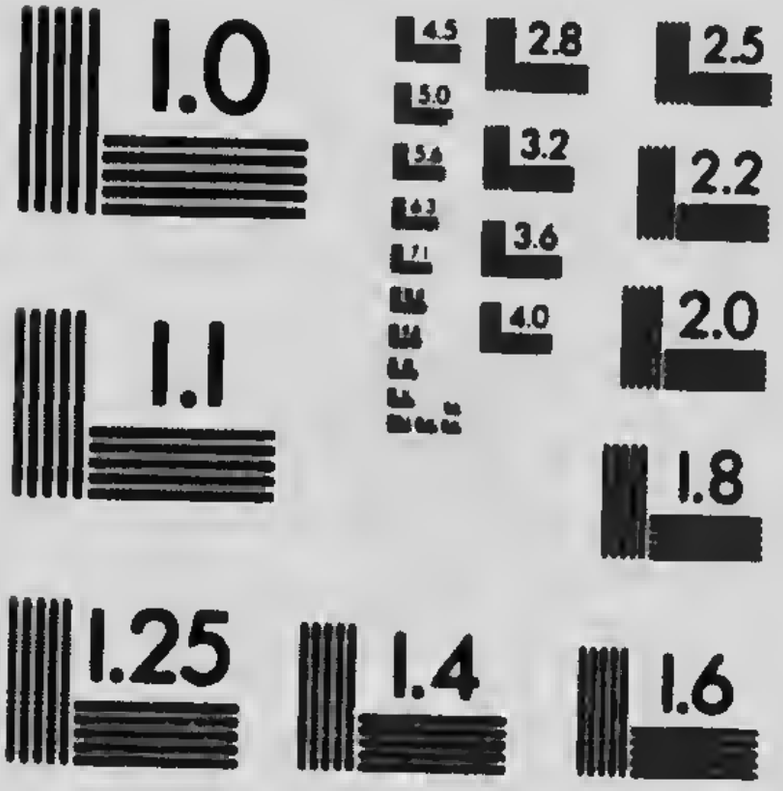

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against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any court authorising the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void, so far as regards the property in or right to the possession of any chattel comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be (*o*)).

Avoidance of certain duplicate bills of sale.

(Sect. 9) Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the court having cognisance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading the Act.

Mode of registering bills of sale.

(Sect. 10) A bill of sale shall be attested and registered under the Act in the following manner:—(1) The

(*o*) Under the Bills of Sale Act, 1878, a bill of sale not made in accordance with the conditions imposed by the Act, is nevertheless valid as between the grantor and the grantee; *Davis* v. *Goodman*, 5 C. P. D. 128; *Ex parte Blaiberg, Re Tonmer*, 23 Ch. D. 254; *Hickson* v. *Darlow*, 23 Ch. D. 690; *ante*, p. 76 and n. (*k*).

execution of every bill of sale shall be attested by a solicitor of the Supreme Court (*p*), and the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting solicitor (*q*). (2) Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill (*r*), and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation (*s*), and a description of the residence and occupation (*t*) of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale (*u*), shall be presented to, and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed (*x*). (3) If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under the Act therewith and as part thereof, otherwise the registration shall be void (*y*). In case

(*p*) See *Hill* v. *Kirkwood*, 28 W. R. 358; *Seal* v. *Claridge*, 7 Q. B. D. 516; *Pennarden* v. *Roberts*, 9 Q. B. D. 137.

(*q*) See *Ex parte National Mercantile Bank, Re Haynes*, 15 Ch. D. 42; *Ex parte Bolland, Re Roper*, 21 Ch. D. 543.

(*r*) See *Re Hewer, Ex parte Kahen*, 24 Ch. D. 871; *Coates* v. *Moore*, 1903, 2 K. B. 340.

(*s*) See *Sharp* v. *Birch*, 8 Q. B. D. 111; *Ford* v. *Kettle*, 9 Q. B. D. 139; *Ex parte Bolland, Re Roper*, 21 Ch. D. 543.

(*t*) See *Kemble* v. *Addison*, 1900, 1 Q. B. 430.

(*u*) See *Ex parte Popplewell, Re Storey*, 21 Ch. D. 73; *Re Hewer, Ex parte Kahen*, ib., 871; *Ex parte Webster, Re Morris*, 22 Ch. D. 136; *Blaiberg* v. *Parke*, 10 Q. B. D. 90.

(*x*) See *ante*, p. 231, n. (*k*), 232, n. (*p*).

(*y*) See *Edwards* v. *Marcus*, 1894, 1 Q. B. 587.

two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively, as regards such chattels (*z*). A transfer or assignment of a registered bill of sale need not be registered (*a*).

Renewal of registration.

By sect. 11, the registration of a bill of sale, whether executed before or after the commencement of the Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void (*b*). A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale.

Register.

Entry of satisfaction.

Copies may be taken, &c.

Sect. 12 provides for the entry of particulars relating to bills of sale in the register thereby required to be kept, and for the keeping of an index of the names of the grantors of registered bills of sale. Sect. 15 provides for the entry of a memorandum of satisfaction of a registered bill of sale. And by sect. 16, any person shall be entitled to have an office copy or extract of any registered bill of sale and affidavit of execution filed therewith, or registered affidavit of renewal, upon paying for the same; and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all courts and before all arbitrators or other persons be admitted as *primâ facie* evidence thereof, and of the fact and date of registration as shown thereon. And any person shall be entitled at all reasonable times to search the register and every registered bill of sale, upon payment of one shilling for every copy of a bill of sale inspected (*c*).

(*z*) See *Conolly* v. *Steer*, 7 Q. B. D. 520; *Lyons* v. *Tucker*, *ib.* 520.

(*a*) See *Ex parte Tuquand*, *Re Parker*, 14 Q. B. D. 636.

(*b*) See *Fenton* v. *Blythe*, 25 Q. B. D. 417; *Re Parsons*, 1893, 2 Q. B. 122; *Antoniadi* v. *Smith*, 1901, 2 K. B. 589.

(*c*) Provision is now made for an official search in the register of bills of sale, and the issue of a certificate of the result of such a search at the instance of any person requiring the same; so that now a man may either search the register himself, or cause an official search to be

Order and disposition.

(Sect. 20) Chattels comprised in a bill of sale which has been and continues to be duly registered under the Act, shall not be deemed to be in the possession, order or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869 (*d*).

Bills of Sale Act of 1882.

The Bills of Sale Act, 1878, Amendment Act, 1882 (*e*), came into operation on the 1st of November, 1882, which date is therein referred to as the commencement of the Act (*f*). This Act contains the following provisions :—

(Sect. 3) The Bills of Sale Act, 1878, is hereinafter referred to as "the principal Act," and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but unless the context otherwise requires shall not apply to any bill of sale duly registered before the commencement of this Act so long as the registration thereof is not avoided by non-renewal or otherwise (*g*).

Meaning of terms.

The expression "bill of sale" and other expressions in this Act have the same meaning as in the principal Act, except as to bills of sale or other documents mentioned in sect. 4 of the principal Act (*h*), which may be given otherwise than by way of security for the payment of money, to which last-mentioned bills of sale and other documents this Act shall not apply (*i*).

(Sect. 4) Every bill of sale shall have annexed thereto or written thereon a schedule containing an inventory of the personal chattels comprised in the bill of sale;

made; see stat. 45 & 46 Vict. c. 39, s. 2, and the rules made thereunder, set out in Williams' Conveyancing Statutes, 262, 270, 479—491; R. S. C. 1883, Order LXI. rule 23.

(*d*) *Re Heaver, Ex parte Kahen*, 21 Ch. D. 871. See *ante*, pp. 113, 114. And see stat. 46 & 47 Vict. c. 52, s. 140, sub-s. 9.

(*e*) Stat. 45 & 46 Vict. c. 43.

(*f*) Sects. 1, 2. This Act does not extend to Scotland or Ireland, sect. 18.

(*g*) *Ex parte Izard, Re Chapple*, 23 Ch. D. 409; see *ante*, p. 113. It has been held that the Act of 1882 does not apply to an unregistered bill of sale executed more than seven days before the 1st November, 1882, while the Act of 1878 was in force (see *ante*, p. 630, and note (*o*); *Hickson* v. *Darlow*, 13 Ch. D. 690).

(*h*) See *ante*, pp. 626, 627.

(*i*) See *ante*, pp. 625, 626, n. (*x*).

and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule; and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described (*k*).

Chattels of which grantor is not true owner.

(Sect. 5) Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale (*l*).

Growing crops.

Fixtures.

(Sect. 6) Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things (that is to say), (1) any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed; (2) any fixtures separately assigned or charged, and any plant or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant, or trade machinery specifically described in the schedule to such bill of sale (*l*).

Seizure.

(Sect. 7) Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes: (1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security (*m*); (2) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes; (3) If the grantor

(*k*) See *Roberts* v. *Roberts*, 13 Q. B. D. 794; *Witt* v. *Banner*, 19 Q. B. D. 276; *Thomas* v. *Kelly* 13 App. Cas. 506; *Carpenter* v. *Deen*, 23 Q. B. D. 566; *Hickley* v. *Greenwood*, 25 Q. B. D. 277; *Davidson* v. *Carlton Bank*, 1893, 1 Q. B. 82.

(*l*) See *Roberts* v. *Roberts*, 13 Q. B. D. 794; *ante*, pp. 98–101.

(*m*) See *Hammond* v. *Hocken*, 12 Q. B. D. 291.

shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises; (4) If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates and taxes (*n*); (5) If execution shall have been levied against the goods of the grantor under any judgment at law: Provided that the grantor may within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just (*o*).

Registration.

(Sect. 8) Every bill of sale shall be duly attested, and shall be registered under the principal Act within seven clear days after the execution thereof, or if it is executed in any place out of England then within seven clear days after the time at which it would in the ordinary course of post arrive in England if posted immediately after the execution thereof and shall truly set forth the consideration for which it was given (*p*); otherwise such bill of sale shall be void in respect of the personal chattels comprised therein (*q*).

Form of bill of sale.

(Sect. 9) A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this act annexed (*r*).

(*n*) See *Ex parte Cotton*, 11 Q. B. D. 301.

(*o*) See *Re Wood, Ex parte Woolfe*, 1894, 1 Q. B. 605. It has been held that the provisions of sect. 7 apply to the case of the seizure of goods under a bill of sale made and registered before the commencement of the Act; *Ex parte Cotton*, 11 Q. B. D. 301; see sect. 13, below.

(*p*) See *Roberts* v. *Roberts*, 13 Q. B. D. 794; *Ex parte Allam, Re Munday*, 14 Q. B. D. 43; *Hughes* v. *Little*, 17 Q. B. D. 204, 18 Q. B. D. 32; *Re Hockaday*, 3 Times L. R. 285; *Sharp* v. *McHenry*, 38 Ch. D. 427.

(*q*) See *Heseltine* v. *Simmons*, 1892, 2 Q. B. 547.

(*r*) The schedule to the Act is as follows:—

Form of Bill of Sale.

This indenture, made the day of , between *A. B*

Attestation.

By sect. 10, the execution of every bill of sale by the grantor shall be attested by one or more credible

of of the one part, and *C. D.* of of the other part, witnesseth that in consideration of the sum of £ now paid to *A. B.* by *C. D.*, the receipt of which the said *A. B.* hereby acknowledges [*or whatever else the consideration may be*] he the said *A. B.* doth hereby assign unto *C. D.*, his executors administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said *A. B.* doth also agree with the said *C. D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in sect. 7 of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said *A. B.* in the presence of me *E. F.* [*add witness's name, address, and description*].

See *Davis* v. *Burton*, 10 Q. B. D. 414, 11 Q. B. D. 537; *Re Williams, Ex parte Pearce*, 25 Ch. D. 656; *Hammond* v. *Hocking*, 12 Q. B. D. 291 (bill of sale containing an agreement for grantor to pay premiums necessary for insuring the goods against fire, and to deliver the receipts to the grantee is not void on that account); *Melville* v. *Stringer*, 13 Q. B. D. 392; *Hetherington* v. *Groome*, ib. 789 (bill of sale containing agreement to pay the money advanced *on demand* and power to seize in default held void); *Roberts* v. *Roberts*, ib. 794; *Sibley* v. *Higgs*, 15 Q. B. D. 619; *Consolidated Credit Corporation* v. *Gosney*, 16 Q. B. D. 24 (agreement to replace worn out goods does not avoid the security); *Myers* v. *Elliott*, ib. 526; *Ex parte Stanford, Re Barber*, 17 Q. B. D. 259 (security void for incorporating statutory covenants for title under Conveyancing Act of 1881); *Davies* v. *Rees*, ib. 408 (covenant to pay principal and interest contained in a void bill of sale is void); *Goldstrom* v. *Tallerman*, 18 Q. B. D. 1 (security held valid providing for repayment of loan by instalments with interest at 60 per cent., for insurance and payment of rent, rates and taxes by mortgagor, and in default by mortgagee, with power to add same with interest at 20 per cent. to his security); *Hughes* v. *Little*, ib. 32; *Blaiberg* v. *Beckett*, ib. 96; *Ex parte Official Receiver, Re Morritt*, ib. 222 (security held valid containing power to seize for causes specified in sect. 7 of the Act, and to break open doors and windows for that purpose; much discussion and variance of opinion as to what power of sale is enjoyed by the holder of a bill of sale under the Act of 1882); *Watkins* v. *Evans*, ib. 386 (same subject); *Re Cleaver*, 18 Q. B. D. 489; *Furber* v. *Cobb*, ib. 494 (covenant held valid not to remove the goods and not to suffer them to be injured and to repair and replace worn out goods); *Lumley* v. *Simmons*, 34 Ch. D. 698 (bill upheld containing a proviso making the whole of the principal unpaid and interest due to be immediately payable on default in making payment of any instalment and containing an express power of sale, as to which see the two previous cases also); *Calvert* v. *Thomas*, 19 Q. B. D. 204 (further opinions as

witness or witnesses, not being a party or parties thereto. And so much of sect. 10 of the principal Act as requires that the execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and that the attestation shall state that before the execution of the bill of sale the effect thereof has been explained to the grantor by the attesting witness, was repealed (*s*).

Local registration.

(Sect. 11) Where the affidavit (which under sect. 10 of the principal Act is required to accompany a bill of sale when presented for registration) describes the residence of the person making or giving the same or of the person against whom the process is issued to be in some place outside the London bankruptcy district as defined by the Bankruptcy Act, 1869 (*t*), or where the bill of sale describes the chattels enumerated therein as being in some place outside the said London bankruptcy district, the registrar under the principal Act shall forthwith and within three clear days after registration in the principal registry, and in accordance with the prescribed directions, transmit an abstract in the prescribed form of the contents of such bill of sale to the county court registrar in whose district such places are situate, and if such places are in the districts of

to the power of sale given by a bill of sale); *Real and Personal Advance Co.* v. *Clears*, 20 Q. B. D. 304 (*power of seizure* on non-payment of moneys expended by the mortgagee for rent, rates and taxes invalidates the security); *Parsons* v. *Brand*, 25 Q. B. D. 110; *Cochrane* v. *Entwistle*, ib. 116; *Simmons* v. *Woodward*, 1892, A. C. 100; *Johnson* v. *Diprose*, 1893, 1 Q. B. 512 (grantor of bill of sale has an equity of redemption only); *Seed* v. *Bradley*, 1894, 1 Q. B. 319; *Weardale Coal and Iron Co.* v. *Hodson*, 1894, 1 Q. B. 598; *Altree* v. *Altree*, 1898, 2 Q. B. 267 (bill void for not giving grantee's address); *De Braam* v. *Ford*, 1900, 1 Ch. 142; *Davies* v. *Jenkins*, 1900, 1 Q. B. 133 (bill void for not containing an acknowledgment of the receipt of the money advanced); *Saunders* v. *White*, 1902, 1 K. B. 472; *Coates* v. *Moore*, 1903, 2 K. B. 140; *Rosefield* v. *Provincial Union Bank*, 1910, 2 K. B. 781 (bill providing for payment of the principal and interest secured by equal monthly instalments, upheld); *Hall* v *Whiteman*, 1912, 1 K. B. 683 (bill held void for not containing a term of the parties' agreement embodied in a contemporaneous document).

(*s*) This enactment applies only to bills of sale given by way of security for the payment of money; and the execution of other bills of sale is still regulated by sect. 10 of the Act of 1878; *Casson* v. *Churchley*, 53 L. J. Q. B. 335; see *ante*, pp. 625, 626, 631.

(*t*) See now stat. 46 & 47 Vict. c. 52, ss. 96, 149 (sub-sect. 2).

different registrars to each such registrar. Every abstract so transmitted shall be filed, kept and indexed by the registrar of the county court in the prescribed manner, and any person may search, inspect, make abstracts from, and obtain copies of the abstract so registered in the like manner and upon the like terms as to payment or otherwise as near as may be as in the case of bills of sale registered by the registrar under the principal Act (*u*).

Bill of sale to secure less than 30*l*.

(Sect. 12) Every bill of sale made or given in consideration of any sum under thirty pounds shall be void (*x*).

Chattels seized under bill of sale.

(Sect. 13) All personal chattels seized, or of which possession is taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of (*y*).

No protection against distress for taxes and rates.

(Sect. 14) A bill of sale to which this Act applies shall be no protection in respect of personal chattels included in such bill of sale, which, but for such bill of sale, would have been liable to distress under a warrant for the recovery of taxes and poor and other parochial rates.

Repeal.

(Sect. 15) The eighth and twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act (*z*).

Searching the register.

(Sect. 16) So much of the sixteenth section of the principal Act as enacts that any person shall be entitled

(*u*) See *ante*, p. 632, and s. 16, below.

(*x*) See *Davis* v. *Usher*, 12 Q. B. D. 490.

(*y*) See sect. 7, *ante*, p. 635; *Tomlinson* v. *Consolidated Credit Corporation*, 24 Q. B. D. 135.

(*z*) See *ante*, pp. 629, 630, 633.

at all reasonable times to search the register and every registered bill of sale upon payment of one shilling for every copy of a bill of sale inspected (*a*) is hereby repealed, and from and after the commencement of this Act any person shall be entitled at all reasonable times to search the register, on payment of a fee of one shilling, or such other fee as may be prescribed, and subject to such regulations as may be prescribed, and shall be entitled at all reasonable times to inspect, examine and make extracts from any and every registered bill of sale without being required to make a written application, or to specify any particulars in reference thereto, upon payment of one shilling for each bill of sale inspected, and such payment shall be made by a judicature stamp: Provided that the said extracts shall be limited to the dates of execution, registration, renewal of registration, and satisfaction, to the names, addresses, and occupations of the parties to the amount of the consideration, and to any further prescribed particulars (*b*).

(Sect. 17) Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stocks, or goods, chattels and effects of such company (*c*).

(*a*) See *ante*, p. 632.
(*b*) See note (c) to p. 632, *ante*.
(*c*) See *Ross* v. *Army and Navy Hotel Co.*, 34 Ch. D. 43; *Jenkinson* v. *Brandley Mining Co.*, 19 Q. B. D. 568; *Reid* v. *Joannon*, 25 Q. B. D. 300; *Re Standard Manufacturing Co.*, 1891, 1 Ch. 627; *Great Northern Ry. Co.* v. *Coal Co-operative Society*, 1896, 1 Ch. 187; *Richards* v. *Kidderminster Overseers*, 1896, 2 Ch. 212; *Clark* v. *Balm*, 1908, 1 K. B. 667; and see *ante*, p. 346 n. (*e*).

APPENDIX (B).

(Referred to, *ante*, p. 358.)

Form of Letters Patent given in the Third Schedule to the Patents Rules, 1908.

EDWARD VII. by the grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas King, Defender of the Faith, Emperor of India: To all to whom these presents shall come greeting:

WHEREAS

hath declared that he is in possession of an invention for

that he claims to be the true and first inventor thereof, and that the same is not in use by any other person to the best of his knowledge and belief (*a*):

AND WHEREAS the said inventor hath humbly prayed that a patent might be granted unto him for the sole use and advantage of his said invention:

AND WHEREAS the said inventor (hereinafter together with his executors, administrators, and assigns (*b*), or any of them, referred to as the said patentee) hath by and in his complete specification particularly described the nature of his invention (*c*):

AND WHEREAS We, being willing to encourage all inventions which may be for the public good, are graciously pleased to condescend to his request:

KNOW YE, therefore, that We of our especial grace certain knowledge and mere motion (*d*) do by these presents, for us our heirs and successors, give and grant unto the said patentee our especial license, full

(*a*) See *ante*, pp. 348, 351, 354.

(*b*) See *ante*, pp. 43, 303.

(*c*) See *ante*, pp. 355—360.

(*d*) See *ante*, p. 354.

power, sole privilege, and authority, that the said patentee by himself, his agents or licensees, and no others, may at all times hereafter during the term of years herein mentioned make, use, exercise, and vend the said invention (*e*) within our United Kingdom of Great Britain and Ireland, and Isle of Man (*f*), in such manner as to him or them may seem meet, and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention during the term of fourteen years from the date hereunder written of these presents (*g*): And to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention; We do by these presents for us, our heirs and successors, strictly command all our subjects whatsoever within our United Kingdom of Great Britain and Ireland, and the Isle of Man, that they do not at any time during the continuance of the said term of fourteen years either directly or indirectly make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same, nor make or cause to be made any addition thereto or subtraction therefrom, whereby to pretend themselves the inventors thereof, without the consent license or agreement of the said patentee in writing under his hand and seal, on pain of incurring such penalties as may be justly inflicted on such offenders for their contempt of this our Royal command, and of being answerable to the patentee according to law for his damages thereby occasioned (*h*):

PROVIDED ALWAYS that these letters patent shall be revocable on any of the grounds from time to time by law prescribed as grounds for revoking letters patent granted by Us and the same may be revoked and made void accordingly (*i*):

PROVIDED ALSO, that if the said patentee shall not pay all fees by law required to be paid in respect of the grant of these letters patent, or in respect of any

(*e*) See *ante*, pp. 351, 593, 594.
(*f*) See *ante*, p. 358.
(*g*) See *ante*, pp. 348, 350, 358.
(*h*) See *ante*, pp. 351, 366.
(*i*) See *ante*, pp. 367, 368.

matter relating thereto at the time or times, and in manner for the time being by law provided (*k*), and also if the said patentee shall not supply or cause to be supplied, for our service all such articles of the said invention as may be required by the officers or commissioners administering any department of our service in such manner, at such times, and at and upon such reasonable prices and terms as shall be settled in manner for the time being by law provided (*l*), then, and in any of the said cases, these our letters patent, and all privileges and advantages whatever hereby granted shall determine and become void notwithstanding anything hereinbefore contained: Provided also that nothing herein contained shall prevent the granting of licenses in such manner and for such considerations as they may by law be granted (*m*): And lastly, We do by these presents for us, our heirs and successors grant unto the said patentee that these our letters patent shall be construed in the most beneficial sense for the advantage of the said patentee.

In witness whereof We have caused these our letters to be made patent and to be sealed as of the (*n*) one thousand nine hundred and

* Here is to be inserted the name of the Comptroller-General.

*

Comptroller-General of Patents, Designs, and Trade Marks.

Seal of Patent Office

(*k*) See *ante*, p. 349.
(*l*) See *ante*, pp. 354, 355.
(*m*) See *ante*, p. 361.
(*n*) See *ante*, p. 358.

APPENDIX (C).

(Referred to, *ante*, pp. 397, 409, 411, 416, 419, 421, 431, 439, 553.)

Marriage Settlement of Stock and of a Share of a Testator's Residuary Estate upon the usual Trusts.

THIS INDENTURE made the 5th day of August 1913 Date; parties.
BETWEEN A. B. [*intended husband*] of [*description*] of the first part C. D. [*intended wife*] of [*description*] of the second part and E. F. of [*description*] and G. H. of [*description*] hereinafter referred to as "the trustees" which expression shall except where repugnant to the context include the survivor of them or the executors or administrators of such survivor or all or every other the trustees or trustee for the time being of these presents (*a*) of the third part

WHEREAS a marriage is intended to be solemnized Recitals. between the said A. B. and C. D. AND WHEREAS in pursuance of an agreement in that behalf entered into upon the treaty for the said intended marriage the said A. B. has transferred (*b*) the sums of stock described in the schedule hereto into the names of the trustees to the intent that the trustees shall stand possessed thereof UPON TRUST for the said A. B. until the said intended marriage and after the solemnization thereof upon the trusts hereinafter declared and subject to the provisions hereinafter contained concerning the same AND WHEREAS L. D. late of [*description*] by his last will dated the 23rd day of January 1912 after bequeathing

(*a*) The devolution by survivorship or otherwise of trusts and powers imposed on or given to trustees is provided for by law (see 1 Wms. V. & P. 271—273, 278—280, 2nd ed.; stats. 50 & 57 Vict. c. 53, s. 22; 1 & 2 Geo. V. c. 37, s. 8); but that does not make it improper to declare expressly, by an interpretation clause or otherwise, the intention that all the duties, powers and discretions of the original trustees may be exercised by their successors or sole successor in office.

(*b*) *Ante*, p. 439.

divers specific and pecuniary legacies and annuities devised and bequeathed all the residue of his real and personal estate unto and to the use of J. K. and L. M. their heirs executors administrators and assigns upon trust for sale and conversion into money and for payment thereout of his funeral and testamentary expenses and debts and the legacies and annuities bequeathed by his will and the legacy duty thereon and declared that subject thereunto his residuary estate should be in trust for his daughters E. D. F. D. and the said C. D. to be equally divided between them and appointed the said J. K. and L. M. executors of his said will AND WHEREAS the said L. D. died on the first day of March 1912 and his said will was proved on the 6th day of December 1912 in the principal probate registry of the High Court of Justice by both the said executors (*c*) AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said C. D. should assign the said share of the residuary estate of the said L. D. to which she is entitled under the said will to the trustees upon the trusts hereinafter declared and subject to the provisions hereinafter contained concerning the same and that she should enter into the agreement hereinafter contained for the settlement of other property to which she may now be or may hereafter during her intended coverture become entitled (*d*)

1st testatum: Assignment of share of residuary estate.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement in this behalf and in consideration of the said intended marriage (*e*) the said C. D. doth hereby assign AS SETTLOR (*f*) unto the trustees (*g*) ALL THAT the share and interest of the said C. D. under the said will of the said L. D. in all the real and personal estate which is now or may at any time hereafter become subject to the trusts of the said will

Habendum.

TO HAVE AND TO HOLD the same premises unto the trustees UPON TRUST for the said C. D. until the said intended marriage and after the solemnization thereof upon the trusts hereinafter declared and subject to

(*c*) See *ante*, pp. 488, 489.
(*d*) See *ante*, pp. 430—432, 551.
(*e*) See *ante*, p. 433.
(*f*) See *ante*, p. 619, n. (*h*).
(*g*) See *ante*, pp. 402, 403, 452, 453.

the provisions hereinafter contained concerning the same

2ndtestatum: Declaration of trusts.

AND THIS INDENTURE ALSO WITNESSETH that in further pursuance of the agreement entered into upon the treaty for the said intended marriage and for the consideration aforesaid it is hereby agreed and declared that after the solemnization of the said intended marriage the trustees (*h*) shall either permit the sums of stock described in the schedule hereto (hereinafter referred to as the husband's trust fund) or any of them or any part or parts thereof respectively to remain in their present state of investment or shall at any time or times with the consent of the said A. B. and C. D. during their joint lives and of the survivor during his or her life and after the death of such survivor at the discretion of the trustees (*i*) sell or convert into money the said sums of stock or any of them or any part or parts thereof respectively And shall get in and receive payment of the moneys constituting the said share of the residuary estate of the said L. D. hereinbefore assigned (hereinafter referred to as the wife's trust fund) with power with such consent or at such discretion as aforesaid to accept and take over at a valuation any property of any kind for the time being forming part of the said residuary estate which may be or desired to be appropriated by the executors or trustees of the said will to the said share of the said C. D. therein and take a transfer to the trustees of such property and retain the same in its then state of investment (notwithstanding that the same be not such as is hereinafter authorised) or sell or convert into money such property

To permit present investments to remain, or to convert them into money.

For investment.

AND SHALL with such consent or at such discretion as aforesaid invest any money which shall be produced by the sale of the husband's trust fund or any part thereof or received in respect of the wife's trust fund or the sale thereof or of any part thereof and any other money which may be or become subject to the trusts of these presents and which ought to be invested in the names or under the legal control of the trustees

(*h*) See *ante*, p. 643, n. (*a*).
(*i*) See *ante*, p. 643, n. (*a*).

upon any securities or in any manner of investment upon or in which trustees shall for the time being be authorised by law to invest trust money (*k*) or in any of the public stocks or funds or government securities of the United Kingdom or India or any colony or depe[illegible]ency of the United Kingdom (including the Dominion of Canada or any province forming part thereof and the Commonwealth of Australia or any state forming part thereof and the Dominion of New Zealand (*l*)) or upon freehold copyhold leasehold or chattel real securities in England or Wales or in or upon the mortgages debentures debenture stock securities or bonds or the guaranteed preference or ordinary stock or shares of any corporation company or public body whether municipal county local commercial or otherwise incorporated constituted situate or carrying on business in the United Kingdom or India or any colony or dependency of the United Kingdom (including as aforesaid) or upon the security of any interest for or determinable with a life or lives in any real or personal property wherever situate or arising together with a policy or policies of assurance on such life or lives or in the purchase of any hereditaments situate or arising in England or Wales and held for an estate of inheritance of freehold copyhold or customary tenure or for any term of years whereof not less than fifty years shall be unexpired at the time of purchase and either in possession or subject to any lease or underlease for any term of years or in the enfranchisement of any copyhold hereditaments which shall have been purchased under this present power all hereditaments so to be purchased to be held on trust for sale with such consent or at such discretion as aforesaid and for application of the rents and profits thereof until sale as if the same were income arising from investments (otherwise than in the purchase of hereditaments) of the proceeds of sale thereof (*m*) but not in any other mode of investment (*n*)

(*k*) See *ante*, p. 417, and Table annexed thereto.

(*l*) See *Re Sir S. M. Maryon Wilson's Estate*, 1912, 1 Ch. 55.

(*m*) See *ante*, pp. 418—420.

(*n*) See *ante*, p. 417, and n. (*r*).

AND MAY with such consent or at such discretion as aforesaid from time to time vary or transpose all or any of the investments of the property for the time being subject to the trusts of these presents for or into any other or others of the description hereby authorised (*o*) Power to vary investments.

AND SHALL PAY THE INCOME of the husband's trust fund and of the investments thereof to the said A. B. during his life and after his death to the said C. D. during her life but so that she shall have no power during her said intended or any future coverture to alien or anticipate her interest therein (*p*) To pay income of fund settled by husband to him for life then to wife for life.

AND SHALL PAY THE INCOME of the wife's trust fund and of the investments thereof to the said C. D. during her life without power of anticipation and after her death to the said A. B. during his life (*q*) To pay income of fund settled by wife to her for life then to husband for life.

AND AFTER THE DEATH of the said A. B. and C. D. shall stand possessed of the husband's trust fund and the wife's trust fund and the investments and income thereof respectively IN TRUST for all or such one or more exclusively of the others or other of the issue (whether children or more remote) (*r*) of the said intended marriage such remoter issue to be born and such children or remoter issue to take interests which must necessarily vest (if at all) during the lives of the said A. B. and C. D. or the life of the survivor of them or within twenty-one years after the death of such survivor (*s*) at such age or time or respective ages or times if more than one in such shares for such interests and with such future or executory or other trusts for the benefit of the said issue or some or one of them and with such provisions for their respective advancement (either overreaching the interests prior to this power or not) or maintenance or education at the discretion of the trustees or of any other persons or person and upon such conditions with such restrictions Trusts for the issue and children of the marriage.

(*o*) See Williams on Settlements, 175.

(*p*) See *ante*, p. 552; Williams on Settlements, 149.

(*q*) See *ante*, pp. 551, 517—520; Williams' Conveyancing Statutes, 418, 419; Williams on Settlements, 127, 128, 149.

(*r*) See *ante*, p. 411.

(*s*) See *ante*, pp. 404, 412—414.

and in such manner as the said A. B. and C. D. shall by any deed or deeds with or without power of revocation and new appointment jointly appoint

AND IN DEFAULT of any and subject to every such appointment then as the survivor of them shall in like manner or by will or codicil appoint (*t*)

AND IN DEFAULT of any and subject to every such appointment **IN TRUST** for all the children or the only child of the said intended marriage who being sons or a son shall attain the age of twenty-one years or being daughters or a daughter shall attain that age or marry under that age and if more than one in equal shares (*u*)

Hotchpot clause.

PROVIDED ALWAYS that no child who or whose issue shall take any part of the said trust premises under any appointment in pursuance of either of the powers lastly hereinbefore contained shall in default of appointment to the contrary have or be entitled to any share of the unappointed part of the said trust premises without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly (*x*)

Advancement clause

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that (in addition to the powers of maintenance and other powers by the Conveyancing Act 1881 or otherwise by law given to the trustees (*y*)) it shall be lawful for the trustees after the death of the said A. B. and C. D. or in their his or her lifetime with their his or her consent in writing to raise any part or parts not exceeding altogether one-half of the then expectant or presumptive or vested share of any child of the said intended marriage under the trusts hereinbefore declared and to pay or apply the same for his or her advancement or benefit as the trustees shall think fit (*z*)

Trusts in default of children.

AND IT IS HEREBY AGREED AND DECLARED that if

(*t*) See *ante*, pp. 407—414, 551—553; Williams on Settlements, 150—160.

(*u*) See *ante*, pp. 415, 551; Williams on Settlements, 160—164.

(*x*) See *ante*, p. 409; Williams on Settlements, 164, 166.

(*y*) See *ante*, pp. 415, 416.

(*z*) See Williams on Settlements, 166.

there shall be no child of the said intended marriage who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age then (subject and without prejudice to the trusts hereinbefore declared) the trustees shall stand possessed of the said trust premises and the income thereof or so much thereof respectively as shall not have become vested or have been applied under any of the trusts or powers herein contained or by statute implied upon the trusts following (that is to say)

As to fund settled by husband.

As to the husband's trust fund and the investments and income thereof or so much thereof respectively as shall not have become vested or have been applied under any of the trusts or powers herein contained or by statute implied after the death of the said C. D. and such default or failure of children as aforesaid which shall last happen In trust for the said A. B. his executors administrators and assigns (*a*)

As to fund settled by wife.

And as to the wife's trust fund and the investments and income thereof or so much thereof respectively as shall not have become vested or have been applied under any of the trusts or powers herein contained or by statute implied after the death of the said A. B. and such default or failure of children as aforesaid which shall last happen In trust for such person or persons and for such purposes as the said C. D. shall during coverture by will or codicil or when not under coverture by deed with or without power of revocation and new appointment or by will or codicil appoint (*b*)

And in default of any and subject to every such appointment Upon the trusts following (that is to say) If the said C. D. shall survive the said A. B. then in trust for the said C. D. absolutely (but so that she shall have no power during her said intended coverture to alien or anticipate her interest therein) (*c*) But if the said A. B. shall survive the said C. D. then in trust for such person or persons as under the statutes for the distribution of the effects of intestates (*d*) would have

(*a*) See Williams on Settlements, 168; *ante*, p. 552.
(*b*) See *ante*, pp. 405—497.
(*c*) See *ante*, p. 551.
(*d*) See *ante*, p. 523.

become entitled thereto at the decease of the said C. D. had she died possessed thereof intestate and without having been married such persons if more than one to take as tenants in common in the shares in which they would have taken under the same statutes (*e*)

Agreement to settle wife's other or after-acquired property above the value of 500*l*.

AND IT IS HEREBY AGREED (*f*) that if the said C. D. now is or if during the said intended coverture she shall at one and the same time and from one and the same source become seised or possessed of or entitled to or empowered absolutely to dispose (otherwise than by will) of any real or personal property exceeding the value of 500*l*. (except jewels trinkets ornaments furniture plate pictures prints books carriages horses motor cars and other articles of the like nature) for any estate or interest whatever other than an estate or interest for the life or determinable with the life of the said C. D. then and in every such case the said C. D. and all other necessary parties (if any) will at the cost of the said trust estate as soon as circumstances will admit and to the satisfaction of the trustees convey assign and assure the said real or personal property to or otherwise cause the same to be vested in the trustees Upon trust that they shall with all convenient speed and in such manner as they shall think fit (but as to reversionary property not until it shall fall into possession unless it shall appear to the trustees that the capital of the trust estate will be probably injured by deferring the sale) sell or call in and convert into money such part or parts of the said property as shall not consist of money or of stocks funds shares securities or property hereinbefore authorised as an investment And shall stand possessed of any money which shall arise from any such sale calling in and conversion and of such part or parts of the said property as shall consist of money or of such stocks funds shares securities or property as aforesaid and of the income thereof respectively upon the trusts herein-

(*e*) See Williams on Settlements, 144, 145, 168, 199; *ante*, p. 551; Williams' Conveyancing Statutes, 456—460; *Re Smith*, 1903, 1 Ch. 373; *Re Brydone's Settlement*, 1903, 2 Ch. 84.

(*f*) See *ante*, pp. 558—560; Williams' Conveyancing Statutes 234—238, 418, 419, 447.

before declared and subject to the provisions hereinbefore contained concerning the wife's trust fund and the investments and income thereof respectively (*g*) Provided always that it shall not be obligatory on the trustees to enforce the agreement lastly hereinbefore contained or to take any proceedings to obtain the conveyance transfer or payment to them of any real or personal estate which may be or become subject to the said agreement unless and until they shall be required to do so by some person beneficially interested under the trusts hereinbefore declared and that the trustees shall not be liable or accountable in respect of any such real or personal estate unless and until the same shall have been actually conveyed transferred or paid to them

Power to lease purchased lands

AND IT IS HEREBY AGREED AND DECLARED that until any hereditaments which shall have been purchased under the power in that behalf hereinbefore contained shall be sold the trustees may with such consent or at such discretion as aforesaid exercise over or in respect of the same or any part thereof the like powers of leasing (*h*) and other powers as are by sections 6 to 13 both inclusive of the Settled Land Act 1882 and by the Settled Land Acts 1889 and 1890 given to tenants for life of settled land (*i*) and so that any money which shall become receivable under some exercise of any of the powers so hereby conferred and which if received under some exercise of any of the said statutory powers would be capital money arising under the said Acts (*i*) shall be payable to and received by the trustees and shall be invested or applied by the trustees as capital money

Power to permit the husband or wife or their issue to occupy any house or land purchased

AND THAT the trustees may with such consent as aforesaid permit the husband and the wife or either of them during their joint lives or the survivor of them to occupy rent free any messuage or lands comprised in any such hereditaments as aforesaid and suitable for occupation as a residence or otherwise and the trustees may at their discretion after the death of such survivor permit any issue of the husband and the wife who shall

(*g*) See *ante*, pp. 430—432, 551.

(*h*) See *ante*, p. 420, and n. (*q*).

(*i*) See Williams R. P. 121 123, 21st ed.

for the time being be actually or presumptively entitled to the rents and profits of any such messuage to occupy the same rent free

Power to expend money in repairs of or improvements to hereditaments purchased.

AND THAT the trustees may with such consent or at such discretion as aforesaid raise or retain out of the income or capital of any property for the time being subject to the trusts of these presents (whether forming part of the husband's or of the wife's trust fund) any money which the trustees shall with such consent or at such discretion as aforesaid consider necessary or expedient to be expended for the purpose of making any improvements alterations or repairs in or to or for the insurance against fire of any such hereditaments as aforesaid or for the purpose of paying the rent reserved by or satisfying the covenants contained in any lease whereby any leasehold hereditaments which shall have been purchased under the power in that behalf hereinbefore contained shall have been demised Provided always that this power shall not prejudice abridge or affect in any way the right of the trustees to be indemnified out of the trust property and otherwise against their liability in respect of any rent or covenants of which they shall become personally liable for the payment or performance and it is in addition hereby expressly agreed and declared that the trustees shall be entitled to be indemnified against such liability out of any property for the time being subject to the trusts of these presents (whether forming part of the husband's or of the wife's trust fund) and shall not be bound to see to the state of repair or condition or the insurance against fire or otherwise of any such hereditaments as aforesaid or any messuage or building thereon and shall not be liable for any deterioration loss or destruction thereof

Persons to appoint new trustees.

AND IT IS HEREBY AGREED AND DECLARED that the husband and the wife during their joint lives and the survivor of them during his or her life shall be the proper persons and person to appoint new trustees or a new trustee of these presents (*k*)

(*k*) See *ante*, p. 421.

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that if in the execution of any of the trusts or powers of these presents it shall become necessary to divide or apportion between or among two or more persons the several funds the trusts whereof are hereinbefore declared and all or any of the trust money stocks funds shares securities or property of which the said trust funds shall then consist shall be so blended together that it shall be doubtful which part or parts thereof shall have been produced by or substituted for each original fund or any part thereof respectively it shall be lawful for the trustees to divide or apportion the said trust money stocks shares funds securities and property between or among the several persons entitled thereto in such manner as the trustees shall deem just and reasonable according to the respective rights and interests of such persons And such division or apportionment shall be as binding and conclusive upon all persons then or thereafter to be interested in the premises as if the same had been duly made by a Court of competent jurisdiction (*l*) Power to apportion blended trust funds.

AND THAT if for any of the purposes of these presents it shall be necessary or expedient to set a value upon any hereditaments investments or property subject to the trusts hereof or any part thereof or share therein the trustees shall be at liberty to have such valuation made in such manner and at such time as they shall think proper and the same shall be binding and conclusive upon all persons then or thereafter beneficially interested under the trusts of these presents in any property subject to the trusts hereof Power to

AND THAT (in addition to the powers and indemnity and right to reimbursement by law given to trustees (*m*)) the trustees shall be at liberty on lending money on the security of or on purchasing any hereditaments or property to accept such title as they shall in their own absolute discretion think fit notwithstanding that the same be less than a good marketable title and shall not Special powers to trustees.

(*l*) As to trustees' receipts and powers to compromise, &c., see *ante*, p. 421; stat. 56 & 57 Vict. c. 53, s. 21; Williams' Conveyancing Statutes, 189–194.

(*m*) See *ante*, pp. 425—429.

be answerable for any loss thereby occasioned (*n*) and that the trustees shall be at liberty at their discretion to release either gratuitously or for valuable consideration from any mortgage or security held by them as an investment of any money subject to the trusts of these presents any part of the property comprised in such mortgage or security on being satisfied that the remainder of the property comprised therein will be a sufficient security for the money so invested (*o*)

Power for trustees to act by agents.

AND THAT the trustees shall not in any circumstances (other than those involving the exercise of some discretion hereby conferred upon or entrusted to them) be bound to act in person but may employ at the expense of the trust estate any professional or business person or other agent to transact any business receive pay or deliver any money or securities or do any other act relating to the trust estate and shall not be answerable for any loss which may arise in consequence of their acting by agent and not in person

Power for professional trustee to charge.

AND THAT every trustee acting under these presents who shall be a solicitor or other professional or business person and shall act in his professional or business capacity on behalf of the trustees or in relation to the trust estate and in the execution of the trusts of these presents shall be entitled to charge and shall be remunerated out of the trust estate for all work or business so done or transacted by him (including therein any acts which he might as a trustee have been required to perform in person) as fully in all respects as if he were not a trustee hereunder (*p*)

Attestation clause.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written

(*n*) See 1 Wms. V. & P. 288—299, 2nd ed.; stat. 56 & 57 Vict. c. 53, s. 8.

(*o*) See 1 Wms. V. & P. 635—637, 2nd ed.

(*p*) See *ante*, p. 425, and *Re Chapple*, 27 Ch. D. 584, 587, as to inserting this and the previous power.

The SCHEDULE above referred to.

£2,000 £2·15 *per Cent. Consolidated Stock*
£350 *Capital Stock of the Bank of England*
£2,460 *Debenture Stock of the London and North-Western Railway Company*
£500 *South Australian Inscribed Stock*

NOTE.—Notice of the assignment to the trustees of the share of L. D.'s residuary estate must be given to his executors (*q*).

(*q*) See *ante*, pp. 613—616.

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