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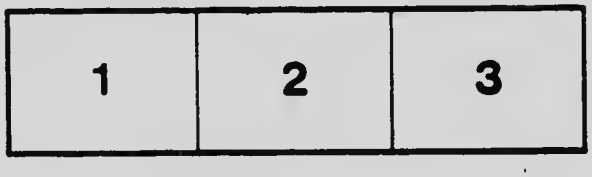

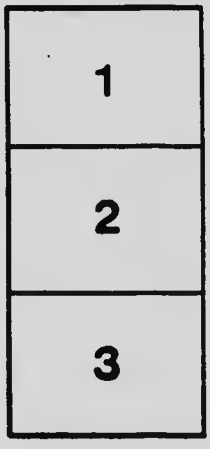

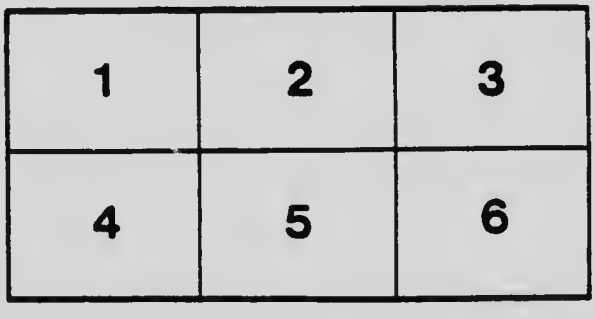

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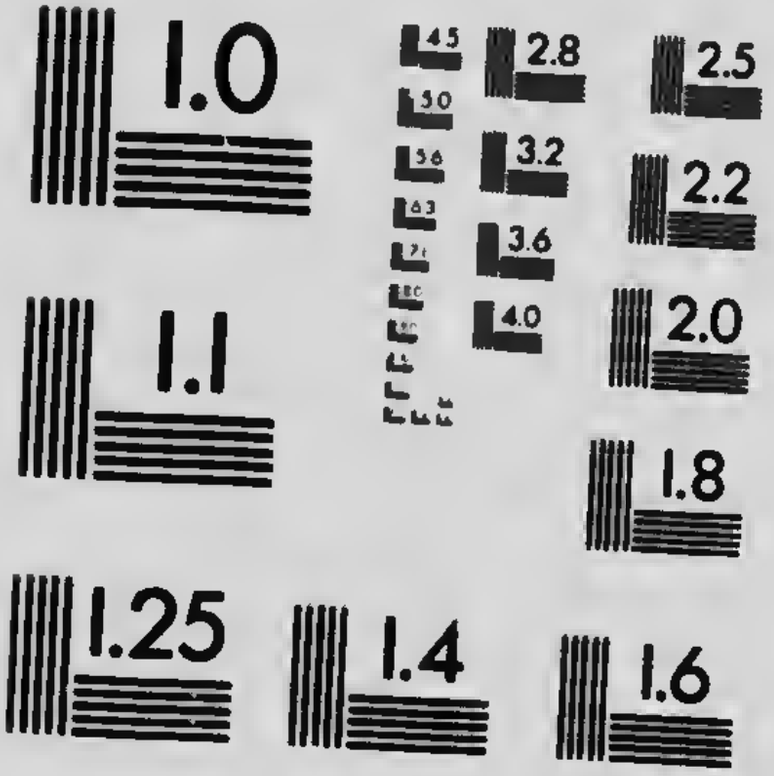

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OF

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CARDINAL RULES

OF

LEGAL INTERPRETATION.

COLLECTED AND ARRANGED

BY

EDWARD BEAL, B.A.

LATE SCHOLAR OF TRINITY HALL, CAMBRIDGE,
OF THE MIDDLE TEMPLE AND THE SOUTH EASTERN CIRCUIT,
BARRISTER-AT-LAW,
Author of "The Law of Bailments" and Editor of "The Yearly Digest," 1899, 1900, 1901, 1902,
and "The Trial of Adelaide Bartlett."

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PREFACE

TO THE SECOND EDITION.

My hope that the First Edition might be of service to members of the legal profession and others has been realized, and a Second Edition is required. Since its first publication I have collected further materials, and the arrangement is in the main the same as before. Considerable additions and some alterations have been made involving an increase in the size of the book. I have, amongst other things, added an Introduction to this Edition, justifying, I trust, this my further endeavour to reduce legal interpretation to an art, and also explaining my arrangement of the subject-matter and the broad issues of legal interpretation.

My best thanks are due to my friend Mr. Ernest A. C. Lloyd, of the Middle Temple, for his careful revision of the proof sheets, and for assisting me in making the very numerous quotations word perfect.

E. B

5, Paper Buildings,
Temple,
July, 1908.

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PREFACE

TO THE FIRST EDITION.

I know of no attempt having been made to collect and arrange in one volume the Cardinal Rules of the legal interpretation of *all* instruments. Scattered as such rules are in reports and statutes, they are inaccessible to most persons. It is in the hope that this collection and arrangement may be of service to members of the legal profession, students of law and lay persons, whether at home or in the colonies, whose business it is to be conversant with the canons and principles of legal interpretation, that I have ventured to print this book. I trust that the legal profession will deem this, my endeavour to reduce legal interpretation to an art, not unworthy to take a place, as a helpmeet, beside the well-known elaborate and excellent treatises on the interpretation of deeds, statutes, and wills.

As authority, I give the reported words of the Court or Judge, without burdening the work with the facts of the particular cases in which the rules were laid down. I deem it better, and more useful, to give the very words of the Court or Judge, as reported, than to attempt to paraphrase such important language.

The rules printed in italics are not intended to be exhaustive, but are merely introductory to the quotations that follow. When dealing with rules relating to any particular subject, I quote from decisions on that subject only. The plan of the book has necessitated a certain amount of repetition, which, however, conduces to clearness, and may, I hope, be regarded with indulgence.

Cases referred to are in their chronological order, and have their dates given. Where two references are given, the quotation is from the first-mentioned report.

The Interpretation Act, 1889, and also the now repealed Act, commonly known as Lord Brougham's Act, 1850, are printed—the latter in italics—for reference in the Appendix.

My best thanks are due to my friend Mr. JAMES WEIR, M.A., of Lincoln's Inn, for his careful revision of the proof sheets and for valuable suggestions while the book was passing through the press.

E. B.

5, PAPER BUILDINGS,
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INTRODUCTION

TO THE SECOND EDITION.

LEGAL interpretation, I take it, is the ascertainment by legal tribunals of the meaning of the language employed in an instrument submitted to them when such meaning is not at once clearly manifest to persons of ordinary skill and information or is doubtful on the face of it, or when the true legal meaning, according to common law, statute or case law, is disputed by the litigants. Instruments submitted to legal tribunals for interpretation should be interpreted by them in the same way as instruments would be interpreted by liberally cultured persons in general, with, however, this very important saving and exception, that the legal tribunal is bound to conform to or be guided by certain accepted legal authorities, axioms, rules and regulations, *e.g.*, common law maxims, statutes and certain rules established by the reported decisions of the Law Courts, all of which are interposed in order to secure, as far as possible, *uniformity of legal interpretation*. Legal interpretation is therefore a species of the genus interpretation, or in other words a natural interpretation frequently modified or restrained by artificial rules. This, I think, is the true theory of our system of legal interpretation which has developed and will develop with the advancement of human thought and knowledge, the spirit of the times, and the science of human conduct.

It is hardly to be contested that some such system of interpretation is not absolutely necessary to the steady and impartial administration of justice. All judges are not expert philologers, nor are they all masters of even legal logic, nor all of equal clarity of comprehension. Moreover without such a system their legal exegesis might not, and probably would not, be uniform,

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for does not the saying, *Tot homines quot sententiæ*, apply to judges? Are not their judgments impressed with their mind-prints? The want of such a system as exists would cause great uncertainty to prevail, much confusion and considerable increase of litigation to arise. The strongest and ablest judges have never despised or spurned the help or guidance of authority, or refused to accept such rules of conduct as the well-established cardinal rules of legal interpretation provide. It has indeed been said that the principle, that in the matter of positive law, abstract justice requires or justifies any departure from the established rules of interpretation, is inadmissible. (See per Lord Westbury in *Ex parte the Vicar of St. Sepulchre* (1864), 33 L. J. Ch. 372, at p. 374.)

Bacon, Aph. 46, laid it down that *Optime est lex quæ minimum relinquit arbitrio judicis; optimus judex qui minimum sibi*, and this aphorism is still approved of in all civilised communities. To disregard the numerous well-established rules of legal interpretation which have hitherto guided the Law Courts in coming to their decisions when interpreting any instrument might be the unsettling of titles to real estate, the disturbance of the enjoyment of property generally and of the received meanings of numberless common-form instruments. Moreover, legal practitioners would be absolutely at sea without a compass in their endeavours to deal professionally with numerous legal and commercial documents; and commercial men themselves would find immense difficulty in safely contracting or endeavouring to conform to the law.

When we consider the great length of time which the system of legal interpretation, now guiding our judges and the legal profession, has taken to mature and more or less to perfect itself, the multitude of cases on interpretation reported and digested, and the enormous expense the litigants engaged in such cases have been put to in order to establish the present system, we may well hesitate before we think of abolishing it either in whole or in part, or of merely substituting therefor innumerable reported cases which would only reveal the wide diversity of judicial opinions and lay down no guiding principles or definite doctrines.

If the present, a fairly harmonious system, were to be abolished, what possible system—for some system surely there must be—could in reason take its place?

A fairly settled and definite set of suitable legal rules—the growth of ages, be it remembered—saves the daily repetition of lengthy arguments at the bar on abstract questions of interpretation—a wasting conflict—and thereby promotes a far speedier settlement of all questions of interpretation. It is always to be borne in mind that *Interest reipublicæ ut sit finis litium*. Finally, it is impossible to secure continuity of interpretation in legal administration without clear, well reasoned and long established rules.

A better acquaintance with the existing cardinal and root rules of legal interpretation might help our legislators, whether educated or uneducated, to frame and pass fewer of those cryptic and mystic pieces of legislation that do *not* adorn, though they certainly too often appear on, the statute book, and such rules might help to put an end to the wholesale litigation caused by the attempted solution of such expensive puzzles as are evidenced by far too many cases in the Law Reports. A fruitful source of trouble to legal interpreters is legislation by reference. Our legislators, it is true, are theoretically not bound, as our judges are, by the rules of legal interpretation, but they surely should possess a thorough knowledge of such rules and keep them in mind while legislating. In this connection I cannot do better than cite Mill, who says:—

"The *judge* is not called upon to determine what course would be intrinsically the most advisable in the particular case in hand, but only within what rule of law it falls; what the legislature has ordained to be done in the kind of case, and must therefore be presumed to have intended in the individual case. . . . As the judge has laws for his guidance, so the legislator has rules, and maxims of policy; but it would be a manifest error to suppose that the legislator is bound by these maxims in the same manner as the judge is bound by the laws, and that all he has to do is to argue down from them to the particular case, as the judge does from the laws. The legislator is bound to take into consideration the reasons or grounds of the maxims; the judge has nothing to do with those of the law, except so far as a consideration of them may throw light upon the intention of the law-maker, where his words have left it doubtful."—System of Logic, by J. S. Mill, 8th ed., 1872, Vol. II., at p. 547.

Some rules of legal interpretation may indeed become obsolete or

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obsolescent. The necessity of adapting the rules of interpretation to the inexorable logic of future events and to the fresh complexities of modern times must, however, never be lost sight of by the Courts. The rules should be applied consistently with the shrewdest possible practical insight, but they should not, in any way, be jeopardised by hasty experiments or immature suggestions. The whole subject of legal interpretation should be placed and kept on a scientific basis in order to command assent and respect in the future. I have used my best endeavours here to seek out the fundamental principles and rules of legal interpretation, to state them succinctly, and to classify them in a useful consecutive order of subject-matter. "What is your authority for that statement?" is a question repeatedly put in Courts of Law to legal practitioners who lay down some proposition of law which they suppose governs their case. In law authority is a *sine quâ non*, and

> "Authority, though it errs like others,
> Hath yet a kind of medicine in itself."

The seminal sources of the rules of legal interpretation are the common law and the case law of England (which is the evidence of what is common law); that is to say, the authorities of the law, such as reports, digests, and text books.

I therefore commence with CASE LAW, which forms Part I. and upon which all the subjects that follow more or less depend.

I then pass on to the various instruments which are governed by rules of legal interpretation. As some of these rules are applicable to **All instruments**, I make such rules stand first and form Part II. It is advisable, I think, to introduce in section I of this part certain warnings against the danger of accepting broad legal maxims and general legal rules as being perfectly inelastic, or as framed to meet every possible case that may arise in the future. No legal maxim or rule has ever been, nor can, I venture to say, ever be framed to meet every new point that may crop up out of the exigencies of advancing civilization. That more perfect cardinal rules and dominant doctrines of vast scope are yet to be framed is undoubted. To expect that an infallible, complete, and everlasting code of interpretation can be formulated for the interpretation of all human legal documents in the future is of course

highly extravagant. *Leges humanæ nascuntur, vivunt, et moriuntur* (*Calvin's Case*, 7 Co. 25 a). The legal wisdom of the past and present must yield to the legal wisdom of the future.

My arrangement of the subject-matter is intended to facilitate a discriminative and comparative view and to aid the memory. My solicitude and endeavour have been to base the classification on the identifying process of similarities and diversities by seizing the pervading resemblances.

Contracts in writing or print are intended to express the will of the parties thereto, and seem to me to be the most important class of all instruments to be dealt with, not only as covering all or nearly all of the remaining subjects of this work, but as having probably existed prior to them all. I therefore make the rules of interpretation of the genus "contracts" form Part III.

Deeds by reason of their solemnity form a very important and special kind of contract (and conveyance) needing separate special rules. The rules of interpretation relating to "Deeds" naturally follow next in Part IV.

Mercantile Contracts embrace contracts, both under seal or under hand only, which relate to trade and commerce: further special rules are therefore needed with regard to them and form Part V. For convenience the various kinds of mercantile contracts are dealt with in alphabetical order.

Miscellaneous Instruments that form several separate and distinct classes and each of which requires special and distinct sets of rules of interpretation form Part VI., and these also are arranged in alphabetical order for convenience of reference.

Statutes of the realm that express the *will* of the legislature are of far higher importance than the last wills and testaments of private individuals; accordingly I deal with the rules regulating their interpretation next in Part VII.

Wills of private individuals as they express their last wishes very fitly occupy the final Part VIII.

The above general arrangement of the main subjects is also convenient as being itself alphabetical, and the juxtaposition and order of the subjects afford opportunities of comparative study. Each subject is in its turn sub-divided into heads that are arranged in what I deem to be the natural order for considering them,

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which is, speaking broadly, that of the usual order of the formal parts of the various instruments. Any deficiency of my classification is, I trust, made up for by numerous cross references, an ample table of contents, and a full index whereby the reader is enabled to find the various items of information he may seek with a minimum expenditure of time and trouble.

This work is mainly made up of the very best authoritative judicial and curial statements culled from first-class recognised reports. Such statements are moreover given *in ipsissimis verbis* of the reports, and often amount to very able theses, dissertations or expositions by most eminent and learned judges, as well being memorable paragraphs by eloquent judges. The quotations are given in chronological order, thus generally exhibiting the history and development of the particular rule or rules at a glance. Occasionally it may at first sight seem that too many quotations are given to establish or elucidate some particular rule. The fact that the particular rule with its application was so often discussed before the Courts and confirmed or enlarged upon by the judges and found reported in the reports is a sufficient excuse, I hope, for such redundancy, as it indicates the great importance attached to the rule and its final general acceptance by the profession.

The origin of some rules, in some cases centuries old, is, unfortunately, often lost in obscurity. The growth, however, of a rule is often traceable in the chronological quotations even up to the last word of reported progress. The application of a rule and its modern use are in general both well illustrated by the cases from which the more recent quotations are taken. I have always tried to avoid the fatal doctrine of *Ex uno disce omnes*, yet it will sometimes be found that though a single quotation pithily sums up the outcome of many previously decided cases and judicial dicta, it may yet have to go through a further probationary period.

The intertwining and overlapping of the various branches of Law dealt with in the compass of this book has made the subject of legal interpretation a peculiarly difficult one to deal with.

Cardinal rules, be it ever remembered, are for general guidance only, and not of universal and absolute obligation or application.

CARDINAL RULES

OF

LEGAL INTERPRETATION.

Part I.—CASE LAW.

Section I.

Sources of the English Law.

"*Leges humanæ nascuntur, vivunt, et moriuntur.*"—Calvin's Case, 7 Co. 25a.

"Hale, C. J., said the sources of the English law are as undiscoverable as the sources of the Nile, and although in our day such a phrase cannot be appropriately used, it was true in Hale's time."—*Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240, at p. 245; 70 L. J. K. B. 662, at p. 664, Earl of Halsbury, L. C.

AUTHORITIES.

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Text-Books.

Text-books, though valuable as reference books, are not accepted as authorities in courts of justice.

Text-books do not make law, but they show more or less whether a principle has been generally accepted by the profession.

Passages from text-books judicially affirmed may be cited as authority.

"There are also other authors, to whom great veneration and respect is paid by the students of the common law, such as Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert and Staundforde, with some others of ancient date; whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles."—1 *Bl. Com.* p. 72.

"When we see the authority of so great a writer (Lord Coke) not only uncontradicted, but adopted in all the digests and text-books, we can scarcely err if we adhere to his opinion."—*Strother* v. *Hutchinson* (1837), 4 Bing. N. C. 83, at pp. 89, 90, Tindal, C. J.

"Lord Redesdale's Treatise (Mitford, Pleadings) has been referred to. But however valuable his treatise may be, it is much more satisfactory when we have, from the same eminent judge, his opinion declared in the exercise of his judicial duties."—*Foley* v. *Hill* (1848), 2 H. L. C. 28, at p. 38, Lord Cottenham, C.

"Chief Baron Comyns, whose great work (Comyns' Digest), stands high in the estimation of the profession, and who is the universal referee for almost every proposition."—*Heelis* v. *Blain* (1864), 18 C. B. N. S. 90, at p. 108; 34 L. J. C. P. 88, at p. 92, Erle, C. J.

"Looking also to the expressions of text-writers as evidencing the constant practice of the profession."—*Alexander* v. *Kirkpatrick* (1874), L. R. 2 H. L. Sc. 397, at p. 400, Lord Cairns, L. C.

"The law upon this subject is stated in the observations of a text-writer cited by Lord Justice Bramwell. But I prefer taking the law as it is laid down by Lord Justice Turner in a well-known case, which gave rise to a considerable amount of discussion."—*Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 950, Lord Hatherley.

"I read these passages from a text-book (Dart on the Law of Vendors and Purchasers, 5th ed.), as showing the view taken of

the law by the profession."—*In re Turner and Skelton* (1879), 13 Ch. D. 130, at p. 132; 49 L. J. Ch. 114, at p. 115, Jessel, M. R.

"There is one notion often expressed with regard to works written or revised by authors on the Bench, which seems to me in part at least erroneous, the notion, I mean, that they possess a quasi-judicial authority. It is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the bar which precede the judgment."—*Fry on Specific Performance* (1881), 2nd ed. p. v.

"There is only one other point to be considered—what do the text-books say? It is always very important when you want to know whether a rule of law, however erroneous, has been established, to see whether it has been accepted by the profession, and although the text-books do not make law they show more or less whether a principle has been generally accepted."—*Henty* v. *Wrey* (1882), 21 Ch. D. 332, at p. 348; 53 L. J. Ch. 667, at p. 675, Jessel, M. R.

"I will read from a book of my own, not because I have any undue confidence in my own work, but because in it I stated what I considered to be the law after a careful study of it—a more careful study than I could profess to give to it again at this moment."—*Reg.* v. *Endacott*, C. C. C., Times, Nov. 2nd, 1887, Stephen, J.

"The argument, however, has been almost entirely rested upon one passage in the work of Lord Justice *Fry* on Specific Performance. It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in Court—I mean, of course, text-books by living authors—and some judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author. I cannot forbear from quoting the words: 'There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous; the notion, I mean, that they possess a quasi-judicial authority,' and then he gives a reason which must commend itself to all students why that notion is erroneous."—*Union Bank* v. *Munster* (1887), 37 Ch. D. 51, at p. 54; 57 L. J. Ch. 124, at p. 126, Kekewich, J.

"This case has been excellently argued. I do not postpone giving my judgment, for I hope that, while the cases which have

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been cited and the comments of counsel upon them are fresh in my recollection, I may be able to express more intelligibly and coherently the reasons for the conclusion at which I have arrived than if I took time to put my judgment into writing."—*In re Wilmer's Trusts*, *Moore* v. *Wingfield*, [1903] 1 Ch. 874, at p. 879; 72 L. J. Ch. 378, at p. 381, Buckley, J.

"In dealing with the authorities I will first read a passage from Williams on Executors, 7th ed. vol. i. p. 162; 9th ed. vol. i. p. 138, because that passage in its entirety and in particular the final clause of it has been most emphatically and judicially affirmed."—*Townsend* v. *Moore*, [1905] P. 66, at p. 77; 74 L. J. P. 17, at p. 21, Vaughan Williams, L. J.

Reports:

The Times.

"The report of this case [*Walter* v. *Head*] was allowed to be read, having been verified by an affidavit by the barrister who had acted as Times reporter."—*Walter* v. *Emmott* (1885), 54 L. J. Ch. 1061 (n.), C. A.

The Times Law Reports.

"We have also been referred to *Rishdon* v. *White* (1888) [5 Times Rep. 59], a case only reported in a series of reports republished from a newspaper. A Divisional Court does appear there to have made an order under rule 7 for the inspection before the trial of documents in the hands of a firm of wharfingers who were not parties to the action. But I have learned from experience, as regards my own judgments, that the reports of decisions thus republished are not always accurate. I cannot, therefore, accept the case as an authority which precludes another Divisional Court from considering the question of the jurisdiction conferred by the rule."—*Straker* v. *Reynolds* (1889), 22 Q. B. D. 262, at p. 264; 58 L. J. Q. B. 180, at p. 181, Wills, J.

"We have said that we will accept the Times Law Reports, because they are reports by barristers who put their names to their reports."—*West Derby Poor Law Guardians* v. *Atcham Poor Law Guardians* (1889), 6 The Times Law Reports 5, at p. 6, Lord Esher, M. R.

Weekly Notes.

The Weekly Notes are not to be cited as an authority.

"The Lord Chancellor (Lord Selborne) has stated that cases in the Weekly Notes can only be cited as guides to discovering what has taken place in the Courts."—*Barter* v. *Dubeux* (1881), 7 Q. B. D. 413, at p. 414, note (2), Bramwell, L. J.

"The cases in the Weekly Notes cannot be cited as authorities."—*Hornby* v. *Cardwell* (1881), 8 Q. B. D. 329, at p. 334, note (1); 51 L. J. Q. B. 89, at p. 91, Jessel, M. R.

"It was determined, while the Lord Chancellor was sitting in the Court of Appeal, that cases could not be cited from the Weekly Notes. No doubt they were generally accurate, but they were too concise to be safely read as authorities. They were only useful for the purpose for which they were intended—to inform the Court and the profession that certain points had been decided."—*Nearson* v. *Pender* (1884), 27 Ch. D. 43, at p. 50, note (8), Cotton, L. J.

"We do not allow the Weekly Notes to be read as authority."—*Pooley's Trustee* v. *Whetham*, No. 2 (1886), 33 Ch. D. 76, at p. 77, Cotton, L. J.

"*Finlay* v. *Scott*, before Mr. Justice Pearson, was referred to. It is only reported in the Weekly Notes, and although the judgment is given at some length, we cannot rely upon the facts being given as fully as they would have been if the case had been reported in the ordinary way."—*Birmingham and District Land Co.* v. *London and North Western Rail. Co.* (1886), 34 Ch. D. 261, at p. 273, Cotton, L. J.

"I have been asked to say that the persons who would have been his next of kin in 1880 are entitled to the fund, and *In re Westbrook's Trusts*, W. N. 1873, p. 167, is cited as an authority for that conclusion. A note of that kind cannot be relied on as a sufficiently accurate report of the case, and the Weekly Notes are not intended for citation. But I have often derived great assistance from them, and they are useful in putting one on the track for further inquiry."—*In re Rhodes* (1887), 36 Ch. D. 586, at p. 589; 56 L. J. Ch. 825, at p. 826, North, J.

"Now I, speaking for myself, venture to protest against a case being treated as authority which is reported only very briefly in the Weekly Notes, where we cannot tell from the report what the argument was, and cannot tell what the reasons of the judges were, and where we do not even know distinctly what the pro-

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visions of the will were."—*In re Woodin*, [1895] 2 Ch. 309, at p. 318; 64 L. J. Ch. 501, at p. 505, Kay, L. J.

"The rule used to be that cases ought not to be cited from the Weekly Notes, and I think, in this instance at least, the rule is deserving of observance."—*In re Loveridge*, [1902] 2 Ch. 859, at p. 865; 71 L. J. Ch. 865, at p. 868, Buckley, J.

"Except on points of practice, the Weekly Notes should only be cited as interim reports of cases during the period required for their publication in the law reports."—*In re Smith's Settlement*, [1903] 1 Ch. 373, at p. 375, Swinfen Eady, J.

Public Records, Reporters, and Ancient Authors.

"*The law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, 'that the decisions of courts of justice are the evidence of what is common law': in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.

"The decisions, therefore, of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library.

"These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the Court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain, the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive; and from his time to that of Henry the Eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the Crown, and published *annually*, whence they are known under the denomination of *Year-Books*. And it is much to be wished that this beneficial custom had, under proper regulation, been continued to this day: for, though King James the First, at the instance of Lord Bacon, appointed two reporters with a handsome stipend for this purpose, yet that wise institution was

soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.

"Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert and Staundforde, with some others of ancient date, whose treatises are cited as authority, and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles."—1 *Bl. Com.* pp. 71, 72.

Some Old Reports.

Atkyns.	Modern.
Barnardiston.	Peere Williams.
Blackstone.	Plowden.
Coke.	Saunders.
Hobart.	Starkie.
Keble.	Strange.
Leonard.	Vernon.
Levinz.	Winch.

[N.B.—It would take up too much space to give a full account of the accuracy or inaccuracy of all the old reports. It must suffice here to mention a few judicial criticisms on some of them. The reader is referred to "The Reporters," by Mr. J. W. Wallace, of Philadelphia, 3rd edition, revised (1855), for further information on this subject, where he will find a history of more than 2,000 volumes of reports.—AUTHOR.]

Atkyns (1736—1754).

"The case of *Sure* v. *Baxter* (1743), 1 Atk. 245, is miserably reported in the printed book; and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way; and perhaps, even he himself by being very diffuse has laid a foundation for doubts which otherwise would never have existed."—*Lickbarrow* v. *Mason* (1793), reported in *Newsom* v. *Thornton* (1805), 6 East, 21 (n.), at p. 29 (n.), Buller, J.

"Unfortunately Lord Hardwicke's judgments in general are known only by Mr. Atkyns' Reports, which are extremely in-

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accurate."—*Olive* v. *Smith* (1813), 5 Taunt. 56, at p. 63, Mansfield, C. J.

Barnardiston (1726—1735).

"Lord *Mansfield* absolutely forbid the citing that book [Barnardiston's Rep. in Chancery]: for it would be only misleading students to put them upon reading it. He said it was marvellous, however, to those who knew the serjeant and his manner of taking notes, that he should so often *stumble* upon what was right; but yet, that there was not one case in his book which was so throughout."—*Zouch* d. *Woolston* v. *Woolston* (1761), 2 Burr. 1142 (marginal note).

"Barnardiston was a bad reporter."—*The King* v. *Stone* (1801), 1 East, 639, at p. 642 (n.).

Blackstone, W. (1746—1780).

"Mr. Justice Blackstone's reports are not very accurate."—*Doron* v. *Watts* (1779), 1 Doug. 89, at p. 93 (n.), Lord Mansfield, C. J. (Willes, Ashhurst and Buller, JJ., concurred in opinion with his Lordship).

"Mr. Justice *Blackstone's* reports are not very accurate."—*Hassells* v. *Simpson* (1781), 1 Doug. 89, at p. 93, Lord Mansfield.

Coke (1572—1616).

"Some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke, a man of infinite learning in his profession, though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name."—1 *Bl. Com.* p. 72.

Hobart (1603—1625).

"His excellent volume of reports."—*Trovard* v. *Caillaud* (1795), 6 T. R. 439, at p. 441, Lord Kenyon, C. J.

Keble (1661—1679).

"It must, however, be admitted that Keble is of no high repute as an accurate reporter; and the Court would be slow to act on a case in that book, if it were unsupported by others."—

Farrall v. *Hilditch* (1859), 5 C. B. N. S. 840, at p. 853; 28 L. J. C. P. 221, at p. 223; Williams, J., delivering the judgment of the Court.

"With respect to the authority of Keble, we cannot refrain from referring to the highly valuable and interesting work of Mr. J. W. Wallace, of Philadelphia, 'The Reporters,' 3rd ed. pp. 207, 208, from which it appears that more is to be said for the character of this reporter, as a 'tolerable historian of the law,' than, from the remarks made upon him from time to time, might have been supposed."—*Farrall* v. *Hilditch* (1859), 5 C. B. N. S. 840, at p. 855; 28 L. J. C. P. 221, at p. 224, Williams, J., delivering the judgment of the Court.

Leonard (1540—1615).

"Now Leonard is well known to have been a very accurate reporter."—*Duke of Sutherland* v. *Heathcote*, [1892] 1 Ch. 475, at p. 485; 61 L. J. Ch. 248, at p. 251, Lindley, L. J., delivering the judgment of the Court.

Levinz (1660—1697).

"Levinz, though a good lawyer, was sometimes a very careless reporter."—*Tomkyns* v. *Ladbroke* (1754), 2 Ves. Sen. 591, at p. 595, Lord Hardwicke, L. C.

Modern Cases in Law and Equity (1669—1732).

"A miserably bad book, entitled 'Modern Cases in Law and Equity.'"—1 Burr. 386 (marginal note).

"The Court treated that book with the contempt it deserves; and they all agreed that the case was wrong (*sic*) stated *there*. (I mean the old edition of that book.)"—3 Burr. 1327 (marginal note).

"'12 Mod. is not a book of any authority.'—*The King* v. *Lyme Regis* (1779), Doug. 80, at p. 83, Buller, J.

Peere Williams (1695—1735).

"The bench, the bar, and the public in general, are much obliged to him (Mr. Cox) for his very valuable edition of those very valuable reports [Peere Williams]."—*Woods* v. *Huntingford* (1796), 3 Ves. Jun. 128, at p. 129, Sir R. P. Arden, M. R.

"It [*Pierpoint* v. *Lord Cheney* (1718), 1 P. Wms. 488] is most accurately reported, as most of the cases are, in Peere Williams."—

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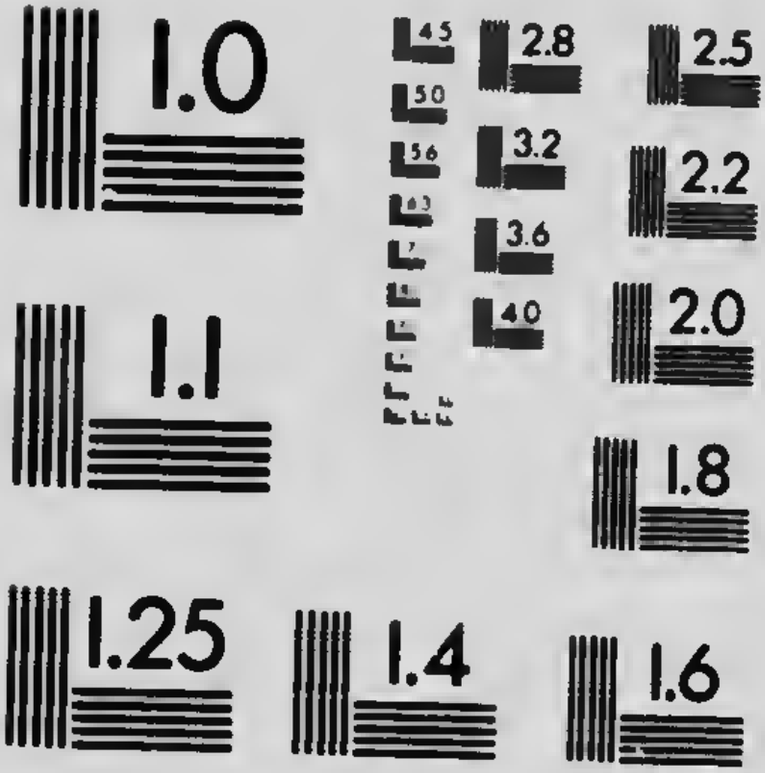

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Clinton v. *Seymour* (1799), 4 Ves. 440, at p. 464, Sir R. P. Arden, M. R.

Plowden (1550—1580).

"Most accurate of all reporters."—Harg. Co. Litt. 23.

Saunders (1666—1673).

"That excellent book the Reports of Saunders."—*Browning* v. *Wright* (1799), 2 B. & P. 13, at p. 23, Lord Eldon, C. J.

Starkie (1815—1822).

"The high reputation of the reporter (Starkie)."—*Malpas* v. *The London and South Western Rait. Co.* (1866), L. R. 1 C. P. 336, at p. 339, Willes, J.

Strange (1716—1749).

"Strange, who is a faithful reporter."—*Lynall* v. *Longbothom* (1756), 2 Wils. 36, at p. 38, Willes, C. J.

Vernon (1681—1720).

"I am very sorry to find that the reports of so able a man should be so imperfect, and come out in this manner."—*Boycot* v. *Cotton* (1738), 1 Atk. 552, at p. 556, Hardwicke, L. C.

"It must be remembered that Mr. Vernon, who was a most learned lawyer, did not publish his own reports, and is believed to have made the notes, which were published after his death, as memoranda merely for his own use."—*In re Willatts, Willatts* v. *Artley*, [1905] 1 Ch. 378, at p. 383; 74 L. J. Ch. 269, at p. 271, Farwell, J.

Winch (1621—1625).

"The cases in Winch are well reported."—*Troward* v. *Cailland* (1795), 6 T. R. 439, at p. 441, Lord Kenyon, C. J.

Nisi Prius Reports.

Campbell (1808—1816).

"It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point which comes before him at *Nisi Prius;* and whoever looks through Campbell's Reports will be greatly surprised to see, among such

an immense number of questions, many of them of the most important kind, which came before that noble and learned judge, not that there are mistakes, but that he is in by far the most of the cases so wonderfully right, beyond the proportion of any other judges."—*Fentum* v. *Pocock* (1813), 5 Taunt. 192, at p. 195, Mansfield, C. J.

"Such decisions at *nisi prius* as had the good fortune to be reported by Lord Campbell are admittedly of high authority."—*Sharman* v. *Mason*, [1899] 2 Q. B. 679, at p. 689; 69 L. J. Q. B. 3, at p. 7, Darling, J.

Espinasse (1793—1807) and Carrington and Payne (1823—1841).

"Neither reporter [Espinasse and Carrington and Payne] has such a character for intelligence and accuracy as to make it certain that the facts are correctly stated, or that the opinion of the judge was rightly understood."—*Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412, at p. 437; 36 L. J. Q. B. 181, at p. 194, Blackburn, J.

Judgments.

[N.B.—Some judgments are reported by reporters without any revision by the Court who pronounced such judgments; again, judges often write their own judgments, and these are printed in the report. Perhaps the highest praise meted out to any judge who wrote his own judgments is that to Lord Ellenborough by Park, J., in the case next cited. —AUTHOR.]

"I think I may venture to state, without fear of contradiction, that, if ever there existed a judge who luminously and perspicuously stated the grounds of a written judgment, what he did, and what he did not rely upon, that noble, very learned, and excellent person [Lord Ellenborough], was the man; and, therefore, it is impossible ever to mistake his meaning, though you may happen not to come to the same conclusion."—*Nind* v. *Marshall* (1819), 1 B. & B. 319, at p. 344, Park, J.

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Section II.

Legal Relevancy.

The practitioner should exclude the assimilating action of all peculiarities of the case, except the one that would govern its decision before a judge.

"In the suggestions of a practical mind, the identification should always turn upon the *relevant* circumstances, and overcome other attractions of sameness on irrelevant points. To attain to this characteristic is the end of a practical education, which makes the person familiar with the aspects that serve the *ends* contemplated. Thus a lawyer in recovering, from his past experience, the precedents and analogies suitable to a case in hand, is impelled by the force of similarity working in his mind; but, of the many peculiarities of the case, he excludes the assimilating action of all except the one that would govern its decision before a judge. His education must serve him in making this discrimination; and if (as may happen) he is by natural temperament keenly alive to this one feature constituting legal relevancy, and indifferent to all other points of interest in the case, he is a born lawyer, just as Newton, with his natural avidity for mathematical relations and indifference to sensuous and poetic effects, was a born natural philosopher, or Milton, by the opposite character, was a born poet. That nature should chance to turn out a legal mind is not singular or surprising, for it is only a variety of the scientific or logical intellect, using verbal forms as the instrument, and implying an obtuseness to all the more popular and interesting features of human life. To secure a vigorous uniformity in dealing with disputes, scientific definitions must be made and equally applied to the most diversified cases."—*Bains' The Senses and the Intellect*, 3rd ed. (1868), at pp. 527, 528.

DECISIONS.

Decisions are the evidence of what is common law.

"Upon the whole, however, we may take it as a general rule, 'that the decisions of courts of justice are the evidence of what is common law:' in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future."—1 *Bl. Com.* p. 71.

Reason and Spirit of Decisions.

The reason and spirit of cases make law.

"The *reason* and *spirit* of cases make law; not the letter of particular precedents."—*Fisher* v. *Prince* (1763), 3 Burr. 1363, at p. 1364, Lord Mansfield.

Use of Decisions.

The use of decided cases is the establishment of some principle which the Court can follow out in deciding the case before it.

"The principle is the ng which we are to extract from cases, and to apply it in the decision of other cases."—*Lord Walpole* v. *Earl of Cholmondeley* (1797), 7 T. R. 138, at p. 148, Lord Kenyon, C. J.

"It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusions. Therefore to say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision."—*Merry* v. *Nickells* (1872), L. R. 7 Ch. 733, at pp. 750, 751; 41 L. J. Ch. 767, at p. 771, Sir W. M. James, L. J.

"The only use of authorities, or decided cases, is the establishment of some principle which the judge can follow out in deciding the case before him. There is, perhaps, nothing more important in our law than that great respect for the authority of decided cases which is shown by our tribunals. Were it not for that our law would be in a most distressing state of uncertainty; and so strong has that been my view, that where a case had decided a principle, although I myself do not concur in it, and although it has been only the decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it when it is of respectable age and

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has been used by lawyers as settling the law, leaving to the Appellate Court to say that case is wrongly decided, if the Appellate Court should so think."—*In re Hallett's Estate* (1879), 13 Ch. D. 696, at p. 712; 49 L. J. Ch. 415, at p. 419, Jessel, M. R.

"Cases on the construction of other Acts or instruments generally give very little help to the Court, but if there is any principle laid down by them we ought not to disregard them in considering a different Act or instrument."—*Reid* v. *Reid* (1886), 31 Ch. D. 402, at p. 405; 55 L. J. Ch. 294, at p. 296, Cotton, L. J.

"Now cases, so far as they give us a rule of construction, are very useful; but it is very seldom, to my mind, that a case upon the construction of one particular document tells us much about the construction of another document, unless it lays down some principle to guide us."—*Clegg* v. *Hands* (1890), 44 Ch. D. 503, at p. 517; 59 L. J. Ch. 477, at p. 481, Cotton, L. J.

"Now, I apprehend that the true way to use authorities is to examine the principle upon which they are based, and to follow the principle. If located in any other way, decisions may often be erroneously used."—*In re Moore, Moore* v. *Moore*, [1901] 1 Ch. 691, at p. 695; 70 L. J. Ch. 321, at p. 323, Buckley, J.

Cases of interpretation are a guide to a Court of interpretation, and help the Court in considering what the true meaning of words and phrases may be.

"I do not intend to go through the cases which have been cited. I have done so to a very considerable extent in a reported decision of my own (*Leonino* v. *Leonino* (1879), 10 Ch. D. 460; 48 L. J. Ch. 217); but I will say this, that they are no further a guide to another tribunal in deciding a case upon this subject [collateral security] than any cases of construction are a guide to a Court of construction on another instrument: that is to say, they help the Court in considering what the true meaning of words and phrases may be, but lay down no absolute rule which prevents the Court of construction arriving at its own conclusion from the words used, irrespective of the actual authority of the decided cases not being decisions upon the same instrument or on the same words."—*In re Athill* (1880), 16 Ch. D. 211, at pp. 223, 224; 50 L. J. Ch. 123, at p. 126, Jessel, M. R.

When Useful.

Decisions are useful when they lay down canons or rules of interpretation, and may be valuable guides where they put an interpretation on common forms.

"For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and, having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles for the construction of all instruments—and to that extent it may be said that they are canons of construction. But the moment I depart from those general canons of construction applicable to all instruments—and I am overwhelmed with authorities about what particular judges have thought about other particular instruments, and whether in this or that particular instrument the judge has been sufficiently satisfied that such and such was the meaning of the testator—I confess myself to be in a hopeless state of confusion. In the first place, I do not know what mental thermometer there is to ascertain what exact degree of certainty is to be obtained. If there is sufficient to establish the meaning, why is it sufficient? And what does that mean? It must mean sufficient in the mind of the particular tribunal that has to decide. That there are particular phrases and particular sets of phrases to which the law would attach a particular meaning is true; and when unqualified and unexplained by anything else those words are found in an instrument, of course you must give to those words or to those phrases the meaning which the law has attached to them, and it would be unreasonable if you did not; because you must suppose, in the absence of any other explanation, that the person who has used those phrases, or used the particular word, has used the phrase or the word in the sense which has hitherto been attached to it by the law, and there is no reason to go out of what you might call the ordinary and *primâ facie* meaning of such expression."—*In re Jodrei.* (1890), 44 Ch. D. 590, at p. 605; 59 L. J. Ch. 538, at p. 542, Lord Halsbury, L. C.

"In truth, in this case, as in many others, the difficulty arises when you look away from the document which you have to construe—when you look into cases (that is to say) which have been decided on other documents more or less like the one before you. I do not propose to deal with decided cases at all. It may be that

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there were expressions in the documents then before the Court which made the judges come to conclusions which I cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common forms. Whether in deeds, wills, or mercantile instruments, they may be valuable guides."—*Ibid.*, Ch. D. at pp. 609, 610; L. J. Ch. at p. 544, Lindley, L. J.

Findings.

The finding of a jury or a Court on a set of facts, when binding.

"The finding of a jury upon one set of facts does not bind a jury upon another set of facts; nor does the finding of any Court bind another where the facts are not the same."—*Howard* v. *Patent Ivory Manufacturing Co.* (1888), 38 Ch. D. 156, at p. 165; 57 L. J. Ch. 878, at p. 882, Kay, J.

Judgments.

Judgments must be read as applicable to the particular facts proved, or assumed to be proved. The law is not always a logical code.

"There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is, that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a form of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."—*Quinn* v. *Leatham*, [1901] A. C. 495, at p. 506; 70 L. J. P. C. 76, at p. 81, Earl of Halsbury, L. C (cited by Joyce, J., in *National Phonograph Co., Ltd.* v. *Edison Bell Consolidated Phonograph Co., Ltd.*, [1908] 1 Ch. 335, at p. 349; 76 L. J. Ch. 194, at p. 200).

Principles of Decisions.

The only thing in a decision binding as an authority is the right principle upon which the case was decided, and not the application of such principle.

"All the cases that have been cited profess to proceed on that ground, and if the rule be established, it is not impaired because a judge at Nisi Prius, meaning to be guided by it, mistakes the application of the rule to the particular case before him. Without minutely examining all the cases, or saying whether I do or do not agree with them, it is sufficient for me to abide by the principle established by them; the principle is the thing which we are to extract from cases, and to apply it in the decision of other cases."—*Lord Walpole* v. *Earl of Cholmondeley* (1797), 7 T. R. 138, at p. 148, Lord Kenyon, C. J.

"With respect to the cases which have been cited, it is to be observed, that where a general principle for the construction of an instrument is once laid down, the Court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner."—*Browning* v. *Wright* (1799), 2 B. & P. 13, at p. 24, Lord Eldon, C. J.

"It is true that in the second action of *Mayfield* v. *Paine* (1871), L. R. 6 Ex. 132; 40 L. J. Ex. 57, before the Court of Exchequer Chamber, there is a very elaborate judgment of Mr. Justice Blackburn which, when one reads it at length and considers the whole tenour of it, would appear to be rather an exposition of the law intended for the guidance of the House of Lords if and when the whole matter should ever come to be reviewed before that tribunal of ultimate appeal; because the thesis of the learned judge is, not that the cases were wrongly decided, but that the cases were decided on a wrong principle. However, that is not the way a Court like this (Lords Justices) deals with the decisions of a Court of co-ordinate jurisdiction. The cases which are cited do not bind us as *res gestæ*, because they are *inter alios acta*; but they bind us in so far as they are authoritative expositions and statements of the law. It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at the same conclusions. Therefore to say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the

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whole theory of our system is, that the decision of . Court is binding on an inferior Court and on a Court of co-ordinate jurisdiction, in so far as it is a statement of the law which the Court is bound to accept."—*Merry* v. *Nickalls* (1872), L. R. 7 Ch. 733, at pp. 750, 751; 41 L. J. Ch. 767, at p. 770, Sir W. M. James, L. J.

"Now, I have often said, and I repeat it, that the only thing in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have been decided on a principle if that principle is not itself a right principle, or one not applicable to the case."—*Osborne* v. *Rowlett* (1880), 13 Ch. D. 774, at p. 785; 49 L. J. Ch. 310, at . 313, Jessel, M. R.

"Even assuming that the decision in *Labouchere* v. *Dawson* (1872), L. R. 13 Eq. 322; 41 L. J. Ch. 127, went beyond previous decisions, this does not seem to me to afford any indication that it was wrong, unless it can be shown that it was in conflict with the principles involved in those earlier decisions."—*Trego* v. *Hunt*, [1896] A. C. 7, at p. 11; 65 L. J. Ch. 1, at p. 5, Lord Herschell.

To find out the principle of a decision the judgments of the judges in the majority need only be looked at.

"When you want to find out the principle of a decision, it is only necessary to refer to the judgments of the judges who were in the majority, and whose decision it really was."—*Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, at p. 560, Jessel, M. R.

Rules of Interpretation and Rules of Law Distinguished.

"In my opinion, rules of construction and rules of law differ very broadly in this point of view; that one (rule of construction) is a rule which points out what a Court should do in the absence of express or implied intention to the contrary; the other (rule of law) is one which takes effect where certain conditions are found, although the testator may have indicated an intention to the contrary."—*In re Coward, Coward* v. *Larkman* (1887), 57 L. T. 285, at p. 291, Fry, L. J.

Rule of Law against Principle.

A rule of law against principle to be binding on a court of co-ordinate jurisdiction must have passed into a binding rule of law.

"Now, when a rule of law which is against principle is alleged to be established, there are two points to be considered; first of all, was any such rule of law ever laid down by any judge? That is the first point to be decided; and secondly, if it was so laid down, has it passed into a binding rule of law?—that is, has it been so recognized and dealt with by subsequent judges as to prevent a judge of a tribunal of co-ordinate jurisdiction from saying that the decision is contrary to the course of law, and is not binding upon him?"—*Canty* v. *Wrey* (1882), 21 Ch. D. 332, at p. 340, Jessel, M. R.

Consistent Decisions—Contradictory Decisions.

Consistent decisions are binding on the Court, but contradictory decisions are to be considered by the Court.

If no reasons are given, or the reasons given for conflicting decisions are equally unsatisfactory, the Court may use its own unfettered judgment.

"If these (decisions) are consistent we are bound by them, even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the law.

"If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them.

"If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally unsatisfactory, we are to put that construction on the statutes which our own unfettered judgment induces us to think the legislature intended should be put on them."—*Newton* v. *Cowie* (1827), 4 Bing. 234, at p. 241, Best, C. J.

"The first observation I will make upon that case is that there are no reasons given for the decision. As a rule, judges give reasons, though in many of the old cases the judges gave no reasons; but where no reasons are given for a particular decision, it becomes extremely difficult for a judge to follow it, because he does not know the principle on which the decision proceeded."—*In*

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re Mercerau (1877), 7 Ch. D. 184, at p. 187; 47 L. J. Ch. 114, at p. 115, Jessel, M. R.

"There are conflicting decisions of judges of first instance upon this question of the incidence of estate duty in respect of appointed funds . . . I have, under these circumstances, to express my own opinion."—*In re Earnsides, Baines* v. *Chadwick*, [1903] 1 Ch. 250, at p. 257; 72 L. J. Ch. 200, at p. 203, Swinfen Eady, J.

Long-standing Decisions.

Stare Decisis.

It is extremely dangerous to shake the authority of long established decided cases.

The House of Lords cannot, upon the principle of stare decisis, *refuse to examine the foundation on which the Courts below rested their decisions.*

The Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of Parliament itself, in matters affecting rights of property, may fairly be treated as having passed into the category of established and recognized law.

Old cases contrary to the principles of the general law should be overruled, unless they have been acted upon and have made the law on a particular subject.

"It is extremely dangerous to shake the authority of decided cases."—*Mousom* v. *Hymer* (1814), 2 M. & S. 303, at p. 312, Lord Ellenborough, C. J.

"There is another duty incumbent on all Courts, and pre-eminently upon a Court of ultimate appeal, and which has been invariably observed, namely, that as regards those rules which regulate the settlement and devolution of property, those Courts which have to interpret instruments and acts of parties must take care to be very guarded against letting any supposed notions as to the inaccuracy of any rule which has in fact been acted upon, induce them to alter it so as to endanger the security of property and titles."—*Young* v. *Robertson* (1862), 4 Macq. H. L. 314, at p. 345, Lord Cranworth.

"The Courts rightly abstain from overruling cases which have

been long established, because if they did so, they would only disturb, without finally settling the law. But when an appeal from any of their judgments is made to this House, however they may be warranted by previous authorities, the very object of the appeal being to bring those authorities under review for final determination, the House cannot, upon the principle of *stare decisis*, refuse to examine the foundation upon which they rest."—*Mersey Docks* v. *Cameron* (1861), 11 H. L. Cas. 443, at p. 510, Lord Chelmsford.

"Assuming that a judge thinks the construction to be clear one way, but a series of authorities is produced, being decisions of judges of co-ordinate jurisdiction, the other way, there must be a time at which the judge is bound by them. If one authority were produced to me, and my own opinion were the other way, I would not follow that author . . ; but if the authorities were numerous, I admit that I must be bound. On that point the case of *In re Newman's Settled Estates* (1871), L. R. 9 Ch. 681; 43 L. J. Ch. 702, is an authority."—*In re Bethlem Hospital* (1875), L. R. 19 Eq. 157, at pp. 159, 160; 44 L. J. Ch. 106, at p. 107, Jessel, M. R.

"The whole difficulty in this case arises simply from the decision of Vice-Chancellor Shadwell in *Cooke* v. *Crawford*, 13 Sim. 91, decided as long ago as 1842. Now, I will first say a word as to what, sitting here, I consider my duty to be as regards that case. If the case stood alone—if no judge had said that that decision was not a good decision, I should feel it my d . at this distance of time—the case having got into the books, and it being impossible to say that it was a mistake on the part of the judge who decided it—to follow it, leaving the Court of Appeal to deal with it. I say this, because the case is cited in the text-books, sometimes with comment and sometimes without."—*Osborne* v. *Rowlett* (1880), 13 Ch. D. 774, at p. 784; 49 L. J. Ch. 310, at p. 312, Jessel, M. R. (cited, in part, by Joyce, J., in *In re Barcus-worth*, [1905] 2 Ch. 1, at p. 3).

"Viewed simply as the decision of a Court of first instance, the authority of this case [*Reg.* v. *Wycombe Rail. Co.* 1867), L. R. 2 Q. B. 310; 36 L. J. Q. B. 121], notwithstanding the respect due to the judges who decided it, is not binding upon us; but viewed in its character and practical results, it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the Court from which they proceed. It constitutes an authority which, after it has stood for so long a period

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unchallenged, should not, in the interests of public convenience, and having regard to the protection of private rights, be overruled by this Court except upon very special considerations. For twelve years and upwards the case has continued unshaken by any judicial decision or criticism as an authoritative exposition of the meaning of sect. 16 of the Railways Clauses Consolidation Act, 1845, in respect of the matter here in dispute. During such period hundreds of special Acts of Parliament have been passed sanctioning the construction of lines of railway and the consequent interference with private rights, and incorporating for that purpose the provisions of the general Act. Promoters must have sought their powers, landowners must have regulated their course of action, and parliamentary committees must have given their sanction to the projects submitted to them upon the faith and footing of a limit to the powers sought and conceded being found in the provisions of the general Act as interpreted from time to time by judicial decisions. If so, it is to be presumed that the limit put upon the powers of a railway company in regard to the diversion of roads and rivers by the decision of the Court of Queen's Bench in *Reg.* v. *Wycombe Rail. Co.* (*supra*) must have exercised a material influence upon the relations of persons owning land proposed to be affected by special railway legislation and the promoters of that legislation. As a matter of practical experience, we cannot doubt that landowners would be advised as to these rights and the limits of the promoters' powers upon the assumption of the correctness of the law laid down after full argument and in clear and distinct terms by a Court so constituted as was the Court of Queen's Bench in the case referred to, and whose decision, although open to appeal, was not appealed from; and we cannot doubt also that parliamentary committees, in considering any question of protection to landowners in relation to rivers and roads, would be invited to proceed, and would proceed, upon the same assumption. While, therefore, in considering the rights of private parties in cases like the present, the Courts are, on the one hand, bound—as it has been held by the highest authority—to disregard any representations, whether in the shape of deposited plans or otherwise, made by the promoters other than such as are embodied in the Act of Parliament, they ought, on the other hand, to be careful not lightly to disregard representations which may reasonably be said to be embodied in a special Act which incorporates the general Act after a particular interpretation of it has received judicial sanction, and contains no provisions

from which can be collected any intention on the part of the legislature, or those who sought its interposition, to question or impugn the correctness of that interpretation. To put the matter in another shape, the Courts should be careful not to overrule decisions which, not being manifestly erroneous and mischievous, have stood for some time unchallenged, and from their nature and the effect which they may reasonably be supposed to have produced upon the conduct of a large portion of the community, as well as of Parliament itself, in matters affecting the rights of property, may fairly be treated as having passed into the category of established and recognized law."—*Pugh* v. *Golden Valley Rail. Co.* (1880), 15 Ch. D. 330, at p. 334; 49 L. J. Ch. 721, at p. 723 [Thesiger, L. J., delivering the judgment of the Court, James, Cotton, and Thesiger, L. JJ.].

"Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision and the practice of mankind in conducting their affairs."—*Ex parte Willey, In re Wright* (1883), 23 Ch. D. 118, at pp. 127, 128; 52 L. J. Ch. 516, at p. 549, Jessel, M. R.

"There is, however, the case which has been referred to, decided by the full Court of Common Pleas in 1843, *Jarmain* v. *Hooper*, 6 Man. & G. 827. That case is not technically binding on the Court of Appeal, but whether rightly or wrongly decided, it was decided nearly forty years ago, and has never been questioned since. It has been frequently cited and commented on, and has got into the text-books, and the Court of Appeal ought not now to disturb it. There are two classes of cases which must be distinguished. Where an old case is contrary to the principles of the general law, the Court of Appeal ought not to shrink from overruling it even after a considerable lapse of time. But when an old decided case has made the law on a particular subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it."—*Smith* v. *Keal* (1882), 9 Q. B. D. 340, at pp. 351, 352, Jessel, M. R. [cited by Lord Esher, M. R., in *Morris* v. *Salberg* (1889), 22 Q. B. D. 614, at p. 619; 58 L. J. Q. B. 275, at p. 277].

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"We have, it is true, the power of reviewing that decision [*Re Rouse and Meier* (1871), L. R. 6 C. P. 212; 40 L. J. C. P. 145]; but where there is a decision as that is on the course of procedure which has been made more than twelve years ago, and which therefore must necessarily have been frequently acted on during that time, and no one has gone to the Legislature to have it altered, this Court of Appeal, even it differed from such decision, would not now be disposed to overrule it."—*Fraser* v. *Ehrensperger* (1883), 12 Q. B. D. 310, at p. 318; 53 L. J. Q. B. 73, at p. 76, Brett, M. R.

"The contract is one which is daily contained in conditions of sale by auction, and when there is with respect to it the decision of such a case as *Bos* v. *Helsham* [(1866), L. R. 2 Ex. 72; 36 L. J. Ex. 20], which having been on demurrer could easily have been brought by appeal to the Exchequer Chamber, and ultimately to the House of Lords, and yet one finds it unchallenged until now, after a lapse of eighteen years; and when also one finds that it was preceded in 1830 by the case of *Cann* v. *Cann* [3 Sim. 477], in which a deliberate statement of the law was made, on which the case of *Bos* v. *Helsham* (*supra*) was founded, one cannot but say that this Court, according to what has been the universal practice, even of a Court of Error, would decide now in the same way, even though it would not have come originally to the same decision. All the sales by auction which have occurred since those decisions must have taken place on the law which had been so published, and therefore it would be very wrong now for this Court to overrule those decisions."—*Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, at p. 354; 53 L. J. Q. B. 348, at p. 349, Brett, M. R.

"If it were not for the previous decisions, one might have thought that such condition was intended only to cover the interval before the formal deed of conveyance, but when, in dealing with such a condition as this, which is so frequent on the occasion of the sale of property, you find that the Courts have put a particular construction upon it which has been unchallenged for many years, it would be unjust to alter it, and I do not think that it is now open to this Court to do so after the case of *Bos* v. *Helsham* [(1866), L. R. 2 Ex. 72; 36 L. J. Ex. 20], which followed *Cann* v. *Cann* [3 Sim. 447], decided in 1830. I must say that I do not think that the Vice-Chancellor Malins was justified, under the circumstances, in differing from those two previous cases."—*Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, at p. 357; 53 L. J. Q. B. 348, at p. 351, Bowen, L. J.

"I am bound to state that I agree with what has been said by the other members of this Court as to its not being desirable to interfere with decisions pronounced so long ago; since it is impossible to deny that during the fifty-four years which have elapsed numerous contracts must have been made, and moneys paid, on the footing of the law as established by *Caun* v. *Caun* (*supra*), and which law I, for one, am not inclined to alter."—*Ibid.*, at p. 358; L. J. at p. 351, Fry, L. J.

"The appellants challenge the decision in *The Mary Ann* (1865), L. R. 1 A. & E. 8; 35 L. J. Adm. 6, and the course of practice which has followed it. The respondent contends that the decision was right. But whether it was right or not, he says that it is too late now even for this House to interfere. I am sensible of disturbing a course of practice which has continued unchallenged for such a length of time, and which has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time."—*Hamilton* v. *Baker* (May 27, 1889), 14 App. Cas. 209, at pp. 221, 222; 58 L. J. P. 57, at p. 62, Lord Macnaghten.

"If this were a contract in daily use, and if the decision had been acted on throughout the country for a long time, it might be that we should feel bound to follow it, on the ground of the number of persons who had acted on it, even though we did not agree with it."—*Phillipps* v. *Rees* (October 31, 1889), 24 Q. B. D. 17, at p. 21; 59 L. J. Q. B. 1, at p. 4, Lord Esher, M. R.

"It is a wholesome rule that has often been laid down, that when a well-known document has been in constant use for a number of years, the Court, in construing it, should not break away from previous decisions, even if in the first instance they would have taken a different view, because all the documents made after the meaning of one has been judicially determined are taken to have been made on the faith of the rule so laid down."—*Dunlop and Sons* v. *Balfour, Williamson & Co.*, [1892] 1 Q. B. 507, at p. 518; 61 L. J. Q. B. 354, at p. 360, Lord Esher, M. R.

"Where there is a decision which has stood for more than two hundred years in respect of a subject-matter constantly arising in

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practice, the Court does not overrule it unless absolutely obliged to do so; more especially, when the law as laid down by that decision has been handed down for a long period through a series of text-books by careful writers, and the general principle on which the decision was founded has often been recognized by eminent judges. In such a case, even if the Court did not agree with the decision, it would not overrule it."—*Hodder* v. *Williams*, [1895] 2 Q. B. 663, at p. 665; 65 L. J. Q. B. 70, at p. 71, Lord Esher, M. R.

"If, by declining to follow the second decision in *Hatton* v. *Scarborough Cliff Hotel Co* (1865), 2 Dr. & Sm. 521; 34 L. J. Ch. 643, we were disturbing titles or embarrassing trade or commerce, we should treat it as one of those decisions which, though wrong, it would be mischievous to overrule. But such is not the case; and it is desirable, from all points of view, to remove from companies a fetter which ought never to have been imposed upon them, and which in practice has been got rid of by skilled draftsmen by the insertion of power to issue preference shares in the original articles of association or the memorandum of association itself. These devices will no longer be necessary."—*Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361, at p. 371; 66 L. J. Ch. 246, at p. 250, Lindley, L. J., delivering the judgment of the Court (Lindley, A. L. Smith and Rigby, L.JJ.).

"In my opinion both these cases are governed by *Surman* v. *Darley* (1845), 14 M. & W. 181; 14 L. J. M. C. 145. In order that the present appeals should succeed, we must dissent from the *ratio decidendi* of that case. That decision is now just sixty years old. It has never yet been dissented from, but, on the contrary, it has been followed continuously up to the present time. That being so, I do not think that this Court, after so long a lapse of time, ought to overrule or depart from that decision."—*Lewin* v. *End*; *Lewin* v. *Civil Service Supply Association, Limited*, [1905] 1 K. B. 669, at p. 676; 74 L. J. K. B. 406, at p. 409, Romer, L. J.

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House [of Lords] to overrule them, if it has not lost the right to do so by itself expressly affirming

them."—*West Ham Union* v. *Edmonton Union*, [1908] A. C. 1, at pp. 4, 5; 77 L. J. K. B. 85, at p. 87, Lord Loreburn, L. C.

"The only difficulty is that one has to consider a decision of as long ago as the year 1842. I do not think that is an absolute reason against a reversal of that decision, but undoubtedly it is an undesirable thing to upset any canon of construction or principle of law which has been settled for so long that people may be supposed to have acted according to it for a considerable time. But all these things must be governed, I think, by a reference to the subject-matter with which we are dealing."—*Ibid.*, at p. 6, Earl of Halsbury.

If a decision has not stood wholly unquestioned, it need not be followed.

"The decision in *Lobbaschere* v. *Dawson* [(1872), L. R. 13 Eq. 322; 41 L. J. Ch. 427] has not stood wholly unquestioned, and I do not think that we are bound to follow it merely because it has stood for twelve years without being authoritatively overruled."—*Pearson* v. *Pearson* (1884), 27 Ch. D. 145, at p. 154; 54 L. J. Ch. 32, at p. 40, Baggallay, L. J.

Long-standing decisions as to the jurisdiction of an inferior Court.

The rule as to not overruling decisions of many years' standing is not applicable where the decision is one as to the jurisdiction of an inferior Court.

"I do not think that the rule is applicable which often governs us in not overruling decisions of many years' standing, on which persons may often have acted in making contracts, or otherwise. Where the decision is really one as to the jurisdiction of another Court there seems to me to be no reason why, at any distance of time, a superior Court may not overrule it."—*The Queen* v. *Edwards* (1884), 13 Q. B. D. 586, at pp. 590, 591; 53 L. J. M. C. 149, at p. 151, Brett, M. R.

(See also *post*, Decisions on Statutes.)

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Dicta contained in Decisions.

Old Dicta—Modern Dicta.

Where a dictum of law has been accepted, and is likely to have affected divers contracts and dealings between man and man, or has put an interpretation on a statute and thus made a law which men follow in their daily dealings, it is binding.

Dicta of modern judges should not have much attention paid to them.

Dicta not binding should be examined into.

"I distrust *dicta* in all cases, and especially *dicta* during argument."—*Wallis* v. *Smith* (1882), 21 Ch. D. 243, at p. 265; 52 L. J. Ch. 145, at p. 152, Jessel, M. R.

"Speaking for myself, I do not pay much attention to the *dicta* of modern judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern judges, nor to old recognized *dicta* by eminent judges."—*Quilter* v. *Heatly* (1883), 23 Ch. D. 42, at p. 49, Jessel, M. R.

"I never allow my construction of a plain enactment to be biassed in the slightest degree by any number of judicial decisions or *dicta* as to its meaning, when those decisions or *dicta* are not actually binding upon me. I read the Act for myself. If I think it clear I express my opinion about its meaning as I consider I am bound to do. Of course, if other judges have expressed different views as to the construction, and their decisions are binding on this Court, this Court has simply to bow and submit, whatever its own opinion may be. But when there is no such binding decision, in my view a judge ought not to allow himself to be biassed in the construction of a plain Act of Parliament (for it appears to me to be plain) by any number of *dicta* or decisions which are not binding on him. The judge ought, with all due respect, to examine into them, but he must not allow any number of *dicta*, or even decisions which are not binding on him, to affect his judgment except in one peculiar case. That case is peculiar, and, therefore, I will mention it. Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course that

requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."—*Ex parte Willey, In re Wright* (1883), 23 Ch. D. 118, at pp. 127, 128; 52 L. J. Ch. 546, at p. 548, Jessel, M. R.

"I perfectly admit that, although there has been no such judicial decision, yet if I could find that this had been an accepted *dictum* of law, and that it was likely to have affected divers contracts and dealings between man and man, and that by not following it I should be disturbing anything which had been done in former times over and over again on the faith of the *dictum*, I should feel myself bound by it, and I should decline to decide in opposition to it."—*In re Rosher* (1884), 26 Ch. D. 801, at p. 821; 53 L. J. Ch. 722, at p. 731, Pearson, J.

"I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience the judgments come with far more weight and gravity when they come upon points which the judges are bound to decide, and I think that *obiter dicta*, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the judges who have uttered them, and are a great source of embarrassment in future cases. Therefore I abstain from putting a construction on more than it is necessary to do for this particular case."—*Cooke* v. *New River Company* (1888), 38 Ch. D. 56, at pp. 70, 71; 57 L. J. Ch. 389, at p. 390, Bowen, L. J.

"Sir George Jessel has pointed out in *Quilter* v. *Heatly* (1883), 23 Ch. D. 42, at p. 49, and in *Ex parte Willey* (1883), 23 Ch. D. 118, at pp. 127, 128, what I think everyone must agree in—the inexpediency of deciding any case upon the authority of the *dicta* of modern judges. There are old *dicta* of great judges, which have been followed by many decisions and have become maxims of the law, but modern *dicta* are but attempts to embody, in a short form, the result of decisions on statutes which any lawyer can examine for himself."—*Dashwood* v. *Magniac*, [1891] 3 Ch. 306, at p. 376; 60 L. J. Ch. 809, at p. 826, Kay, L. J.

"No *dicta* of text-writers or judges, however eminent, if contrary to fixed principle or the words of a statute, can have the force of an amending Act of Parliament, or absolve us from the duty of ourselves applying the principle or construing the Act."—*In re McCallum, McCallum* v. *McCallum*, [1901] 1 Ch. 143, at p. 157; 70 L. J. Ch. 206, at p. 214, Rigby, J.

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Decisions on Identical Words or Similar Grounds.

Decisions on the interpretation of instruments, if the words are identical, are not strictly binding.

Decisions on the interpretation of instruments if the words are only similar or somewhat similar are not binding.

On a question of interpretation even the decision of the Appeal Court on similar grounds is not binding on another Court and much less on a Court of equal jurisdiction.

"No judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document, that is to say, I think it is the duty of a judge to ascertain the construction of the instrument before him, and not to refer to the construction put by another judge upon an instrument perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the judge who decided on that other instrument may have thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result, especially in some cases of wills, has been remarkable. There is, first, document A., and a judge formed an opinion as to its construction. Then came document B., and some other judge has said that it differs very little from document A.—not sufficient to alter the construction—therefore he construes it in the same way. Then comes document C., and the judge then compares it with document B., and says it differs very little and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has, by this process, come to be construed in the same manner."—*Aspden* v. *Seddon* (1875), L. R. 10 Ch. 394, at p. 397, note (1); 44 L. J. Ch. 359, at p. 363, Jessel, M. R.

"Nothing is better settled than that the construction put upon

an instrument by a Court of law or equity is not binding on another Court of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language."—*In re New Callao* (1882), 22 Ch. D. 484, at p. 488; 52 L. J. Ch. 283, at p. 285, Jessel, M. R.

"Nothing is better known than that on a question of mere construction even the decision of the Appeal Court on similar grounds is not binding on another Court, and much less on a Court of equal jurisdiction. As regards the construction of the instrument, even if there are the identical words, although we follow them (decisions), they are not strictly binding; but on similar words they are not binding."—*Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103, at p. 111; 52 L. J. Ch. 541, at p. 542, Jessel, M. R.

"It appears to me that a lamentable waste of judicial time and power is often involved in examining decisions with regard to the meaning of words which with one context are capable of one meaning and with another context of another meaning."—*Foulger* v. *Arding*, [1902] 1 K. B. 700, at p. 704; 71 L. J. K. B. 499, at p. 502, Collins, M. R.

"In a question of construction, in my view, no judge is bound by the decision of another judge. He is obliged to express his view of the meaning of the document which he has to construe, and in expressing that view, in my opinion, he is not bound by the view of somebody else. I remember hearing Sir George Jessel say that he should not regard himself as bound by the decision of a previous judge on the construction of the identical document and the identical passage of the document which he had to construe."—*Pedlar* v. *Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427, at pp. 437, 438; 74 L. J. Ch. 753, at p. 758, Warrington, J.

Decisions and Judgments affirmed on Different Grounds.

A judgment affirmed on different grounds from those of the Court below, renders the judgment of the Court below no longer binding.

A decision affirmed on different grounds from those of the Court below is binding, but not so the reasons given for it.

"The decision of the Court of Appeal was affirmed, but not the judgment, and that is a very important distinction. When the House of Lords affirm a decision on different grounds from those of the Court below, it is evidence, in fact proof, to those who know

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the practice of the House of Lords, that they do not agree with those grounds. Therefore a judgment so affirmed, so far from leaving the judgment of the Court of Appeal intact, shows the contrary, and that you are no longer bound by it. The mere affirmance of the decision is quite a different thing. You are bound by the decision but not by the reasons given for it."—*Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103, at p. 112; 52 L. J. Ch. 541, at p. 542, Jessel, M. R.

Section III.

DECISIONS OF COURTS.

Decisions of Courts of Co-ordinate or Concurrent Jurisdiction.

By the comity or courtesy of Courts, Courts of co-ordinate or concurrent jurisdiction follow one another.

Courts of co-ordinate jurisdiction must act upon the opinion of the majority.

On the grounds of judicial comity a Court bows to its own decisions.

If two cases in the same Court or in Courts of co-ordinate jurisdiction are in conflict, a Court must say with which of them it agrees.

When a Court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views.

When a Court is equally divided, its judgment is not binding on a Court of co-ordinate jurisdiction.

"The rule is this: that wherever there is a decision of a Court of concurrent jurisdiction, the other Courts will adopt that as the

basis of their decision, provided it can be appealed from. If it cannot be appealed from, then they will exercise their own judgment."—*Leech* v. *The North Staffordshire Rail. Co.* (1860), 29 L. J. M. C. 150, at p. 155, Pollock, C. B.

"That is, where they think the judgment of the other Court was clearly wrong; not where it is a doubtful matter."—*Ibid.*, Martin, B.

"Though I have the highest respect for the authority of Williams, J., I think we must, in a Court of co-ordinate jurisdiction, act upon the opinion of the majority, even if I did not think, as I do, that it puts the law on a just and convenient ground."—*Donald* v. *Suckling* (1866), L. R. 1 Q. B. 585, at p. 617; 35 L. J. Q. B. 232, at p. 250, Blackburn, J.

"The whole theory of our system is that the decision of a superior Court is binding on an inferior Court and on a Court of co-ordinate jurisdiction, in so far as it is a statement of the law which the Court is bound to accept."—*Mercy* v. *Nickalls* (1872), L. R. 7 Ch. 732, at p. 751; 41 L. J. Ch. 767, at p. 771, Sir W. M. James, L. J.

"It would not be right to overrule the decision of a Court of co-ordinate jurisdiction, unless we were very clearly satisfied that it was wrong; and it would lead to endless confusion and interminable litigation if the Courts were to make or find minute differences in the language of instruments for the purpose of escaping from the authority or apparent authority of previous decisions."—*Wake* v. *Varah* (1876), 2 Ch. D. 348, at p. 357; 45 L. J. Ch. 533, at p. 537, James, L. J.

"When I first had the honour of sitting here, I used to think myself bound by any decision of a Vice-Chancellor that was twenty years old; but the Court of Appeal in one instance held that I was not so bound. I then reconsidered my position, and thought I was not bound by any decision of co-ordinate authority: accordingly, I have since frequently declined to follow such authority."—*Osborne to Rowlett* (1880), 13 Ch. D. 774, at p. 779, Jessel, M. R. (cited by Joyce, J., in *In re Ravensworth*, [1905] 2 Ch. 1, at p. 3).

"That [the Courts of Queen's Bench, Common Pleas and Exchequer following each other's decisions] was a matter of courtesy. The Vice-Chancellors did not consider themselves bound by each other's decisions. I have differed frequently from Courts of co-ordinate

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jurisdiction."—*Gathercole* v. *Smith* (1881), 44 L. T. 439, at p. 440, Jessel, M. R.

"That case [*London and North Western Rail. Co.* v. *Buckmaster* (1874), L. R. 10 Q. B. 70; in E. .. Ch. 444; 44 L. J. M. C. 180] is not an authority which is binding upon us, because in the Exchequer Chamber, which was a Court of co-ordinate jurisdiction with ourselves, the judges were equally divided, and therefore the judgment of the Queen's Bench stood affirmed."—*Smith* v. *Lambeth Assessment Committee* (1882), 10 Q. B. D. 327, at p. 328; 52 L. J. M. C. 1, Brett, L.J.

"This raises the question whether any Court is bound by a decision of its own, which decision was grounded on the fact that the members of the Court present were equally divided. It was the custom for each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way, there is no common law or statutory rule to oblige a Court of law to bow to its own decision, it does so again on the grounds of judicial comity. But when a Court is equally divided this comity does not exist, for there is no authority of the Court as such, and those who follow must choose one of two adverse opinions. And if the books are examined, I have no doubt it would be found, if authority there be, that when a Court is equally divided, if the case comes before it again, it will exercise an independent opinion and abide by one of the two views. The case may be different as regards the House of Lords, since it is the ultimate Court of Appeal, for if it is otherwise there exists an uncertainty as to the law."—*The Vera Cruz* (No. 2) (1884), 9 P. D. 96, at p. 98; 53 L. J. P. 33, at p. 39, Brett, M. R.

"A Court of law is not justified, according to the comity of our Courts, in overruling the decision of another Court of co-ordinate jurisdiction, and therefore the Vice-Chancellor ought not to have differed from those former decisions. Taut is the rule which Jessel, M. P., adopted in *In re Turner and Skelton* [(1879), 13 Ch. D. 130; 49 L. J. Ch. 114]."—*Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, at p. 355; 53 L. J. Q. B. 348, at p. 350, Brett, M. R.

"The Court ought never to come to the conclusion that two cases in the same Court, or in Courts of co-ordinate jurisdiction, are in conflict, unless it is obliged to. I agree that if two cases

are in conflict the Court must say with which of them it agrees."—*Duke of Devonshire* v. *O'Connor* (1890), 24 Q. B. D. 468, at p. 473; 59 L. J. Q. B. 206, at p. 209, Lord Esher, M. R.

"The only other case that has occasioned me any difficulty is that before Kekewich, J., of *In re Bendy*, [1895] 1 Ch. 109; 64 L. J. Ch. 170. That is a decision of a judge of first instance like myself. Ordinarily, in these cases, I should always follow the decision of a judge of co-ordinate jurisdiction, unless on princip. I differed from it."—*Finlay* v. *Darling*, [1897] 1 Ch. 719, at p. 723; 66 L. J. Ch. 348, at p. 349, Romer, J.

"Whatever my individual opinion might have been in the absence of authority, I am bound by the decision of the Court of Appeal or a Court of co-ordinate jurisdiction on similar facts."—*Lyon & Co.* v. *London, City and Midland Bank*, [1903] 2 K. B. 135, at p. 138; 72 L. J. K. B. 465, at p. 467, Joyce, J.

"The Court of Appeal have recently recognized that it is desirable in the public interest, and in order that people may know with certainty what their position is, that Courts of co-ordinate jurisdiction should follow their decisions unless there are strong grounds which enable the Court to say that the previous decisions ought not to be followed."—*London County Council* v. *Schenzik*, [1905] 2 K. B. 695, at p. 700; 74 L. J. K. B. 959, at p. 962, Lord Alverstone, C. J.

Divisional Court and Judge at Nisi Prius.

"Now, although I myself might not have so decided, I should not be justified as a judge sitting at *nisi prius* in not conforming to a judgment of the Divisional Court which has not been expressly overruled or judicially disapproved, unless it was absolutely and unquestionably clear that it was inconsistent and could not be reconciled with later decisions of higher authority."—*Ruben* v. *Great Fingall Consolidated*, [1904] 1 K. B. 650, at p. 666; 73 L. J. K. B. 299, at p. 309, Kennedy, J.

King's Bench Division and Chancery Judge.

"Though we (King's Bench Division) are not bound by the decision of a judge sitting alone in the Chancery Division, we should not differ from it unless we were clearly satisfied that it was wrong."—*Brass* v. *London County Council*, [1904] 2 K. B. 336, at p. 340; 73 L. J. K. B. 841, at p. 846, Lord Alverstone, C. J.

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Old Court of Appeal in Chancery and Court of Appeal.

"As a rule, this Court ought to treat the decisions of the Court of Appeal in Chancery as binding authorities, but we are at liberty not to do so where there is a sufficient reason for overruling them. As the decision in *Tassell* v. *Smith* [(1858), 2 D. & J. 713; 27 L. J. Ch. 694] may lead to consequences so serious, we think that we are at liberty to reconsider and review the decisions in that case as if it were being reheard in the old Court of Appeal in Chancery, as was not uncommon."—*Mills* v. *Jennings* (1880), 13 Ch. D. 639, at pp. 648, 649; 49 L J. Ch. 209, at p. 212, Cotton, L. J., delivering the judgment of the Court (James, Baggallay Cotton, L. JJ.).

Exchequer Chamber and Court of Appeal.

"We (the Court of Appeal) are, of course, bound by the decision of the Court of Exchequer Chamber in the case referred to as that of a Court of appellate jurisdiction, and which, therefore, can only be reviewed by a Court of ultimate appeal."—*Nugent* v. *Smith* (1876), 1 C. P. D. 423, at p. 433; 45 L. J. C. P. 697, at p. 705, Cockburn, C. J.

Decisions of Superior Courts.

Decisions of superior Courts are binding on inferior Courts.

"The whole theory of our system is, that the decision of a superior Court is binding on an inferior Court."—*Merry* v. *Nickalls* (1872), L. R. 7 Ch. 733, at p. 751; 41 L. J. Ch. 767, at p. 771, Sir W. M. James, L. J.

Lord Chancellor's Court.

Decisions of a Lord Chancellor, sitting alone, are decisions of a Superior Court of Appeal, but are not to be taken as decisions of the Court of Appeal. They were liable to be reheard and to be overruled by the Lord Chancellor himself or his successor, or the Court of Appeal.

If the decisions of two Lord Chancellors are conflicting, the decision of the subsequent Lord Chancellor is entitled to greater weight, because the subsequent Lord Chancellor could overrule the decision of the prior Lord Chancellor.

"For us to reverse the judgment of a Lord Chancellor would

require a tremendous case—a case of a clear error."—*Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, at p. 47, James, L. J.

"I think I may say for myself (and I believe I am expressing the views of the other members of the Court) that we ought not to lay down as an absolute rule that decisions of Lord Chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal, and absolutely binding on this Court so as to prevent us from even looking into the grounds or considering the case which was before the particular Lord Chancellor. But no doubt the greatest weight ought to be given to such decisions, and unless they are shown to be manifestly wrong or manifestly contrary to the general current of authority on the point decided, it appears to me that we ought not to take upon ourselves to overrule them."—*Ibid.*, at p. 54; L. J., at p. 859, Thesiger, L. J. (cited by Vaughan Williams, L. J., in *In re Lloyd*, [1903] 1 Ch. 385, at p. 392; 72 L. J. Ch. 78, at p. 80).

"I may say I do not consider the decision of a Lord Chancellor is absolutely binding upon us, because every Lord Chancellor's decision was liable to be reheard not only by himself but by his successor, and there are known instances of it. When I was sitting with Lord Justice Mellish we did rehear decisions of the Lord Chancellor Selborne. There is always this to be considered, that it is the decision, no doubt, of a superior Court of Appeal; but it is always qualified by this, that according to the old practice of the Court of Chancery it was liable to be reheard."—*Ashworth* v. *Munn* (1880), 15 Ch. D. 363, at p. 377, James, L. J.

"I think the Lord Chancellor, wherever he is sitting and whatever cases he is trying, is still Lord Chancellor, and that his decision is binding on me."—*Ex parte Vicar of St. Mary, Wigton* (1881), 18 Ch. D. 646, at p. 648, Fry, J.

"It must be remembered that where we have conflicting decisions of two Lord Chancellors, the decision of the subsequent Lord Chancellor is entitled to greater weight, because the subsequent Lord Chancellor could overrule the decision of the prior Lord Chancellor, and sometimes did. It has not been the practice of modern Courts to exercise the jurisdiction quite so freely as the old Chancellors did, but they overruled one another, and sometimes they overruled their own decisions without the slightest doubt or hesitation. There are remarkable cases even in modern times in which a Lord Chancellor has overruled the decision of his predecessor. One of the most remarkable is one of the earlier cases

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heard before Lord Lyndhurst, where he varied a decision of Lord Eldon's. There is no doubt about the jurisdiction or about its being exercised."—*Heaty* v. *Wreg* (1882), 21 Ch. D. 332, at p. 346, Jessel, M.R.

"I am of opinion that the decision in *Thomas* v. *Dare* [(1866), L. R. 2 Ch. 1; 36 L. J. Ch. 201], being a decision of the Lord Chancellor, is a decision by which we are bound."—*Gard* v. *Commissioners of Sewers of the City of London* (1885), 28 Ch. D. 486, at p. 509; 54 L. J. Ch. 698, at p. 707, Baggallay, L.J.

"Though sometimes a decision of the Court of Appeal [that of Lord Cairns, L.C., sitting alone] is overruled, this is only to be done with great caution."—*In re Watts* (1885), 29 Ch. D. 947, at p. 953; 55 L. J. Ch. 332, at p. 334, Cotton, L. J.

House of Lords.

Conclusiveness of Decisions.

A decision of the House of Lords is an authoritative and conclusive declaration of the existing state of the law, and is binding upon itself when sitting judicially, as much as upon all inferior Courts. The doctrine upon which the judgment of the House is founded must be universally taken for law, and can only be altered by Act of Parliament.

"It appears that judgment—a complete and final judgment—has been pronounced by your Lordships' House in this case. That judgment can only be vacated by a special Act of Parliament to enable the parties, if injustice can be proved to have been done, to be again heard. I remember only one case in which such an Act was passed for such a purpose."—*Tommey* v. *White* (1850), 3 H. L. Cas. 49, at p. 69, Lord Truro, L. C.

"S. eral authorities were referred to, in which it had been stated by Lord Eldon and other learned judges that a case once decided here between A. and B. is, as against A. and B., conclusively and for ever decided, and that nothing but an Act of Parliament can afterwards alter the decision. I think that is so."—*Ex parte White and Others* v. *Tommey* (1853), 4 H. L. Cas. 313, at pp. 333-4, Lord Cranworth, L. C.

"It has been doubted by a noble and learned lord, who is not now present, whether this House can correct any error which it has committed. I confess, my Lords, I have always entertained the opinion, that in the particular case, you cannot correct the

error—it is settled; nothing but an Act of Parliament can reverse it. But I certainly hold that this House has the same power that every other judicial tribunal has to correct an error (if it has fallen into one) in subsequently applying the law to other cases."—*Wilson* v. *Wilson* (1854), 5 H. L. Cas. 40, at p. 63, Lord St. Leonards.

"I protested against what I thought might be hereafter quoted as a dangerous precedent, of calling in question a deliberate decision of the House of Lords."—*Thellusson* v. *Rendlesham* (1859), 7 H. L. Cas. 429, at p. 529, Lord St. Leonards.

"By the constitution of this United Kingdom, the House of Lords is the Court of Appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals. The observations made by members of the House, whether law members or lay members, beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities. But the doctrine on which the judgment of the House is founded must be universally taken for law, and can only be altered by Act of Parliament. So it is, even where the House gives judgment in conformity to its rule of procedure, that where there is an equality of votes, *semper præsumitur pro negante*."—*Att.-Gen.* v. *The Dean and Canons of Windsor* (1860), 8 H. L. Cas. 369, at p. 391; 30 L. J. Ch. 529, at p. 531, Lord Campbell, L. C.

"The rule of law which your Lordships lay down as the ground of your judgment, sitting judicially as the last and Supreme Court of Appeal for this Empire, must be taken for law till altered by an Act of Parliament, agreed to by the Commons and the Crown as well as by your Lordships. The law laid down as your *ratio decidendi*, being clearly binding on all inferior tribunals and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority."—*Beamish* v. *Beamish* (1861), 9 H. L. Cas. 274, at pp. 338-9, Lord Campbell, L. C.

"When it appears that a case falls within the *ratio decidendi* of the House of Lords, the highest Court of Appeal, I do not think it competent, for even this House, to say that the *ratio decidendi*

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was wrong."—*Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317, at p. 335, Lord Blackburn.

"My Lords, for my own part, I am prepared to say that I adhere to what has been said by Lord Campbell, and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford, and others, that a decision of this House, once given upon a point of law, is conclusive upon this House afterwards, and that it is impossible to raise that question again, as if it was *res integra*, and could be re-argued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries."—*London Street Tramways Company* v. *London County Council*, [1898] A. C. 375, at p. 379; 67 L. J. Q. B. 559, at p. 561, Earl of Halsbury, L. C.

"It appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle—namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House."—*Ibid.*, at p. 381; L. J., at p. 562, Earl of Halsbury, L. C.

Independent Reasons of Lords.

Where the Lords give independent reasons, the judgments of the majority who decided the case must only be looked at.

"Of course, where you have five lords giving independent reasons, it is very difficult to ascertain with accuracy the ground upon which the House of Lords decided, but I think that in all such cases you must only look at the judgments of the majority who decided the case, for the reasons to be found in their judgments must be either wholly or to some extent the reasons which guided the House of Lords in coming to their conclusion. I therefore confine myself for this purpose to the opinions of the three lords who decided the case in favour of the appellants."—*Re Agrave* v. *Hurd* (1881), 20 Ch. D. 1, at pp. 14, 15; 51 L. J. Ch. 113, at p. 118, Jessel, M. R.

"Now we know that each of them [the lords] considers the matter separately, and then they consider the matter jointly, interchanging their judgments so that every one of them has seen the judgments of the others. If they mean to differ in their view,

they say so openly when they come to deliver their judgments, and if they do not do this, it must be taken that each of them agrees with the judgments of the others."—*Guardians of Poor of West Derby Union* v. *Guardians of Poor of Atcham Union* (1889), 24 Q. B. D. 117, at p. 120; 59 L. J. M. C. 17, Lord Esher, M. R.

"It has been pointed out by the Master of the Rolls in *Guardians of West Derby Union* v. *Guardians of Atcham Union* [(1889), 24 Q. B. D. 117; 59 L. J. M. C. 17] (and I entirely concur with him), that where in the House of Lords one of the learned lords gives an elaborate explanation of the meaning of a statute, and some of the other learned lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it."—*Overseers of Manchester* v. *Guardians of Ormskirk Union* (1890), 24 Q. B. D. 678, at p. 682, Lord Coleridge, C. J.

Observations made and mere opinions given of the noble Lords beyond the ratio decidendi *are only binding in as far as they may be considered agreeable to sound reason and to prior authorities.*

"The observations made by members of the House, whether law members or lay members, beyond the *ratio decidendi* which is propounded and acted upon in giving judgment, although they may be entitled to respect, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities."—*Att.-Gen.* v. *The Dean and Canons of Windsor* (1860), 8 H. L. Cas. 369, at p. 392; 30 L. J. Ch. 529, at p. 531, Lord Campbell, L. C.

"According to my understanding, the mere opinions of the noble Lords, apart from decision, do not overrule the decisions of the Court of Appeal, which, at any rate so far as the judges of first instance are concerned, must remain binding upon them until they are in fact overruled."—*Higgins* v. *Betts*, [1905] 2 Ch. 210, at p. 217; 74 L. J. Ch. 621, at p. 624, Farwell, J.

Irreconcilable Cases of House of Lords.

The case which is more recent and the more consistent with general principles is to prevail.

"If the two cases [in the House of Lords] are not to be so recor[illegible], I apprehend that the authority which is at once the more

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recent and the more consistent with general principles ought to prevail."—*Campbell* v. *Campbell* (1880), 5 App. Cas. 787, at p. 798, Lord Selborne, L. C.

"It is your Lordships' duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting. The reasons which learned lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House."—*Caledonian Rail. Co.* v. *Walker's Trustees* (1882), 7 App. Cas. 259, at p. 275, Lord Selborne, L. C.

"There have been many decisions on those statutes. I shall think it proper to refer to five in this House, which it is certainly not easy, and to my mind not possible, altogether to reconcile."—*Ibid.*, at p. 294, Lord Blackburn.

"If this [*Metropolitan Board of Works* v. *McCarthy* (1874), L. R. 7 H. L. 243; 43 L. J. C. P. 385] is in conflict with the previous decision in *Caledonian Rail. Co.* v. *Ogilvy* [(1856), 2 Macq. 229], and in candour I must admit that I think it is, I think we ought to follow the later and more deliberate decision."—*Ibid.*, at p. 302, Lord Blackburn.

Privy Council.

A decision of the Privy Council which has been reported to His Majesty, and has been sanctioned and embodied in an Order of Council, becomes the decree or order of the final Court of Appeal.

"When a decision of this board has been reported to Her Majesty, and has been sanctioned and embodied in an Order of Council, it becomes the decree or order of the final Court of Appeal—the House of Lords, which was brought into the discussion, having no jurisdiction whatever in the subject-matter of it—and that it is the duty of every subordinate tribunal to whom the

order is addressed to carry it into execution."—*Pitts* v. *La Fontaine* (1880), 6 App. Cas. 482, at p. 483, *per* Sir James W. Colville, delivering the judgment of their Lordships.

Though the decisions of the Privy Council may not be theoretically binding, they are to be given great weight.

"The Privy Council is not a Court whose decisions are binding on us sitting here [Court of Exchequer], but it is a Court to whose decisions I should certainly on all occasions give great weight."—*Great Northern Rail. Co.* v. *Swaffield* (1874), L. R. 9 Ex. 132, at p. 138; 43 L. J. Ex. 89, at p. 91, Pollock, B.

"Then there is the case of *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270; 48 L. J. P. C. 25, a decision of the Privy Council which, though it is not binding upon this Court [of Appeal], is of the greatest weight."—*Abrahams* v. *Deakin*, [1891] 1 Q. B. 516, at pp. 520, 521; 60 L. J. Q. B. 238, at p. 240, Lord Esher, M. R.

In cases of mercantile and Admiralty law, where the same principles are professedly followed in the Colonies and in this country, it is highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country.

"It is true that the decisions of the Privy Council are not theoretically binding on this Court, but in cases of mercantile or Admiralty law, where the same principles are professedly followed in the Colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country."—*The City of Chester* (1884), 9 P. D. 182, at p. 207, Lindley, L. J.

Ecclesiastical Courts.

The temporal Court, proceeding in prohibition to restrain excess of jurisdiction in the Court Ecclesiastical, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters.

"I think that there is authority for saying that the temporal Court, proceeding in prohibition to restrain excess of jurisdiction

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in the Court Ecclesiastical, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters. The temporal Courts had carried on a long struggle, first, before the Reformation, with the Pope, and afterwards during the period subsequent to the Reformation, with the Church and the Crown, and many of their decisions may be attributed to a jealousy which they had thus acquired of the Ecclesiastical Courts. But I do not think that the doctrine now in question is open to observation as founded on that jealousy. I think the very nature of a restraining power involves in it a right to consider the decision of the Court which it is sought to restrain, and (if satisfied on sufficient grounds that the decision was a usurpation) a right, and consequently a duty, to declare that it was so. And though, when an appeal from the Ecclesiastical Courts was transferred to such a body as the Judicial Committee, it might have been thought that the restraining jurisdiction of the temporal Courts was no longer needed, the legislature has not thought fit to take away the prohibition to the Ecclesiastical Courts."—*Mackonochie* v. *Lord Penzance* (1881), 6 App. Cas. 424, at p. 447; 50 L. J. Q. B. 611. at p. 622, Lord Blackburn.

Railway Commissioners.

Decisions of the Railway Commissioners are not to be cited as authorities.

"I think we have held that cases before the Railway Commissioners must not be cited as authorities to us."—*Great Western Rail. Co.* v. *Railway Commissioners* (1881), 50 L. J. Q. B. 483, at p. 489, *per* Bramwell, L. J.

Scotch and Irish Courts.

Decisions of the Scotch and Irish Courts, though entitled to the highest respect, are not binding on English judges.

"I agree therefore entirely with the construction of this statute adopted by the Court of Appeal in Scotland, although we are not bound by it. We look carefully to the decisions of such Courts for assistance, and I have read both the decisions, that of the Court in Scotland and the Court in Ireland, and, without being bound by either, my rule of construction accords with that applied in the former case."—*The Queen* v. *Commissioners of Income Tax* (1888),

22 Q. B. D. 296, at p. 306; 58 L. J. Q. B. 196, at p. 199, Lord Esher, M. R.

"Decisions of the Irish Courts, though entitled to the highest respect, are not binding on English judges."—*In re Parsons, Stockley* v. *Parsons* (1890), 45 Ch. D. 51, at p. 62; 59 L. J. Ch. 666, at p. 671, Kay, J.

"*Delaney* v. *Mansfield* (1825), 1 Hog. 234, is not binding on me, being an Irish decision; but, of course, it is deserving of all respect."—*In re Hoare*, [1892] 3 Ch. 94, at p. 99; 61 L. J. Ch. 541, at p. 543, Stirling, J.

"I am not sure that in the absence of those authorities [Irish cases] I should have come to the same conclusion, but it is very desirable that the practice [as to costs of taking out letters of administration] should be the same in both countries, and I therefore follow the Irish Courts."—*In re Lloyd and North London Railway (City) Branch Act*, 1861, [1896] 2 Ch. 397, at p. 402; 65 L. J. Ch. 626, at p. 629, Stirling, J.

"The decisions of the Scottish and Irish Courts do not bind us, and for myself, if I thought they were wrong, it would be my duty to say so."—*Powell* v. *Main Colliery Co.*, [1900] 2 Q. B. 145, at p. 149; 69 L. J. Q. B. 542, at p. 544, A. L. Smith, L. J.

"This question has been recently discussed in the Court of Appeal in Ireland, and though their decision does not bind us, I need hardly say that we have the greatest possible respect for it."—*Hildesheimer* v. *W. & F. Faulkner, Ltd.*, [1901] 2 Ch. 552, at p. 562; 70 L. J. Ch. 800, at p. 803, Collins, L. J.

"The decisions in Ireland are to be treated with respect here; still, they are not binding, though the decisions of Lord Redesdale and Lord St. Leonards have been treated with especial respect, and as of almost equal authority to the English decisions."—*In re Maunder, Maunder* v. *Maunder*, [1902] 2 Ch. 875, at p. 879; 71 L. J. Ch. 815, at p. 816, Joyce, J.

"As decisions of the Court in Ireland, they are not binding on me; and if they conflict with decisions in England, or if they are not consistent with my view of the English law, I should decline to follow them; and therefore I proceed to consider the English cases."—*In re Inman*, [1903] 1 Ch. 241, at p. 247; 72 L. J. Ch. 120, at p. 123, Swinfen Eady, J.

"The authorities which have been referred to in the Irish Courts are interesting and instructive, and are very pertinent to the matter for decision. They are, of course, not binding upon us,

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but I will use them at least for the purpose of illustration."—*Tozeland* v. *West Ham Union*, [1907] 1 K. B. 920, at p. 934; 76 L. J. K. B. 514, at p. 525, Buckley, L. J.

Scotch Court of Session.

The decisions of the Court of Session ought to have every consideration and respect paid to them on points of law common to both England and Scotland, but such decisions, however, are not binding in England.

"The plaintiff's counsel, in support of the latter alternative, have mainly relied upon certain decisions of the Court of Session in Scotland, which they have very properly brought to our notice. If those decisions had been pronounced upon a law common to both parts of the United Kingdom, we should have been equally ready to be bound by them as if they had been pronounced by the Courts in Westminster Hall."—*Blake* v. *Midland Rail. Co.* (1852), 18 Q. B. 93, at p. 109; 21 L. J. Q. B. 233, at p. 237, Coleridge, J., delivering the judgment of the Court (Lord Campbell, C. J., Patteson, J., Coleridge, J., and Wightman, J.).

"It was said that that [the case cited] was an authority, although not strictly binding on us, but yet a very high authority, indeed, of the Court of Session, and one which, if in point, I should pay the greatest possible respect to, although we might not feel ourselves bound by it."—*Great Western Rail. Co.* v. *Railway Commissioners* (1881), 50 L. J. Q. B. 483, at p. 486, Field, J.

"The plaintiffs relied on two recent decisions of the Court of Session which no doubt are in their favour. But, although we ought to pay respect to the opinion on a point of law common to both England and Scotland expressed by that Court, their decisions cannot be considered binding here."—*Johnson* v. *Raylton* (1881), 7 Q. B. D. 438, at p. 445; 50 L. J. Q. B. 753, at p. 756, Cotton, L. J.

"As to authority, there are only the Scotch cases, which are to be treated with every respect."—*Ibid.*, at p. 455; L. J., at p. 761, Brett, L. J.

"Now although that case [*Wilson* v. *The Glasgow Tramways and Omnibus Co.*, Court of Session Cases, 5th Series, Vol. 5, p. 981] is not an authority which is absolutely binding upon us, the Court of Session not being for this purpose a Court of co-ordinate jurisdiction with ourselves, far be it from me to say that the decisions of that

Court are not entitled to receive the greatest consideration and respect at our hands. It has been strongly urged that it would be inconvenient if a different law were to prevail on this side of the Tweed from that which is administered on the other side. If that be so, it is an inconvenience which has subsisted for a very long time; and I do not anticipate that any very grave inconvenience will result if we take a different view of the meaning of an Act of Parliament from that which the judges who preside in the Scotch Courts do."—*Morgan* v. *London General Omnibus Co.* (1883), 12 Q. B. D. 201, at p. 205, Day, J.

Effect of decision of House of Lords in Scotland on English law and on Scotch law.

"A decision of this House, in an English case, ought to be held conclusive in Scotland, as well as in England, as to the questions of English law and English jurisdiction which it determined. It cannot, of course, conclude any question of Scottish law, or as to the jurisdiction of any Scottish Court in Scotland. So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland; as a similar judgment of this House on a Scotch appeal ought to have weight in England. If, however, it can be shown that by any positive law of Scotland, or according to authorities having the force of law in that country, a different view of the proper interpretation, extent, or application of those principles prevails there, the opinions on those subjects expressed by noble and learned lords when giving judgment on an English appeal ought not to be held conclusive in Scotland. When a Scottish decision, in apparent conflict with them, is brought to the bar of this House, the first duty of your lordships must (I conceive) be, to ascertain, whether there is any settled rule of Scottish law, requiring or justifying that decision. If not, it may still be open to the House to reconsider the points raised, in any new light which may be presented by the view of them taken in the Scottish Court."—*Ewing* v. *Orr Ewing* (1885), 10 App. Cas. 453, at p. 499, Earl of Selborne.

American Courts.

American decisions, though entitled to great respect, are not authorities, but decisions of learned judges that ought to influence the House of Lords to come to the same conclusion.

"It will be very fit, if the case at bar is taken into a Court of error, that the reasoning of the American Court should be care-

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fully and respectfully considered; and if it appear to the Court of error satisfactory, they may act upon it, and overrule the case of *Sharp* v. *Grey* (1833), 9 Bing. 457. But it is clear that we, in the Court of Queen's Bench, cannot treat the American decision as an authority, to be placed on the same footing as the decision of the Court of Common Pleas."—*Readhead* v. *Midland Rail. Co.* (1867), L. R. 2 Q. B. 412, at p. 439; 36 L. J. Q. B. 181, at p. 195, Blackburn, J.

"The English Courts are desirous to treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated."—*Readhead* v. *Midland Rail. Co.* (1869), L. R. 4 Q. B. 379, at p. 392; 38 L. J. Q. B. 169, at p. 176, Montague Smith, J., delivering the judgment of the Exchequer Chamber (Kelly, C. B., Byles, Keating, and M. Smith, JJ., Channell and Bramwell, BB.).

"An appeal was made by the learned counsel to an American case, not, of course, as to an authority, because I take it that a judgment of a Court in *New York* is not an authority in a case arising in *England*, with regard to English rules of procedure, but as a decision of learned judges that ought to influence the House to come to the same conclusion."—*Castro* v. *The Queen* (March 10, 1881), 6 App. Cas. 229, at p. 249; 50 L. J. Q. B. 497, at p. 507, Lord Watson.

"In coming to that conclusion, as I do upon principle, I am much strengthened by the American authorities to which my attention has been called by Mr. Cookson."—*Steel* v. *Dixon* (March 28, 1881), 17 Ch. Div. 825, at p. 831; 50 L. J. Ch. 591, at p. 593, Fry, J.

"We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions of our own Courts, is wrong. Among other things it involves an inquiry, which often is not an easy one, whether the law of *America* on the subject in which the point arises is the same as our own."—*In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, at p. 330, Lord Halsbury, L. C.

"I also have been struck by the waste of time occasioned by the growing practice of citing American authorities."—*Ibid.*, Fry, L. J.

"I have often protested against the citation of American authorities."—*Ibid.*, at p. 351, Cotton, L. J.

"Decisions in the American Courts are entitled to great respect, but are not binding here [Chancery Division]; and there are many circumstances affecting questions arising between the laws of different States which may or may not be applicable to questions arising here."—*In re De Nicols*, [1898] 1 Ch. 403, at p. 410, Kekewich, J.

"The decisions of the American Courts are not, of course, in any sense binding, but we read them with respect, and they afford useful illustrations."—*Apollinaris Co.* v. *Nord Deutsche Insurance Co.*, [1904] 1 K. B. 252, at p. 260; 73 L. J. K. B. 62, at p. 65, Walton, J.

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Part II.—Rules of Legal Interpretation applicable to all Instruments.

Section I.

INTRODUCTORY CAUTIONS.

Rules of Interpretation and Rules of Law distinguished.

"In my opinion, rules of construction and rules of law differ very broadly in this point of view: that one [rule of construction] is a rule which points out what a Court should do in the absence of express or implied intention to the contrary; the other [rule of law] is one which takes effect when certain conditions are found, although the testator may have indicated an intention to the contrary."—*In re Coward, Coward* v. *Lakman* (1887), 57 L. T. 285, at p. 291, Fry, L. J.

Reasons of Rules of Law.

"Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned, but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded. And it hath been an ancient observation in the laws of England that whenever a standing rule of law, of which the reason, perhaps, could not be remembered or discerned, hath been wantonly broken in upon by

statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation."—1 *Bl. Com.* 70.

"The doctrine of the law, then, is this: that precedents and rules must be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration." —1 *Bl. Com.* 70.

Difficulty and Danger of framing General Rules.

"There is, indeed, great truth in the remarks which have been judicially promulgated on this subject by a learned Court. When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far; to define and fix that which cannot in the nature of things be defined and fixed."—*Story, on the Conflict of Laws*, s. 28.

"I am perfectly well aware of the danger there is in attempting to lay down general propositions, and few judges would more shrink from doing so than I, knowing as I do how a general proposition laid down often hampers judges in dealing with succeeding cases."—*In re Moss, Kingsbury* v. *Walter*, [1899] 2 Ch. 314, at p. 319; 68 L. J. Ch. 598, at p. 601, Romer, L. J.

Convenience of General Rules.

"There hardly exists a general rule out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless, the convenience of having certain fixed rules, which is far above any other consideration, has induced Courts of justice to adopt them, without canvassing every particular inconvenience which ingenuity may suggest as likely to be derived from their application."—*Rex* v. *The Inhabitants of Harringworth* (1815), 4 M. & S. 350, at p. 352, Lord Ellenborough.

Restraint by Rules on Courts of Justice.

"There is no Court in England which is entrusted with the power of administering justice without restraint. That

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restraint has been imposed from the earliest times; and although instances are constantly occurring where the Courts might profitably be employed in doing simple justice between the parties, unrestrained by precedent, or by any technical rule, the law has wisely considered it inconvenient to confer such power upon those whose duty it is to preside in Courts of justice. The proceedings of all Courts must take a defined course and be administered according to a certain uniform system of law, which, in the general result, is more satisfactory than if a more arbitrary jurisdiction was given to them. Such restrictions have prevailed in all civilized countries, and it is probably more advantageous that it should be so, though at the expense of some occasional injustice. The only Court in this country which is not so fettered is the Supreme Court of the legislature."—*Freeman* v. *Tranah* (1852), 12 C. B. 406, at pp. 413, 414; 21 L. J. C. P. 214, at p. 215, Maule, J.

Maxims.

"It is holden for an inconvenience that any of the maxims of the law should be broken, though a private man suffer loss; for that by infringing of a maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all would follow."—*Co. Litt.* 152 *b*.

The law should not be fettered by maxims.

"I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."—*Yarmouth* v. *France* (1887), 19 Q. B. D. 647, at p. 653; 57 L. J. Q. B. 7, at p. 9, Lord Esher, M. R.

Established Rules of Legal Interpretation.

Importance of Established Rules of Legal Interpretation.

"The rules which were to govern the construction of wills, as well as of all other written instruments, were clearly established, and it is impossible to overrate the importance of adhering to them."—*Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68, at pp. 113, 114; 28 L. J. Ch. 110, at p. 114, Lord Wensleydale.

The rules of legal interpretation are far more certain than the rules of grammatical construction.

"The ground upon which the latter view is sustained is chiefly that the rules of grammatical construction require such an interpretation to be put on the Act of Parliament. Grammar may, no doubt, sometimes render assistance to law by helping to the construction, and thereby to the meaning of a sentence: but grammar, with reference to a living, and therefore a variable language, is perhaps more difficult to deal with than law, and the rules of legal construction are far more certain than the rules of grammatical construction. To resort to grammar where law fails is frequently, I think, to decide '*ignotum per ignotius*'; and it is remarkable that on more than one occasion there has been on the bench a difference of opinion, and for each opinion the rule of grammatical meaning and construction has been relied upon. The very case before your Lordships is an example."—*Eastern Counties and London and Blackwall Railway* v. *Marriage* (1860), 9 H. L. C. 32, at p. 62; 31 L. J. Ex. 73, at pp. 85, 86, Pollock, C. B.

Established Rules of Legal Interpretation must be regarded.

"I confess that I am not a great admirer of canons of construction. They were framed with a view to general results, but are sometimes instructive of injustice by leading to results contrary to the intention of the parties; but still, in a case to which they clearly applied, we should hold ourselves bound by them."—*Burchell* v. *Clark* (1876), 2 C. P. D. 88, at p. 93; 46 L. J. C. P. 115, at p. 117, Cockburn, C. J.

"We are bound to have regard to any rules of construction which have been established by the Courts."—*Ralph* v. *Carrick* (1879), 11 Ch. D. 873, at p. 878; 48 L. J. Ch. 801, at p. 804, Cotton, L. J.

Rules of interpretation have in modern times become perfectly well settled, and have become much more limited as regards the powers of the Courts, and are binding on all Courts.

"I should like to say a word or two as to the rules which are binding on all Courts in regard to the construction of statutes as well as of all other instruments. Whatever may have been the case in times past, in modern times those rules have become perfectly well settled. They have become much more limited as

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regards the power of the Courts, and at the same time so well recognised as to be binding on this Court [of Appeal] and all other Courts."—*Ex parte Walton* (1881), 17 Ch. D. 746, at p. 750; 50 L. J. Ch. 657, at p. 658, Jessel, M. R.

Stereotyped rules of juridical writers cannot be accepted as infallible canons.

"Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard-and-fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal."—*Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, at p. 601; 53 L. J. Q. B. 156, at p. 159, Bowen, L. J., delivering the judgment of the Court of Appeal.

"It is to be observed that the rule [of *ejusdem generis*] admits, as every rule of construction of documents must admit, as it is after all but a working canon to enable us to arrive at the meaning of the particular document—it admits of being modified by the contents of the document itself, and there are many classes of cases in which it is obvious the rule would have to bend."—*Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union* (1889), 22 Q. B. D. 555, at pp. 561, 562; 58 L. J. Q. B. 573, at p. 577, Bowen, L. J.

"Rightly or wrongly, certain canons of construction have been acted upon for so long that I think it would be impossible now to disregard them, partly on the ground that it is to be assumed—whether the assumption is well founded or not I do not stop to inquire—that lawyers draw instruments with reference to the known state of the law, and the known state of the law is supposed to include those canons of construction which from time to time have been adopted by the Courts in the construction of wills."—*Kingsbury* v. *Walter*, [1901] A. C. 187, at pp. 188, 189; 70 L. J. Ch. 546, at p. 547, Earl of Halsbury, L. C.

Section II.

RULES APPLICABLE TO ALL INSTRUMENTS.

Definition of the word "Instrument."

An "instrument" seems to embrace contracts, deeds, statutes, wills, Orders in Council, orders, warrants, schemes, letters patent, rules, regulations, bye-laws, whether in writing or in print, or partly in both; in fact, any written or printed document that may have to be interpreted by the Courts.

"An instrument is 'a writing as the means of giving formal expression to some act.'"—*Webster's Dictionary.*

An instrument is "a deed, writ, or other law proceeding reduced into writing."—*Wharton's Law Lexicon.*

"A deed, will, or whatever other instrument may have to be construed by the Court"—*Att.-Gen.* v. *Earl of Powis* (1853), Kay, 186, at p. 207, Sir W. Page Wood, V.-C.

A Statute is an Instrument in Writing.

"I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of

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law act in construing instruments in writing; and a statute is an instrument in writing."—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas 743, at p. 763; 47 L. J. Q. B. 193, at p. 202, Lord Blackburn.

"Any instrument—that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or bye-laws."—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 31.

"The Act [Stamp Act, 1891 (54 & 55 Vict. c. 39)] speaks of the 'instrument.' The provision is not confined to the operative part of the instrument It speaks of the instrument as 'relating to' certain subjects. There is no expression more general or far-reaching than that."—*Inland Revenue Commrs.* v. *Maple & Co. (Paris), Ltd.*, [1908] A. C. 22, at p. 26; 77 L. J. K. B. 55, at p. 59, Lord Macnaghten.

N.B.—The word "instrument" is in this work used synonymously with the word "document" and as including all material substances on which the intentions of men are represented by printing or writing

Duties of Court and Jury.

It is the duty of the jury to ascertain as facts the true meaning of words of art, commercial phrases, and surrounding circumstances, and then to take the interpretation of the instrument from the judge, otherwise the entire interpretation belongs to the judge.

"Judges ought to remember that their office is 'jus dicere' and not 'jus dare'; to interpret law and not to make law."—*Bacon's Essays—Of Judicature.*

"The law I take to be this,—that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was."—*Hutchinson* v. *Boucker* (1839), 5 M. & W. 535, at p. 542, Parke, B.

"The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words of art or phrases used in commerce, and no surrounding circum-

stances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law: for a misconstruction by the Court is the proper subject, by means of a bill of exceptions, of redress in a Court of Error; but a misconstruction by the jury cannot be set right at all effectually."—*Neilson* v. *Harford* (1841), 8 M. & W. 806, p. 823; 11 L. J. Ex. 20, at p. 25, *per cur.*

"My duty is plain. It is to expound and not to make the law—to decide on it as I find it, not as I wish it to be." —*Miller* v. *Salomons* (1852), 7 Exch. 475, at p. 543; 21 L. J. Ex. 161, at p. 190, Alderson, B.

"I apprehend that, in construing an Act of Parliament, a deed, will, or whatever other instrument may have to be construed by the Court, I have a right to look to all the circumstances which the parties to the instrument, whether a testator, a donor, or the Legislature, who are executing a solemn act, had before them at the time, and were themselves contemplating, as proved, not of course, by any extrinsic evidence, but by evidence afforded by the instruments themselves, and also such matters as can be proved by extrinsic evidence to have been the circumstances which surrounded them, and which may have affected the conclusion at which they arrived."—*Att.-Gen.* v. *Earl of Powis* (1853), Kay, 186, at p. 207, Sir W. Page Wood, V.-C.

"Is not the judge bound to know the meaning of all words in the English language, or, if they are used technically or scientifically, *to inform his own mind* by evidence, and then to determine the meaning?"—*Hills* v. *London Gaslight Co.* (1857), 27 L. J. Ex. 60, at p. 63, Martin, B.

"When the meaning of a document depends on facts *dehors* the document, those facts must be first ascertained, and then it is for the judge, no doubt, to determine the meaning."—*Ibid.* at p. 64, Bramwell, B.

"It is no doubt true that the construction of written instruments is matter of law, and that where a written instrument is laid before jurymen they are bound to receive the interpretation of the effect of that instrument from the judge."—*Lyle* v. *Richards* (1866), L. R. 1 H. L. 222, at p. 241; 35 L. J. Q. B. 214, at p. 224, Lord Westbury.

"The office of the judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious."—*River Wear Commissioners* v.

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Adamson (1877), 2 App. Cas. 743, at p. 764; 47 L. J. Q. B. 193, at p. 203, Lord Blackburn.

Evidence of Contents of Instrument.

The contents of a written instrument are to be proved by the instrument itself.

"In their (the judges') judgment (it) is a rule of evidence as old as any part of the common law of England that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence."—*Queen Caroline's Case* (1820), 2 B. & B. 284, at p. 289, Abbott, C. J.

"I have always (perhaps more so than other judges) acted most strictly on the rule that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments; they may be so easily mistaken, that I think the purposes of justice require the strict enforcement of the rule."—*Vincent* v. *Cole* (1828), M. & M. 257, at p. 258, Lord Tenterden, C. J.

Beneficial Construction.

"There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall), that you should rather lean towards that construction which preserves than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense."—*Langston* v. *Langston* (1834), 2 Cl. & Fin. 194, at p. 243, Lord Brougham, L. C.

"It is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat*."—*In re Florence Land and Public Works Co.* (1878), 10 Ch. D. 530, at p. 544; 48 L. J. Ch. 137, at p. 144, James, L. J.

Sense and Meaning, how collected.

The sense and meaning of an instrument should be collected from the terms used therein.

The terms of an instrument are to be understood (in the first place) in their plain, ordinary, and popular sense, (in the second place) in any peculiar sense they may have acquired in trade, &c., (in the third place) in any special and peculiar sense pointed out by the context.

"The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some special and peculiar sense."—*Robertson* v. *French* (1803), 4 East, 130, at p. 135, Lord Ellenborough, delivering the judgment of the Court. [Cited by Lord Tenterden, C. J., in *Hawler* v. *Leathley* (1830), 10 B. & C. 858, at p. 871, and by Erle, C. J., in *Carr* v. *Montefiore* (1864), 5 B. & S. 408, at pp. 428, 429; 33 L. J. Q. B. 256, at p. 258; and quoted with approval by Bowen, L. J., in *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, at pp. 501, 502; 58 L. J. Q. B. 284, at p. 286, and cited by Lord Halsbury in *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, at p. 358; 62 L. J. Q. B. 466, at pp. 469, 470.]

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*; every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done."—*Barlow* v. *Fitzgerald* (1812), 15 East, 530, at p. 541, Lord Ellenborough, C. J.

"The question in this, and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."—*Rickman* v. *Carstairs* (1833), 5 B. & Ad. 651, at p. 663, Lord Denman, C. J.

"It is unquestionable that the object of all expositions of

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written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention; . . . It is not allowable . . . to adduce any evidence, however strong, to prove an unexpressed intention, varying from that which the words used import. This may be open, no doubt, to the remark, that, although we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be more satisfactory in the particular instance to prove it. The answer is, that the interpreters have to deal with the written expression of the writer's intention, and Courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written."—*Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 525, 526; 5 Scott, 958, at pp. 1001, 1002, Coleridge, J.

"I apprehend it is a sovereign rule in the construction of all written documents to give effect to the intention of the parties as expressed in the instrument itself, and to give effect, if possible, to every word, or at all events to every provision."—*Hague* v. *Cummins* (1864), 16 C. B. N. S. 421, at p. 427, Byles, J.

"We have been referred to a passage in Cicero, which is said to give the rule for construing an English statute. To my mind, to quote Cicero for such a purpose is too ambitious. I am disposed to follow the rule of construction which was laid down by Lord Denman and Baron Parke, and that is quite far enough for me to go back. They said that in construing instruments you must have regard not to the presumed intention of the parties, but to the meaning of the words which they have used."—*Ex parte Chick, In re Meredith* (1879), 11 Ch. D. 731, at pp. 738, 739, Brett, L. J.

"It is to be remembered that what the Courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626, at p. 628, Lord Halsbury, L. C.

"For myself, I am prepared to look at the instrument such as it is; to see the language that is used in it; to look at the whole of the document, and not to part of it; and having looked at the whole of the document, to see (if I can) through the instrument what was the mind of the testator. Those are general principles

for the construction of all instruments—and to that extent it may be said that they are canons of construction"—*In re Jodrell* (1890), 44 Ch. D. 590, at p. 605; 59 L. J. Ch. 538, at p. 542, Lord Halsbury, L. C.

Primary Meaning.

The primary meaning of the words must be taken, conclusively, to be that in which the writer used it and conclusively to state the writer's intention.

"I believe the authorities to be numerous and clear (too numerous and clear to make it convenient or necessary to cite them) that where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it; such meaning, in that case, conclusively states the writer's intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations: the first, that if the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning; the second, that by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable is what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning."

"In proportion as we are removed from the period in which an author writes, we become less certain of the meaning of the words he uses; we are not sure that at that period the primary meaning of the words was the same as now, for by the primary is not meant the etymological, but that which the ordinary usage of society affixes to it. We are also equally uncertain whether at that period the words did not bear a technical or conventional sense, and whether they were not so used by the writer."—*Shore* v. *Wilson* (1840), 9 Cl. & F. 355, at pp. 525—527; 5 Scott, 958, at pp. 1001—1003, Coleridge, J.

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"In my view, the principle upon which words are to be construed in instruments is very plain. Where there is a popular and common word used in an instrument, that word must be construed *primâ facie* in its popular and common sense. If it is a word of a technical or legal character it must be construed according to its technical or legal meaning. If it is a word which is of a technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word you must satisfy the Court, from the instrument itself, or from the circumstances of the case, that the word ought to be construed, not in its popular or primary signification, but according to its secondary intention."—*Holt & Co.* v. *Collyer* (1881), 16 Ch. D. 718, at p. 720; 50 L. J. Ch. 311, at p. 312, Fry, J.

"Doubtless there are cases in which, when in the instrument itself, whether a will or a contract or a statute, evidences may be discovered of the general intention of the framer and of the general meaning, or what has been called the governing sense, in which the words or the provisions are to be understood, you may occasionally modify the language which you have to construe with reference to that general intention which has been so ascertained."—*Vestry of St. John, Hampstead* v. *Cotton* (1886), 12 App. Cas. 1, at p. 6; 56 L. J. Q. B. 225, at p. 226, Lord Halsbury, L. C.

"The Wills Act in terms says that a devise of real estate shall be construed in a certain way, unless the contrary intention appears. That, of course, must be a question of what is the intention as exhibited by the written words, looking at the whole instrument together, which is a principle which, I take it, is not confined in that respect to wills, but applies to any other instrument whatever whereby people signify their intentions."—*Crampe* v. *Crampe*, [1900] A. C. 127, at p. 130; 69 L. J. P. C. 7, at p. 9, Earl of Halsbury, L.C.

"It is therefore a question of construction in each case, to which the ordinary rules of construction apply, namely, that words must bear their ordinary primary meaning unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, show that the secondary meaning expresses the real intention of the parties, or unless the words are used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning *quoad hoc*.

This is a question of fact which (unless so often proved as to be judicially recognised) has to be proved by evidence."—*Brown* v. *Moore*, [1904] 1 Ch. 305, at p. 310; 73 L. J. Ch. 377, at p. 379, Farwell, J.

General Words.

Generalia verba sunt generaliter intelligenda.—3 Inst. cap. 21, p. 76.

General words are primâ facie *to be taken in their usual sense.*

General words are limited by the object and intent of the instrument as ascertained from the instrument itself.

"Our decision depends, as it appears to me, upon an ancient and well-established principle of construction, of which *Leduc* v. *Ward* (1888), 20 Q. B. D. 475; 57 L. J. Q. B. 379, is one of the most recent illustrations. I think that principle of construction is not confined to this class of documents [Bills of lading], but is applicable to all documents. This principle is applicable wherever specific words are used to express the main object and intent of the instrument, and in some other parts general words are used which in their utmost generality would be inconsistent with and destructive of the main object of the contract. When the Court in dealing with a contract or document of any kind finds that difficulty it always, so far as I know, follows this principle, that the general words must be limited so that they shall be consistent with, and shall not defeat the main object of the contracting parties."—*Margetson* v. *Glynn*, [1892] 1 Q. B. 337, at p. 344; 61 L. J. Q. B. 186, at p. 190, Fry, L. J.

Ejusdem Generis Doctrine.

General words following specific words are primâ facie *to be taken in their usual sense, unless the reasonable construction of the instrument requires them to be used in a sense limited to things* ejusdem generis *with those which have been specifically mentioned before.*

"Two rules of construction now firmly established as part of our law may be considered as limiting those words" ["losses and misfortunes"]. "One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the

same genus as the specific words that precede them."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626, at p. 628, Lord Halsbury, L.C.

"I will take first the rule as stated by Lord Eldon in *Church* v. *Mundy* [(1808), 15 Ves. 396, 406]. He said 'the best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary.' [Cited by Knight-Bruce, V.-C., in *Midland Counties Ry. Co.* v. *Oscin* (1844), 1 Coll. 74, at p. 79; 13 L. J. Ch. 209, at p. 210.] That is, as I understand him, *primâ facie* you are to give the words their larger meaning, unless you find something which plainly shows that they were intended to be read in a more restricted sense.

"Then again, Knight-Bruce, V.-C., in *Parker* v. *Marchant* [(1842), 1 Y. & C. 290, at p. 300; 11 L. J. Ch. 223, at p. 226], said: 'The words "goods, chattels, and effects" which the Legatee contended to be residuary contains, or any of them, are terms that, in their proper sense and nature, are sufficiently large to include and pass the absolute interest in the whole personal estate. But a will may be so worded as to show that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense: and when this appears, the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction to show that a rational interpretation of the will requires a departure from that which ordinarily and *primâ facie* is the sense and meaning of the words.'

"Nothing can well be plainer than that to show that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before. . . . I entirely adopt the canon of construction which was laid down by Knight-Bruce, V.-C., in *Parker* v. *Marchant* [(1842), 1 Y. & C. 290, at p. 300; 11 L. J. Ch. 223, at p. 226], and I reject the supposed rule that general words are *primâ facie* to be taken in a restricted sense."—*Anderson* v. *Anderson*, [1895] 1 Q. B. 749, at pp. 753, 754; 64 L. J. Q. B. 457, at p. 459, Lord Esher, M. R.

"The doctrine known as that of *ejusdem generis* has, I think,

frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words in themselves plain have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of the doctrine; but the doctrine itself, as laid down by great judges from time to time, has never been varied; it has been one doctrine throughout. The main principle upon which you must proceed is to give all the words their common meaning; you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning; and the mere fact that general words follow specific words is certainly not enough. One need not travel beyond the case of *Parker* v. *Marchant* [*supra*] to find great authority for that proposition—I mean not only the authority of the case itself, which is deservedly high, but other authorities which are cited in it. Lord Eldon, Lord Cottenham, Sir William Grant, Sir John Leach, and Knight-Bruce, V.-C., himself, all lay down the rule to the effect I have stated. You must give the words which you find in the instrument their general meaning, unless you can see with reasonable plainness that that was not the intention of the testator or settlor. We must look at the surroundings."—*Anderson* v. *Anderson*, [1895] 1 Q. B. 749, at p. 755; 64 L. J. Q. B. 457, at p. 459, Rigby, L. J.

"I am quite aware that there have been cases, such as *Anderson* v. *Anderson*, [1895] 1 Q. B. 749 (to which I drew attention during the argument), where the Court has protested against pushing the doctrine of *ejusdem generis* too far. It is very often pushed too far."—*In re Stockport Ragged Industrial and Reformation Schools*, [1898] 2 Ch. 687, at p. 696; 68 L. J. Ch. 41, at p. 44, Lindley, M. R.

If the particular words exhaust the whole genus, *the general words refer to some larger* genus.

"That case [*Reg.* v. *Payne* (1866), L. R. 1 C. C. 27; 35 L. J. M. C. 170] falls within the rule that if the particular words exhaust the whole *genus*, the general word must refer to some

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larger *genus*."—*Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at p. 315; 37 L. J. C. P. 78, at p. 80, Willes, J.

General Words and Special Provisions.

"It is, I think, a rule of construction that general words in a document do not defeat an earlier special provision as to the same subject-matter—both must, if possible, be read together, so as to make the whole document consistent."—*James Nelson & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.* (No. 2), [1907] 1 K. B. 769, at p. 780; 76 L. J. K. B. 411, at p. 417, Cozens-Hardy, L. J.

Compare general and special provisions in statutes, *post*, p. 374.

Relative Words.

Relative and Last Antecedent.

"*Semper proximo antecedente refertur.*"—Co. Litt. 30 b.

"*Ad proximum antecedens fiat relatio, nisi impediatur sententia.*"—Noy, Maxims, 9th ed., p. 4.

Words of reference are in general referred to that to which the context appears properly to attract it—to the last sensible antecedent.

"It is true that, in strict grammatical construction, the relative ought to apply to the last antecedent; but there are numerous examples in the best writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification. Suppose, for example, this phrase: 'If there be any powers or provisions of an Act of Parliament of which the corporation are sole commissioners for executing.' Is it not obvious here that the relative 'which' refers to the 'powers and provisions,' and not to the 'Act of Parliament'?"—*Staniland* v. *Hopkins* (1841), 9 M. & W. 178, at pp. 192, 193; 11 L. J. Ex. 65, at p. 71, Lord Abinger, C. B.

"It is an ordinary rule, not so much of law as of the grammatical construction of the English language, that words of relation *primâ facie* refer to the nearest antecedent."—*Eastern Counties and London & Blackwall Railway* v. *Marriage* (1860), 9 H. L. Cas. 32, at p. 37; 31 L. J. Ex. 73, at p. 75, Blackburn, J.

"It could not be denied that 'such' is in general a word of reference, relating to the last sensible antecedent, according to the

rule by which words of reference are in general referred to the last sensible antecedent—a rule not depending on any nice technical distinction between such expressions as '*idem*' and '*prædictus*,' but a general rule of construing writings in the ordinary affairs of life."—*Ibid.*, at p. 54, L. J., at p. 82, Crompton, J.

"Lord Coke says (Co. Litt. 30 b), '*Semper proximo antecedente refertur.*' At the same time it must be admitted that every relative ought to be referred, not perhaps to the next antecedent 'which will make sense with the context,' but to that to which the context appears properly to attract it."—*Ibid.*, at p. 74; L. J., at p. 90, Lord Chelmsford.

"It must on all hands be admitted that, both in writing and speaking, the antecedent really referred to is often to be made out by the good sense of the hearer or reader rather than by the position of a word in the sentence: frequently the actual last antecedent would make nonsense; and it seems conceded you must then go back to some other antecedent, and a curious question may be raised as to the degree of absurdity and injustice which may be tolerated before referring back to an earlier antecedent. The *judicial* exposition of any document ought to be the *reasonable* one, and not emphatically the grammatical one."—*Ibid.*, at p. 64; L. J., at p. 86, Pollock, C. B.

"*Primâ facie*, no doubt the words would apply to the antecedent next before them; but we may look at the rest of the deed, and if necessary apply the words, not to the antecedent next before them, but to the one next before that. This view of the construction to be put on a deed is supported by the decision in the House of Lords in *The Eastern Counties and London & Blackwall Ry. Co.* v. *Marriage* (1860), 9 H. L. C. 32; 31 L. J. Ex. 73."—*Tetley* v. *Wanless* (1866), L. R. 2 Ex. 21, at p. 29; 36 L. J. Ex. 25, at p. 29, Channell, B.

Particular Words.

— *The meaning of particular words is to be found in the subject or occasion on which they are used, and the object that is intended to be obtained.*

"The meaning of particular words in Acts of Parliament, as well as other instruments, is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object

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that is intended to be obtained."—*Rex* v. *Hall* (1822), 1 B. & C. 123, at p. 136, Abbott, C. J., delivering the judgment of the Court.

"In the construction of all instruments it is the duty of the Court not to confine itself to the force of particular expressions, but to collect the intention from the whole instrument taken together."—*Hume* v. *Randell* (1824), 2 S. & S. 174, at p. 177, Sir John Leach, V.-C.

See also Comyn's Digest, Vol. V., "Parols."
Jacob's Law Dictionary.
Kelham's Norman Law Dictionary.
Stroud's Judicial Dictionary.
Wharton's Law Lexicon.

Technical Words or Peculiar Terms.

"In the first place there is no doubt that, not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or, indeed, any expressions are used which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. The authorities in support of this position are: *Att.-Gen.* v. *The Plate Glass Co.* (1787), 1 Anstr. 39; *Goblett* v. *Beechy* (1829), 3 Sim. 24; *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; *Richardson* v. *Watson* (1833), 4 B. & Ad. 787; and *Clayton* v. *Gregson* (1836), 5 Ad. & E. 302. This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate."—*Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 555, 556; 5 Scott, 958, at pp. 1028, 1029, Parke, B.

"The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and

meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or judge to construe the instrument, and to carry such real meaning into effect."—*Ibid.*, at pp. 566, 567; 5 Scott, 958, at pp. 1037, 1038, Tindal, C. J.

"In construing all writings it is a general rule that we are to understand the words in their technical sense, if they have acquired one, or if not, in their ordinary sense, unless there be something to show that they are used in some secondary sense."—*The Queen* v. *Castro* (1874), L. R. 9 Q. B. 350, at p. 360; 43 L. J. Q. B. 105, at p. 110, Blackburn, J., delivering the judgment of the Court (Cockburn, C. J., Blackburn, Lush, and Quain, JJ.).

Same Words in different Parts.

The same words in different parts of an instrument should be given the same meaning.

"It is a well-settled rule of construction, and one to which, from its soundness, I shall strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary."—*Ridgeway* v. *Munkittrick* (1841), 1 Dr. & War. 84, at p. 93, Sir E. B. Sugden, C.

"I do not know whether it is law, or a canon of construction.

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but it is good sense to say whenever in a deed, or will, or other document, you find that a word in one part has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear."—*In re Birks, Kenyon* v. *Birks*, [1900] 1 Ch. 417, at p. 418; 69 L. J. Ch. 124, at p. 125, Lindley, M. R.

Insensible Words and Phrases.

A word or a phrase in an instrument to which no sensible meaning can be given must be eliminated.

"We have no power, indeed, to alter the words or to insert words which are not in the deed, but we may, and ought to, construe the words in a manner most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. These maxims, my Lords, are founded on the greatest authority, Coke, Plowden, and Lord Chief Justice Hale."—*Smith* v. *Packhurst* (1741-2), 3 Atk. 135, at p. 136, Willes, C. J.

"The ordinary rule of interpretation requires that construction, which attributes some meaning to words, rather than totally to reject them as surplusage."—*Stratford* v. *Bosworth* (1813), 2 Ves. & Bea. 341, at p. 347, Sir Thomas Plumer, V.-C.

"It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated."—*Stone* v. *Corporation of Yeovil* (1876), 1 C. P. D. 691, at p. 701; 45 L. J. C. P. 657, at pp. 660, 661, Brett, J.

"It appears to me to be true with regard to a bill of lading, as with regard to any other legal document, that where there are several clauses, as far as possible they must be construed consistently with one another, and one of them ought not to be treated as surplusage, and rejected, unless it is impossible to read it with other clauses."—*Borthwick* v. *Elderslie Steamship Co.*, [1904] 1 K. B. 319, at p. 324; 73 L. J. K. B. 240, at p. 243, Lord Alverstone, C. J.

Supplying anything necessarily to be inferred from the terms used.

"The result of all the authorities is, that when a Court of law can clearly collect from the language within the four corners of a

deed or instrument in writing the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intentions so discerned." —*Guyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209, at p. 215; 37 L. J. Ex. 122, at p. 126, Kelly, C. B.

"One rule of construction which must prevail is that you must give effect to every part of a document if you can; you must read it as a whole."—*Elderslie Steamship Co.* v. *Borthwick*, [1905] A. C. 93, at p. 96; 74 L. J. K. B. 338, at p. 340, Earl of Halsbury, L. C.

Subject-Matter.

"Whenever you have to construe a statute or document, you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule."—*Lion Insurance Association* v. *Tucker* (1883), 12 Q. B. D. 176, at p. 186; 53 L. J. Q. B. 185, at p. 189, Brett, M. R.

"Words, however general, may be limited with respect to the subject-matter in relation to which they are used."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626, at p. 628, Lord Halsbury, L. C.

Circumstances and Object.

— *The purpose of interpreting an instrument is to see what is the intention expressed by the words used.*

— *If from the imperfection of language it is impossible to know what the intention is without inquiring further, then see what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.*

"I apprehend that, in construing an Act of Parliament, a deed, will, or whatever other instrument may have to be construed by the Court, I have a right to look to all the circumstances which the parties to the instrument, whether a testator, a donor, or the

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legislature, who are executing a solemn act, had before them at the time, and were themselves contemplating, as proved, not of course by any extrinsic evidence, but by evidence afforded by the instruments themselves, and also such matters as can be proved by extrinsic evidence to have been the circumstances which surrounded them, and which may have affected the conclusion at which they arrived."—*Att.-Gen.* v. *Earl of Powis* (1853), Kay, 186, at p. 207, Sir W. Page Wood, V.-C.

"The principles of construction of statutes laid down by this House in the present case, must have an important effect on those who have to construe that [the Harbour, Docks, and Piers Clauses Act, 1847 (10 Vict. c. 27)], or any other enactment. My Lords, it is of great importance that those principles should be ascertained, and I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing, and a statute is an instrument in writing. In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used. I do not know that I can make my meaning plainer than by referring to the old rules of pleading as to innuendoes in cases of defamation. Those rules, though highly technical, were very logical. No innuendo could enlarge the sense of the words beyond that which they *primâ facie* bore, unless it was supported by an inducement or preliminary averment of facts, and an averment that the libel was published, or the words spoken, of and concerning those facts, and of and concerning the plaintiff as connected with those facts. If those preliminary averments were proved, words which *primâ facie* bore a very innocent meaning might be shown to convey a very injurious one, and it was for the Court to say whether, when used of and concerning the inducement, they bore the meaning imputed by the innuendo. See the notes to *Craft* v. *Boite* (1681) [1 Wms. Saund. 246b]. The legislature has rendered it no longer necessary to set out on the record the facts, and the *colloquium* necessary to support an innuendo: they are now only matter of proof on the trial, but the principle remains.

"In construing written instruments I think the same principle applies. In the cases of wills the testator is speaking of and concerning all his affairs, and, therefore, evidence is admissible to show all that he knew, and then the Court has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family.

"In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words; see *Graves* v. *Legg* [(1854), 9 Ex. 709; 23 L. J. Ex. 228].

"In neither case does the Court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is.

"And this, as applied to the construction of statutes, is no new doctrine. As long ago as *Heydon's Case* [(1584), 2 Coke, p. 18, Part III., 7b] Lord Coke says, that it was resolved 'That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law) four things are to be discerned and considered:—

'First. What was the Common Law before the making of the Act?

'Second. What was the mischief and defect for which the Common Law did not provide?

'Third. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? and

'Fourth. The true reason of the remedy;

and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy.'

"But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the Court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right."—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763; 47 L. J. Q. B. 193, at pp. 202, 203, Lord Blackburn.

"The Court has a right to know, and is bound to know, all the material facts which were known to the parties at the time when

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the agreement, deed, will, or whatever it may be, was entered into or made. That is legitimate in all cases for the purpose of construing a written instrument."—*Hart* v. *Hart* (1881), 18 Ch. D. 670, at p. 693; 50 L. J. Ch. 697, at p. 705, Kay, J.

"The principles of the rules by which the true construction of written instruments are [*sic*] to be arrived at are neither difficult nor doubtful. Plain words must have their plain meanings, and none other can be justly or safely assigned to them. If any doubt arises as to the true intent and meaning of the words employed, it is essentially requisite that the subject to which the words relate should be distinctly understood; and to this end it may at all times be convenient, and in some cases necessary, to have regard to the circumstances attending and relating to the subject, to the interests comprised in it, to the parties to it, and most especially to its avowed, expressed, and, of necessity implied, objects."—*London Financial Association* v. *Kelk* (1884), 26 Ch. D. 107, at pp. 133, 134; 53 L. J. Ch. 1025, at p. 1035, Bacon, V.-C.

"The observations of very learned judges have been quoted to show that you must read all the words in every instrument with reference to the circumstances under which they are uttered or written. In one sense that is quite true. It is quite true that, where you are finding out persons or things—who are the persons designated by the will, what are the things left by the will—you may find either the person or the thing by proper external evidence of what is referred to."—*Higgins* v. *Dawson*, [1902] A. C. 1, at p. 5; 71 L. J. Ch. 132, at p. 135, Earl of Halsbury, L. C.

Lord Wensleydale's Golden Rule.

The Grammatical and Ordinary Sense not modified unless to avoid absurdity, repugnance, and inconsistency.

In interpreting all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, and no further.

"The great cardinal rule is that which is pointed out by Mr. Justice Burton, viz., to adhere as closely as possible to the literal meaning of the words. When once you depart from that canon of construction, you are launched into a sea of difficulties

which it is difficult to fathom."—*Gandey* v. *Pinniger* (1852), 1 D. G. M & G. 502, at p. 505; 21 L. J. Ch. 405, at p. 406, Lord Cranworth, L. J.

"It must, however, be conceded that where the grammatical construction is quite clear and manifest, and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition, that however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document (and the same rule applies in the construction not only of an Act of Parliament, but of deeds, wills, and of any subject of a like nature) that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it."—*Waugh* v. *Middleton* (1853), 8 Ex. 352, at p. 357; 22 L. J. Ex. 109, at p. 111, Pollock, C. B.

"I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of law in *Westminster Hall*, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. This is laid down by Mr. Justice Burton, in a very excellent opinion, which is to be found in the case of *Warburton* v. *Loveland* (1828), 1 Hud. & B. (Ir.) 623, at p. 648."—*Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, at p. 106; 26 L. J. Ch. 473, at p. 481, Lord Wensleydale.

"I entirely agree that to the words in this will we must apply the rule of construction, now, I believe, universally applied in Westminster Hall, that in construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance, or to some inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance, or inconsistency, but no farther. *Warburton* v. *Loveland* [(1828), 1 Hudson & B. Irish Cas. 623, at p. 648, Burton, J.]."—*Thellusson* v. *Rendlesham*

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(1859), 7 H. L. Cas. 429, at p. 519; 28 L. J. Ch. 948, at p. 966, Lord Wensleydale.

"Now, in construing instruments, I have always followed the rule laid down by the House of Lords in *Grey* v. *Pearson* [(1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473), which is to construe the instrument according to the literal import, unless there is something in the subject or context which shows that that cannot be the meaning of the words."—*Lowther* v. *Bentinck* (1874), L. R. 19 Eq. 166, at p. 169; 44 L. J. Ch. 197, at p. 198, Jessel, M. R.

"There is always some presumption in favour of the more simple and literal interpretation of the words of a statute or other written instrument."—*Caledonian Rail. Co.* v. *North British Rail. Co.* (1881), 6 App. Cas. 114, at p. 121, Lord Selborne, L. C.

"Now, I believe there is not much doubt about the general principle. Lord Wensleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it, very clearly and accurately, in *Grey* v. *Pearson* [(1857), 6 H. L. C. 61, at p. 106; 26 L. J. Ch. 473, at p. 481] in the following terms: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.' I agree in that completely, but unfortunately in the cases in which there is real difficulty it does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with reference to the subject-matter, is. To one mind it may appear that the most that can be said is that the sense may be what is contended by the one side, and that the inconsistency and repugnancy is very great, that you should make a great stretch to avoid such absurdity, and that what is required to avoid it is a very little stretch, or none at all. To another mind it may appear that the meaning of the words is perfectly clear—that they can bear no other meaning at all, and that to substitute any other meaning would be, not to interpret the words used, but to make an instrument for the parties—and

that the supposed inconsistency or repugnancy is perhaps a hardship—a thing which perhaps it would have been wiser to have avoided, but which we have no power to deal with. The present case is about as good an illustration of that as can very well be."—*Caledonian Rail. Co.* v. *North British Rail. Co.* (1881), 6 App. Cas. 114, at p. 131, Lord Blackburn. (Referred to in *Ex parte Walton* (1881), 17 Ch. D. 746, at pp. 750, 751; 50 L. J. Ch. 657, at p. 659, Jessel, M. R., and in *Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, at pp. 148, 149, Chitty, J.)

"I have often heard Lord Wensleydale lay down that rule, which he quoted from a judgment of Burton, J., in Ireland [*Warburton* v. *Loveland* (1828), 1 Huds. & Br. 623, at p. 648], and I am now content to take it as a good rule, though I heard Crompton, J., say, in reference to it, that he did not set any value upon any golden rule—that they were all calculated to mislead people; and I am not sure that this will not result from what is put at the end of what I have just read, namely, that you are to abide by the grammatical and ordinary sense of the words unless that would lead to some absurdity. That last sentence opens a very wide door. I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another."—*Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, at pp. 464, 465; 53 L. J. Ch. 842, at p. 848, Lord Bramwell.

"One general rule as to the construction of any instrument is that one should give words their ordinary meaning in the English language, and should neither add to nor take anything away from such words unless one be obliged to do so; and another rule is, that unless obliged, one should not construe an instrument in such a way that one part would contradict the other part."—*In re Bedson's Trusts* (1885), 28 Ch. D. 523, at p. 525; 54 L. J. Ch. 644, at p. 646, Brett, M. R.

"If the literal construction leads to an absurdity, repugnancy, or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result."—*Diederichsen* v. *Farquharson Brothers*, [1898] 1 Q. B. 150, at p. 159; 67 L. J. Q. B. 103, at p. 109, Rigby, L. J.

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Context—Noscitur a Sociis.

"I remember that in determining that question, the Court considered the rule adopted by Lord Hale *noscitur a sociis*, which was no pedantic or inconsiderate expression when falling from him, but was intended to convey in short terms the grounds upon which he formed his judgment."—*Hay* v. *Earl of Coventry* (1789), 3 T. R. 83, at p. 87, Lord Kenyon, C. J.

"Again, there is no doubt a rule, applicable to Acts of Parliament as well as to other legal instruments, that you may control the plainest words by a reference to the context. But then, as has been said very often, you must have the context even more plain, or at least as plain—it comes to the same thing—as the words to be controlled."—*Beattey* v. *Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588, at p. 592; 46 L. J. Ch. 286, Jessel, M. R.

Expressio Unius est Exclusio Alterius.

Designatio unius est exclusio alterius.—Co. Litt. 210 a.
Expressum facit cessare tacitum.—Co. Litt. 183 b; 210 a.

"Mr. Justice Fancett in his judgment in this case quotes the following passage from Mr. Justice Hargrave's judgment in *Drinkwater* v. *Arthur* (1879), 10 Supreme Court, N.S.W. 103:—'If there be any one rule of law clearer than another as to the construction of all statutes and all written instruments (as, for example, sales under powers in deeds and wills), it is this: that where the legislature or the parties to any instrument have expressly authorized one or more particular modes of sale or other dealing with property, such expressions always exclude any other mode, except as specifically authorized.' That appears to their Lordships to be a correct exposition of the law, and it is substantially carrying out a principle similar to that expressed in the maxim *Expressio unius est exclusio alterius*."—*Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628, at pp. 634, 635; 50 L. J. P. C. 58, at p. 62, Sir Barnes Peacock delivering the judgment of the Judicial Committee.

"Acts of Parliament are not, in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical. The generality of the maxim '*Expressum facit cessare tacitum*,' which was relied on, renders caution necessary in its

application. It is not enough that the express and the tacit are merely incongruous; it must be clear that they cannot reasonably be intended to co-exist. In *Colquhoun* v. *Brooks* (1887), 19 Q. B. D. 400, at p. 406; 57 L. J. Q. B. 70, at p. 73, Wills, J., says: 'I may observe that the method of construction summarised in the maxim "*Expressio unius exclusio alterius*" is one that certainly requires to be watched. . . . The failure to make the "*expressio*" complete very often arises from accident, very often from the fact that it never struck the draughtsman that the thing supposed to be excluded needed specific mention of any kind.' Lopes, L. J., in the Court of Appeal (1888), 21 Q. B. D. 52, at p. 65; 57 L. J. Q. B. 439, at p. 446, says: 'The maxim "*Expressio unius exclusio alterius*" has been pressed upon us. I agree with what is said in the Court below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'"—*Lowe* v. *Dorling & Son*, [1906] 2 K. B. 772, at pp. 784, 785; 75 L. J. K. B. 1019, at p. 1026, Farwell, L. J.

Writing and Print.

"It is properly laid down in 2 Taylor on Evidence, 4th ed., p. 960, on the authority of Lord Ellenborough [in *Robertson* v. *French* (1803), 4 E. 130, at p. 136], 'If the instrument consists partly of a printed formula and partly of written words, and any reasonable doubt is felt as to the meaning of the whole, the *written words* are entitled to have *greater effect* in the interpretation than those which are printed.'"—*Gunn* v. *Tyrie* (1864), 4 B. & S. 680, at p. 707; 33 L. J. Q. B. 97, at p. 108, Crompton, J.

Capricious Intention.

Where by the use of general words the intention is clearly and unequivocally expressed, the Court is bound by it, however capricious it may be, unless it be plainly controlled by other parts of the instrument.

"In the construction of all instruments it is the duty of the Court not to confine itself to the force of particular expressions, but

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to collect the intention from the whole instrument taken together. But a Court is not authorized to deviate from the force of a particular expression, unless it finds, in other parts of the instrument, expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every Court is bound by it unless it be plainly controlled by other parts of the instrument."—*Hume* v. *Randell* (1824), 2 S. & S. 174, at p. 177, Sir John Leach, V.-C.

Date.

Primâ facie *an instrument was written at the time it bears date.*

"I think that case [*Potey* v. *Glossop* (1848), 2 Ex. 191] is well decided, and we must therefore suppose that *primâ facie* a document is written at the time when it bears date."—*Matpas* v. *Clements* (1850), 19 L. J. Q. B. 435, at p. 437, Lord Campbell, C. J. (cited by Martin, B., in *Morgan* v. *Whitmore* (1851), 6 Ex. 716, at p. 719; 20 L. J. Ex. 289, at p. 290).

Evidence may be admitted to show that an instrument is wrongly dated.

"The cases cited include instruments of almost every class, and there is the statement of a careful text writer [Tay. Ev.] to the same effect. In *Hall* v. *Cazenove* [(1804), 4 East, 477], evidence was admitted that a charter-party was wrongly dated; and in *Jayne* v. *Hughes* [(1854), 10 Ex. 430; 24 L. J. Ex. 157], evidence was admitted to show that a deed (a more solemn instrument if possible even than a will) was wrongly dated. Then comes the case in the House of Lords [*Randfield* v. *Randfield* (1860), 6 Jur. N. S. 901; 30 L. J. Ch. 177], where parol evidence was admitted, apparently without a question being raised, showing that a will purporting on the face of it to be executed before the passing of the Wills Act was actually executed after the Act came into operation."—*Refell* v. *Refell* (1866), L. R. 1 P. & M. 139, at p. 142; 35 L. J. P. 121, at p. 122, Sir J. P. Wilde.

Time.

From and after the 31st December, 1751, the year begins on the 1st January, instead of the 25th March.

The Calendar (New Style) Act, 1750, 24 Geo. II. c. 23.

"Whereas the legal supputation of the year of our Lord in that part of Great Britain called England according to which the year beginneth on the 25th day of March hath been found by experience to be attended with divers inconveniences, ... be it enacted . . . . that in and throughout all his Majesty's dominions and countries in Europe, Asia, Africa and America, belonging or subject to the crown of Great Britain, the said supputation, according to which the year of our Lord beginneth on the 25th day of March, shall not be made use of from and after the last day of December, 1751, and that the 1st day of January next following the said last day of December shall be reckoned, taken, deemed, and accounted to be the first of the year of our Lord 1752; and the 1st day of January which shall happen next after the said 1st day of January, 1752, shall be reckoned, taken, deemed, and accounted to be the 1st day of the year of our Lord 1753; and so on from time to time the 1st day of January in every year which shall happen in time to come shall be reckoned, taken, deemed, and accounted to be the first day of the year, and that each new year shall accordingly commence and begin to be reckoned from the first day of every such month of January next preceding the 25th day of March on which such year would according to the present supputation have begun or commenced."

Time referred to shall in the case of Great Britain, be Greenwich, and in the case of Ireland, Dublin mean time.

Statutes (Definition of Time) Act, 1880, 43 & 44 Vict. c. 9 (2nd August, 1880).

Sect. 1. "Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred (*sic*) (? to) shall, unless it is otherwise specifically stated, be held, in the case of Great Britain, to be Greenwich mean time, and in the case of Ireland, Dublin mean time."

(As to "expression of time," see *Gordon* v. *Cann* (1899), 68 L. J. Q. B. 434.)

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Rational Mode of Computation.

Where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded.

"The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date."—*Russell* v. *Ledsam* (1845), 14 M. & W. 574, at p. 582; 14 L. J. Ex. 353, at p. 354, Parke, B.

"No general rule exists for the computation of time either under the Bankruptcy Act or any other statute, or, indeed, where time is mentioned in a contract, and the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made."—*In re North, Ex parte Hasluck*, [1895] 2 Q. B. 264, at p. 269; 64 L. J. Q. B. 694, at p. 696, Lord Esher, M. R.

"In the reckoning of time each case must depend on its own circumstances and subject-matter, and for this I need only refer to the judgment of Sir William Grant in *Lester* v. *Garland* [(1808), 15 Ves. 248], to that of Kelly, C. B., in *Isaacs* v. *Royal Insurance Co.* [(1870), L. R. 5 Ex. 296, at p. 300; 39 L. J. Ex. 189, at p. 191], and of Chitty, J., in *In re Railway Sleepers Supply Co.* [(1885), 29 Ch. D. 204; 54 L. J. Ch. 720]."—*Ibid.*, at p. 272; L. J. at p. 697, A. L. Smith, L. J.

"The true principle that governs this case is that indicated in the report of *Lester* v. *Garland* (1808), 15 Ves. 248, at p. 257, where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event, the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Parke, B., in *Russell* v. *Ledsam* (1845), 14 M. & W. 574, at p. 582; 14 L. J. Ex. 353, at p. 354, and by other judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded."—*Goldsmiths' Co.* v. *West Metropolitan Railway*, [1904] 1 K. B. 1, at p. 5; 72 L. J. K. B 931, at p. 933, Mathew, L. J.

Decisions.

"Where there has been an exposition of the law by judicial decision, or a settled course of practice or understanding of the law

among legal practitioners, the language of an instrument may in certain cases be interpreted according to such a standard."—*Feather* v. *The Queen* (1865), 6 B. & S. 257, at pp. 290, 291; 35 L. J. Q. B. 200, at p. 207, Cockburn, C. J.

"Cases on the construction of other Acts or instruments generally give very little help to the Court, but if there is any principle laid down by them we ought not to disregard them in considering a different Act or instrument."—*Reid* v. *Reid* (1886), 31 Ch. D. 402, at p. 405; 55 L. J. Ch. 294, at p. 296, Cotton, L. J.

"There is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what Courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626, at p. 628, Lord Halsbury, L. C.

(See also "Decisions," *ante*, Sect. II., p. 13.)

Latent and Patent Ambiguities—Extrinsic Evidence.

Ambiguitas verborum patens nullâ verificatione excluditur.—5 Co. 26 a; Loft's Reports, ed. 1776, Maxims No. 249.

Ambiguitas verbarum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.—Bac. Max. reg. 25. (Spedding & Heath's Lord Bacon's Works, vol. 7, p. 385.)

"There be two sorts of ambiguities of words; the one is *ambiguitas patens*, and the other is *ambiguitas latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed."—*Bacon's Law Tracts*, 99, 100.

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"The general rule I take to be, that where the words of any instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled and the clearest title undermined, if at some future period parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself."—*Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 565, 566; 5 Scott, 958, at p. 1037, Tindal, C. J.

"A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only, if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the Court which is called upon to explain them may be ignorant of the particular fact, art, or science, which was familiar to the persons who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used."—*Vice-Chancellor Wigram, Extrinsic Evidence in the Interpretation of Wills*, ss. 200, 201, 4th ed. (1858).

"If there be, as I think there is here, an ambiguity which is not latent but patent, according to the old distinction, that is not a matter to be solved by evidence as to the meaning of the parties—in a case, that is, where there could be parties—it is to be solved by the Court as a matter of construction."—*Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, [1896] 1 Q. B. 222, at p. 227; 65 L. J. Q. B. 253, at p. 257, Wright, J.

(See also "Contracts," *post*, and "Wills," *post*.)

Incorporating Clauses.

"This must be decided in accordance with the general principles of interpretation, not to bills of lading only, but to all contracts, and indeed to all written instruments. It is plain that a clause incorporating, by general words only, terms of another contract will not incorporate any terms of the latter which are outside the scope and nature of the first." —*Duke Richson* v. *Farquharson Brothers*, [1898] 1 Q. B. 150, at p. 159; 67 L. J. Q. B. 103, at p. 109, Rigby, L. J.

(See also "Statutes," *post*.)

Ancient Instruments—Evidence of Custom and Usage.

"It is not to be disputed that when the necessity of the case requires it, evidence of more recent usage and custom may be adduced for the purpose of explaining old, or obsolete, or even imperfect expressions to be found in ancient documents. But the necessity must be apparent, the ambiguity must be found to be existing."—*Earl de la Warr* v. *Miles* (1881), 17 Ch. D. 535, at p. 573; 50 L. J. Ch. 176, at p. 187, Bacon, V.-C.

(See also "Ancient Deeds—Contemporanea expositio," *post*.)

Alterations in Instruments.

All written instruments which are altered or erased in a material part are thereby avoided.

"The strictness of the rule on this subject, as laid down in *Pigot's Case* [(1615), 6 Coke, p. 47, P. XI. 27 a], can only be explained on the principle, that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration, except through fraud, or laches on his part. To say that *Pigot's Case* has been overruled is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it."—*Davidson* v. *Cooper* (1844), 13 M. & W. 343, at p. 352; 13 L. J. Ex. 276, at p. 280, Lord Denman, C. J.

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"It is established that a material alteration in a written instrument does, and an immaterial alteration does not, avoid it. The rule was first laid down, though not precisely in these words, with reference to deeds conveying freehold property; but it has been discussed in many cases, with the result that the rule as now established is held to be applicable to all written instruments."—*In re Hougate and Osborn's Contract*, [1902] 1 Ch. 451, at p. 454; 71 L. J. Ch. 279, at pp. 280, 281, Kekewich, J.

(See also "Alterations in Contracts," *post*; "Alterations in Deeds," *post*; and "Alterations in Wills," *post*.)

Part III.—CONTRACTS.

Section I.

RULES APPLICABLE TO ALL CONTRACTS.

Fixing Principles.

"There is, indeed, great truth in the remarks which have been judicially promulgated on this subject by a learned Court:—'When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far; to define and fix that which cannot, in the nature of things, be defined and fixed.'"—*Story on the Conflict of Laws*, s. 28.

Framing Definitions.

"To frame a definition of any legal term which shall be both positively and negatively accurate is possible only to those who, having legislative authority, can adapt the law to their own definition."—*Lindley, Law of Partnership*, 5th ed. p. 1.

"Except in mathematics, it is difficult to frame exhaustive definitions of words; they must be construed with reference to the

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subject-matter to which they are applied."—*Wakefield Local Board* v. *Lee* (1876), 1 Ex. D. 336, at p. 343, Grove, J.

"Definitions are most difficult."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 492; 56 L. J. Q. B. 626, at p. 629, Lord Bramwell.

"One is very reluctant to frame definitions unless one can make a law to accord with the definitions, which judges cannot do"—*In re Moss, Kingsbury* v. *Watter*, [1899] 2 Ch. 314, at p. 318; 68 L. J. Ch. 598, at p. 600, Lindley, M. R.

"The definition may, perhaps, like all definitions, be dangerous, because the person who is called upon to define is sometimes dealing with matters which are incapable of exact logical definition."—*Glasgow Corporation* v. *M'Ewan*, [1900] A. C. 91, at p. 96, Earl of Halsbury, L. C.

Contract defined.

A contract is an agreement which the law will enforce, that is, an agreement, made upon sufficient consideration or with certain solemnities, by which something is willed to be done or forborne by one of the parties, such will being communicated to the other of the parties by some act engaging to carry it into effect.

"A contract, according to the well-known definition of Sir William Blackstone [2 Bl. Com. 442], is an agreement upon sufficient consideration to do or not to do a particular act. According to this definition, it is an agreement. Now in order to constitute an agreement or contract two things are requisite—firstly, the will, and secondly, some act, whether in word or deed, whereby that will is communicated to the other party. No man has entered into an agreement or contract to do, or not to do, some particular thing unless he has willed that the thing should be done or forborne, and also has communicated that will to the other party by some act engaging to carry it into effect; when both parties will the same thing, and each communicates his will to the other, with a mutual engagement to carry it into effect, then (and not till then) an agreement or contract between the two is constituted. Now this is not a mere theoretical disquisition, but a statement of sound practical principles of universal law, and of the law of England

in particular."—*Haynes* v. *Haynes* (1861), 1 Dr. & Sm. 426, at p. 433; 30 L. J. Ch. 578, at p. 579, Kindersley, V.-C.

"I understand by a contract an agreement which the law will enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration, or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal. It may seem trivial to mention such obvious matters, but attention to them appears to me to clear up many decisions which are not otherwise readily explained."—*Alderson* v. *Maddison* (1880), 5 Ex. D. 293, at pp. 297, 298; 49 L. J. Ex. 801, at p. 804, Stephen, J.

A contract requires two parties to it.

"A contract requires two parties to it, and a man in one character can, with difficulty, contract with himself in another character."—*Callonan* v. *Lister* (1855), 20 Beav. 356, at p. 370; 24 L. J. Ch. 762, at p. 766, Sir John Romilly, M. R.

Evidence of Contract.

A written contract not under seal is not the contract itself, but only evidence—the record of the contract.

"It should be borne in mind that a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract."—*Wake* v. *Harrop* (1861), 6 H. & N. 768, at pp. 774, 775; 30 L. J. Ex. 273, at p. 277, Bramwell, B.

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Extrinsic Evidence of Contract.

"*Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.*"—Co. Litt. 147; Wing. Maxims, p. 24.

Extrinsic evidence is always admissible, not to add to or subtract from, contradict, or vary a written contract, but to apply it to the facts which the parties had in mind and were negotiating about.

All facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words are used, e.g., identification of persons and things to which the contract refers: but such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected.

If a contract is by fraud or mistake made to speak a different language from what was intended, then in those cases parol proof is admissible to show the fraud or mistake.

"It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."—*The Countess of Rutland's Case* (1605), 5 Rep. 26 a.

"It is not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received to add a term not inserted in the specific agreement which they have executed; and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed."—*Hagues* v. *Hare* (1791), 1 H. Bl. 659, at p. 664, Lord Loughborough delivering the opinion of the Court.

"It is a sound rule of evidence that you cannot alter or substantially vary the effect of a written contract by parol proof. This excellent rule is intended to guard against fraud and perjuries, and it cannot be too steadily supported by Courts of justice. *Expressum facit cessare tacitum; Vox emissa volat; Litera scripta manet*, are law axioms in support of the rule; and law axioms are

nothing more than the conclusions of common sense, which have been formed and approved by the wisdom of ages. The rule prevails equally in a Court of equity and a Court of law; for generally speaking, the rules of evidence are the same in both Courts. If the words of a contract be intelligible, says Lord Chancellor Thurlow [*Shelburne* v. *Inchiquin* (1784), 1 Bro. C. C. 338, at p. 342], there is no instance where parol proof has been admitted to give them a different sense. Where a deed is in writing, he observes in another place [*Lord Irnham* v. *Child* (1781), 1 Bro. C. C. 92, at p. 93], 'it will admit of no contract that is not part of the deed.' You can introduce nothing on parol proof that adds to or detracts from the writing. If, however, an agreement is by *fraud* or *mistake* made to speak a different language from what was intended, then, in those cases, parol proof is admissible to show the fraud or mistake. These are cases excepted from the general rule."—*Bebee* v. *Bank of New York* (1806), 1 Johns. (U. S.) R. 571, 572, Kast, C. J.

"I seldom pass a day in a *Nisi Prius* Court without wishing that there had been some written statement evidentiary of the matters in dispute. More actions have arisen, perhaps, from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, too much under the influence of prejudice, to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule that in all cases the best evidence that could be had should be produced; and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that if produced it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents unless the instrument be proved to have been lost."—*Strother* v. *Barr* (1828), 5 Bing. 136, at p. 151, Best, C. J.

"By the general rules of the Common Law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."—*Goss*

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v. *Lord Nugent* (1833), 5 B. & Ad. 58, at p. 64, Lord Denman, C. J.

"It is a wholesome rule of law that, when parties have put an agreement into writing, parol evidence is not admissible to contradict, or vary the terms of the written agreement. There are certain cases which may conveniently be called 'escrow' cases, where the question is, whether the written agreement has ever become an effective agreement, or whether it was only to have effect as an agreement upon some condition being fulfilled which has not been fulfilled."—*New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, at p. 491; 67 L. J. Q. B. 825, at p. 827, Rigby, L. J.

"Extrinsic evidence is always admissible, not to contradict or vary the contract, but to apply it to the facts which the parties had in their minds and were negotiating about. The rule is thus stated in Taylor on Evidence, 8th ed., vol. ii., s. 1194: 'It may be laid down as a broad and distinct rule of law that *extrinsic evidence* of every *material fact* which will enable the Court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers, must of necessity be received.' In *Grant* v. *Grant* (1870), L. R. 5 C. P. 727, at p. 728, Blackburn, J., quoted judicially the following passage from his valuable work on Contract of Sale (p. 47):—'The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words are used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected.'"—*Bank of New Zealand* v. *Simpson*, [1900] A. C. 182, at pp. 187, 188; 69 L. J. P. C. 22, at pp. 24, 25, Lord Davey delivering the judgment of the Judicial Committee.

See also *post*, p. 123.

Section II.

LAWS GOVERNING CONTRACTS.

Where made—Place of Fulfilment.

The law of the country where a contract is made presumptively governs the nature, the obligation and the interpretation of it, unless the contrary appears to be the express intention of the parties, or the contract is entirely to be performed elsewhere, or the subject-matter is immoveable property situate in another country.

Where the parties, at the time of making the contract, had a view to a different kingdom, the law of the place of fulfilment of the contract presumptively determines its obligations.

Both the above rules must give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction.

"It is perfectly clear that where parties enter into a contract to contravene the laws of their own country, such a contract is void."—*Pelbrat* v. *Angell* (1835), 2 Cr. M. & R. 311, at p. 313, Lord Abinger, C. B.

"As to contracts merely personal, I apprehend it to be a general rule that questions relating to the validity and to the interpretation of a contract, are to be governed by the law of the country where the contract was made."—*Cooper* v. *Waldegrave (Earl)* (1840), 2 Beav. 282, at p. 284, Lord Langdale, M. R.

"The general rule in all cases like the present is, that the *lex loci contractûs* is to govern in the construction of contracts. But that applies only when the contract is not express; if it is special, it must be construed according to the express terms in which it is framed."—*Gibbs* v. *Fremont* (1853), 9 Ex. 25, at p. 30; 22 L. J. Ex. 302, at p. 304, Alderson, B.

"As a general rule, the *lex loci contractûs* governs in deciding whether there was illegality in the contract."—*Brantley* v. *South*

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Eastern Rail. Co. (1862), 12 C. B. N. S. 63, at p. 72; 31 L. J. C. P. 286, at p. 289, Erle, C. J. (See *Hope* v. *Hope*, *post*, p. 104.)

"The right to land in Chili must, no doubt, be determined by the *lex loci*, but a contract entered into between three English gentlemen, two of them domiciled and residing in England, and the third residing in Chili, but not having acquired a foreign domicile, must, I think, be governed and construed by the rules of English law."—*Cood* v. *Cood* (1863), 33 Beav. 314, at p. 322; 33 L. J. Ch. 273, at p. 278, Sir John Romilly, M. R.

"In determining a question between contracting parties, recourse must first be had to the language of the contract itself, and (force, fraud and mistake apart) the true construction of the language of the contract (*lex contractus*) is the touchstone of legal right. It often happens, however, that disputes arise, not as to the terms of the contract, but as to their application to unforeseen questions, which arise incidentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers. In such cases it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter. A familiar illustration of this will be found in the rule, that the lawful usages of a market are as much part of a contract entered into there, which does not expressly exclude them, as if they were set down at large. The binding force of such usages does not depend so much upon the knowledge of the parties as upon implied acquiescence: for whoso goes to Rome must do as those at Rome do. So in the absence of express provision or special usage, the general law itself, in many points of view only a more extended usage, supplies the gaps which the parties have left, and in doing so sometimes modifies the construction of general words in the contract. For instance, a common carrier, while on the one hand he is bound by stringent rules for the protection of his customers, on the other is allowed certain exemptions from liability, even upon an express contract if it do not exclude such exemptions. Thus by the common law of England a person who expressly contracts absolutely to do a thing, not naturally impossible, is not excused for non-performance because of being prevented by the act of God, or the King's enemies (*Paradine* v. *Jane* (1648), Aleyn, 26); and yet, in consideration of the risks to which common carriers are exposed, such

prevention is in their case an implied exception. And in the case of ordinary bailees entrusted with the custody of goods, whether by express contract or not, the exceptions of overwhelming force (*vis major*), and accident without fault (*casus fortuitus*), are implied. . . . In the diversity and conflict of laws which ought to prevail, is a question that has called forth an amazing amount of ingenuity, and many differences of opinion. It is, however, generally agreed that the law of the place where the contract is made, is *primâ facie* that which the parties intended, or ought to be presumed, to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country, and so forth; which latter though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances, so far as they are relevant to construe and determine the character of the contract."—*Lloyd* v. *Guibert* (1865), L. R. 1 Q. B. 115, at pp. 120, 121, 122, 123; 35 L. J. Q. B. 74, at pp. 75, 76, Willes, J., delivering the judgment of the Court (Erle, C. J., Pollock, C. B., Martin, B., Willes and Keating, JJ., and Pigott, B.).

"Considering the authorities which have been brought to my notice, particularly that of *Lloyd* v. *Guibert* [(1865), L. R. 1 Q. B. 115, at p. 122; 35 L. J. Q. B. 74], it seems to me that the rule is that the law of the place where the contract was made is ordinarily to be adopted in construing it."—*Chamberlain* v. *Napier* (1880), 15 Ch. D. 614, at p. 630; 49 L. J. Ch. 628, at p. 633, Hall, V.-C.

"Adopting the well-known rule of law as acted upon in *Lloyd* v. *Guibert* [(1865), L. R. 1 Q. B. 115, at p. 122; 35 L. J. Q. B. 74], the law of the place where the contract is made is *primâ facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt."—*Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co* (1882), 9 Q. B. D. 118, at p. 122; 51 L. J. Q. B. 393, at p. 395, Pollock, B.

"What is to be the law by which a contract, or any part of it, is to be governed or applied, must be always a matter of construction of the contract itself as read by the light of the subject-matter

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and of the surrounding circumstances. Certain presumptions or rules in this respect have been laid down by juridical writers of different countries and accepted by the Courts, based upon common sense, upon business convenience, and upon the comity of nations; but these are only presumptions or *primâ facie* rules that are capable of being displaced, wherever the clear intention of the parties can be gathered from the document itself and from the nature of the transaction. The broad rule is, that the law of a country where a contract is made presumably governs the nature, the obligation, and the interpretation of it, unless the contrary appears to be the express intention of the parties. (This broad rule is cited by Stirling, J., in *Actien Gesellschaft für Cartonnagen Industrie* v. *Temler and Seeman* (1901), 18 R. P. C. 4, at p. 15.) 'The general rule,' says Lord Mansfield, 'established *ex comitate et jure gentium* is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties, at the time of making the contract, had a view to a different kingdom': *Robinson* v. *Bland* [(1760), 1 W. Bl. 256, at p. 258; see *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1865), 3 Moo. P. C. (N. S.) 272, at pp. 290, 291]. This principle was explained by the Exchequer Chamber in the case of *Lloyd* v. *Guibert* [(1865), L. R. 1 Q. B. 115, at p. 122; 35 L. J. Q. B. 74] as follows: 'It is, however, generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance, that the contract is to be entirely performed elsewhere, or that the subject-matter is immoveable property situate in another country, and so forth; which latter, though sometimes treated as distinct rules, appear more properly to be classed as exceptions to the more general one, by reason of the circumstances indicating an intention to be bound by a law different from that of the place where the contract is made; which intention is inferred from the subject-matter and from the surrounding circumstances so far as they are relevant to construe and determine the character of the contract.' It is obvious, however, that the subject-matter of each contract must be looked at as well as the residence of the contracting parties, or the place where the contract is made. The place of

performance is necessarily in many cases the place where the obligations of the contract will have to be enforced, and hence, as well as for other reasons, has been introduced another canon of construction, to the effect that the law of the place of fulfilment of a contract determines its obligations. But this maxim, as well as the former, must, of course, give way to any inference that can legitimately be drawn from the character of the contract and the nature of the transaction. In most cases, no doubt, where a contract has to be wholly performed abroad, the reasonable presumption may be that it is intended to be a foreign contract determined by foreign law; but this *primâ facie* view is in its turn capable of being rebutted by the expressed or implied intention of the parties as deduced from other circumstances. Again, it may be that the contract is partly to be performed in one place and partly in another. In such a case, the only certain guide is to be found in applying sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties. Even in respect of any performance that is to take place abroad, the parties may still have desired that their liabilities and obligations shall be governed by English law; or it may be that they have intended to incorporate the foreign law to regulate the method and manner of performance abroad, without altering any of the incidents which attach to the contract according to English law. Stereotyped rules laid down by juridical writers cannot, therefore, be accepted as infallible canons of interpretation in these days, when commercial transactions have altered in character and increased in complexity; and there can be no hard and fast rule by which to construe the multiform commercial agreements with which in modern times we have to deal."—*Jacobs* v. *Crédit Lyonnais* (1884), 12 Q. B. D. 589, at pp. 599—601; 53 L. J. Q. B. 156, at p. 158, Bowen, L. J., delivering the judgment of Brett, M. R., and himself.

"It is generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention. Numerous instances of the exceptions are to be found in the books. A different intention—that is, an intention to be bound by some other law than the law of the place where the contract is made—may be inferred from the subject-matter of the contract and from the surrounding

circumstances, so far as they are relevant to determine the character of the contract: see the judgment of Mr. Justice Willes in *Lloyd* v. *Guibert* [(1865), L. R. 1 Q. B. 115, at pp. 122, 123; 35 L. J. Q. B. 74]. The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to the true inference to be drawn."—*In re Missouri Steamship Co.* (1889), 42 Ch. D. 321, at p. 326, Chitty, J.

"The principles on which this case has to be decided have been familiar to the Courts at any rate since the time of Lord Mansfield, who, in the case of *Robinson* v. *Bland* [(1760), 2 Burr. 1077; 1 W. Bl. 256], expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of *Lloyd* v. *Guibert* [(1865), L. R. 1 Q. B. 115; 35 L. J. Q. B. 74], where the learned judge [Willes, J.] who delivered the judgment of the Exchequer Chamber said: 'It is, however, generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as, for instance,' and he goes on to enumerate instances from which the Courts have gleaned a different intention. That view of the law was fully adopted in the case of *Jacobs* v. *Crédit Lyonnais* [(1884), 12 Q. B. D. 589; 53 L. J. Q. B. 156] in this Court."—*Ibid.*, at p. 340; 58 L. J. Ch. 721, at p. 724, Fry, L. J.

"If a contract is made in a country, to be executed in that country, unless there appears something to the contrary you take it that the parties must have intended that that contract, as to its construction and as to its effect and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country, to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties, unless they take very particular care to

enunciate such a strange conclusion. Therefore the law has said that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."—*Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, at p. 82; 60 L. J. Q. B. 295, at p. 298, Lord Esher, M. R.

"If a foreign contract is brought before an English Court, the Court has to construe that foreign contract, which is in writing, just as it is the Court which has to construe an English contract; but if it is a foreign contract which has to be construed, it must be construed according to the canons of construction used in the country to which the contract belongs, or, as we say, according to the place where it is made."—*The Industrie*, [1894] P. 58, at p. 72; 63 L. J. P. 84, at p. 87, Lord Esher, M. R.

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractûs* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the Bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to

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indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it."—*Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202, at pp. 207, 208, Lord Herschell, L. C.

"When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractûs* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one forum, and the place of performance in another."—*Ibid.*, A. C. at p. 212, Lord Watson.

"This is what Mr. Westlake says in s. 212, on p. 258 [Westlake's Private International Law, 3rd edition]: 'It may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the transaction has the most real connection, and not to the law of the place of contract as such.' That seems to me to be as precise and accurate a statement as one can expect to find in any judgment or treatise, having regard to the necessarily infinite variety of facts which require consideration in cases of this character."—*South African Breweries, Ltd.* v. *King*, [1899] 2 Ch. 173, at p. 182; 68 L. J. Ch. 530, at p. 534, Kekewich, J.

"That the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy: see *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C. 202."—*Spurrier* v. *La Cloche*, [1902] A. C. 446, at p. 450; 71 L. J. P. C. 101, at p. 103, Lord Lindley.

"The law of the country in which the contract is made and is to be performed, and in which the parties are domiciled, ought to prevail unless there is such duress as must be considered to avoid the contract under any but unreasonable and uncivilised institutions of law—a description which would be applicable to such a case as

that of consent obtained, *e.g.*, by physical torture, or by the use of drugs."—*Kaufman* v. *Gerson*, [1903] 2 K. B. 114, at pp. 119, 120; 72 L. J. K. B. 596, at p. 600, Wright, J.

"That learned writer discusses this question at great length in the work to which reference has been made, and makes the following general observations in s. 76 [Story on the Conflict of Laws, 7th ed. (1872), at p. 78], on the inconvenience of allowing the law of domicil to govern contracts made in other countries. He says: 'How are the inhabitants of any country to ascertain the condition of a stranger dwelling among them, as fixed by the law of a foreign country where he was born or had acquired a new domicil? Even Courts of justice do not assume to know what the laws of a foreign country are; but require them to be proved. How, then, shall private persons be presumed to have better means of knowledge? On the other hand, it may be said with great force that contracts ought to be governed by the law of the country where they are made, as to the competence of the parties to make them, and as to their validity; because the parties may well be presumed to contract with reference to the laws of the place where the contract is made and is to be executed. Such a rule has certainty and simplicity in its application. It ought not, therefore, to be matter of surprise if the country of the party's birth should hold such a contract valid or void, according to its own law, and that, nevertheless, the country where it is made and to be executed should hold it valid or void, according to its own law. It has been well observed by an eminent judge, that "with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law, as exercised in all civilised countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts of that country. If he rashly presumes to contract without such knowledge he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party who has engaged under a proper knowledge and sense of the obligation, which the law would impose upon him by virtue of that engagement".'"—*Ogden* v. *Ogden*, [1908] P. 46, at pp. 59, 60; 77 L. J. P. 34, at p. 39, Sir Gorell Barnes, P.

"I think the conclusion from these authorities [*Copin* v. *Adamson* (1874), L. R. 9 Ex. 345; 43 L. J. Ex. 161, and others] is that to make a person who is not a subject of, nor domiciled nor resident in, a foreign country amenable to the jurisdiction of that

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country, there must be something more than a mere contract made or the mere possession of property in the foreign country."—*Emanuel* v. *Symon*, [1908] 1 K. B. 302, at p. 309; 77 L. J. K. B. 180, at p. 184, Lord Alverstone, C. J.

"The decision of the Privy Council [in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670] is clear that there is no implied obligation on a foreigner to the country of that forum to accept the *forum loci contractus*, as having, by reason of the contract, acquired a conventional jurisdiction over him in a suit founded upon that contract for all future time, wherever the foreigner may be domiciled at the time of the institution of the suit. Such an obligation may exist by express agreement, as in the case of *Copin* v. *Adamson* (1874), L. R. 9 Ex. 345; 43 L. J. Ex. 161, and as in many cases of foreign contracts where the parties by articles of agreement bind themselves to accept the jurisdiction of foreign tribunals; but such an obligation, as is pointed out in the decision of the Privy Council [*Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, at p. 686], is not to be implied from the mere fact of entering into a contract in a foreign country."—*Emanuel* v. *Symon*, [1908] 1 K. B. 302, at pp. 313, 314; 77 L. J. K. B. 180, at p. 187, Kennedy, L. J.

Application of Lex Fori.

The mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought.

"The plaintiff, therefore, must recover here upon what is called *comitas inter comitates*; but it is a maxim that cannot prevail in any case where it violates the law of our own country, the law of nature, or the law of God. . . . If the right sought to be enforced is inconsistent with either of these, the *English* municipal Courts cannot recognise it. I take it, that that principle is acknowledged by the laws of all Europe."—*Forbes* v. *Cochran* (1824), 2 B. & C. 448, at p. 471, Best, J.

"In the case just mentioned [*Melan* v. *The Duke of Fitzjames* (1797), 1 B. & P. 138] the distinction taken by Mr. Justice Heath, who differed from the other judges, was, that in construing contracts the law of the country in which they are made must govern, but that the remedy upon them must be pursued by such means as the law points out where the parties reside. This doctrine is said to

correspond with the opinions of Hübner and Voet. I have not had an opportunity of looking into those authorities, but we think, on consideration of the present case, that the distinction laid down by Mr. Justice Heath ought to prevail. A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not, therefore, to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."—*De la Vega* v. *Vianna* (1830), 1 B. & Ad. 284, at pp. 287-8, Lord Tenterden, C. J., delivering the judgment of the Court. (Cited in *In re Khoo* (1884), 28 Ch. D. 175, at p. 178; 54 L. J. Ch. 297, at p. 299, by Pearson, J., who added, "and that has been the rule in this country, as far as I know, from the earliest time."

"The rule which applies to the case of contracts made in one country, and put in suit in the Courts of law in another country, appears to be this: that the interpretation of the contract must be governed by the law of the country where the contract was made (*lex loci contractûs*); the mode of suing, and the time within which the action must be brought, must be governed by the law of the country where the action is brought (*in ordinandis judiciis, loci consuetudo, ubi agitur*). See *Huberi Prælectiones Civilis Juris*, tit. 3; *De Conflictu Legum*, sect. 7. This distinction has been clearly laid down and adopted in the late case of *De la Vega* v. *Vianna* [*supra*]. See also the case of *The British Linen Co.* v. *Drummond* [(1830), 10 B. & C. 903], where the different authorities are brought together."—*Trimbey* v. *Vignier* (1834), 1 Bing. N. C. 151, at p. 159, Tindal, C. J.

"The distinction between that part of the law of the foreign country where a personal contract is made, which *is* adopted, and that which *is not* adopted by our *English* Courts of law, is well known and established; namely, that so much of the law as affects the rights and merit of the contract, all that relates '*ad litis decisionem*' is adopted from the foreign country; so much of the law as affects the remedy only, all that relates '*ad litis ordinationem*' is taken from the '*lex fori*' of that country where the action is brought."—*Huber* v. *Steiner* (1835), 2 Bing. N. C. 202, at p. 210, Tindal, C. J.

"Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of

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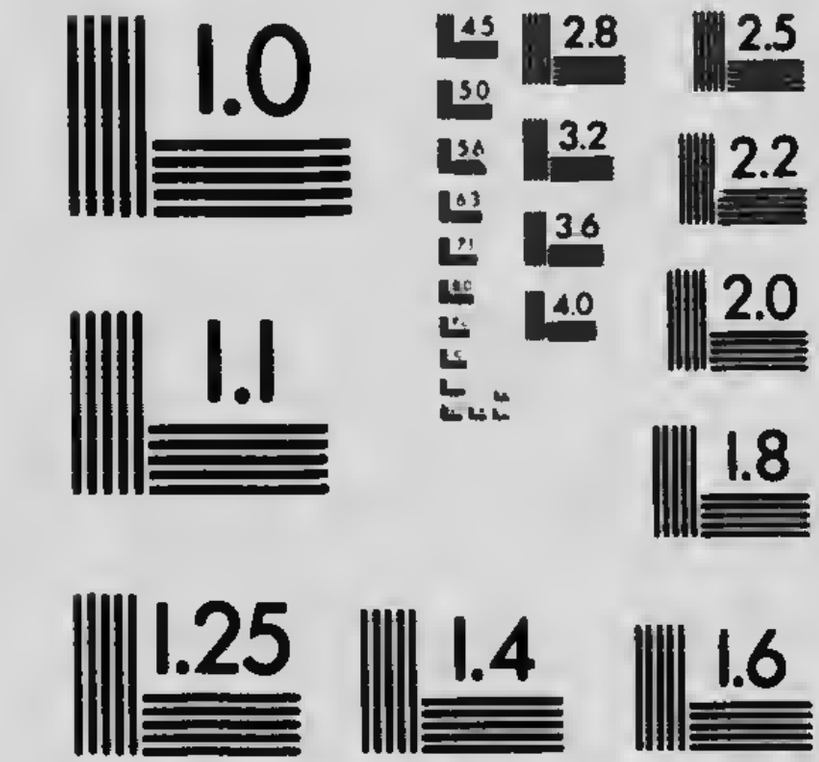

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which the appeal is made. This rule is clearly laid down in *The British Linen Co.* v. *Drummond* [(1830), 10 B. & C. 903]; *De la Vega* v. *Vianna* [(1830), 1 B. & Ad. 284], and in *Huber* v. *Steiner* [(1835), 2 Bing. N. C. 202]."—*Don* v. *Lippmann* (1837), 5 Cl. & F. 1, at p. 13, Lord Brougham.

"As to contracts merely personal, I apprehend it to be a general rule, that questions relating to the validity and to the interpretation of a contract, are to be governed by the law of the country where the contract was made, and that if a remedy for the non-performance of a contract is sought in another country, the mode of suing, and the time within which the suit must be brought are to be governed by the law of the country in which the action is brought."—*Cooper* v. *Waldegrave* (*Earl*) (1840), 2 Beav. 282, at p. 284, Lord Langdale, M. R.

"When the Courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the law of the country in which it was entered into, but whether it is consistent with the law and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the Courts of this country cannot, as I conceive, be called upon to enforce it."—*Hope* v. *Hope* (1857), 8 D. M. & G. 731, at p. 743; 26 L. J. Ch. 417, at p. 424, Lord Justice Turner.

"The question is one of procedure, and as such must be determined by the law of the country where the action is brought."—*Alliance Bank of Simla* v. *Carey* (1880), 5 C. P. D. 429, at p. 430; 48 L. J. C. P. 781, at p. 782, Lopes, J.

"If you find in an Act of Parliament the power to take the remedy in divers Courts, that remedy will, in each Court, be subject to the *lex fori* of that Court, and the *lex fori* includes the limitations of actions, which goes to the remedy and not to the right."—*Blackburn Corporation* v. *Sanderson*, [1902] 1 K. B. 794, at p. 807; 71 L. J. K. B. 590, at p. 594, Vaughan Williams, L. J.

Foreign Documents.

Translation—Meaning of Language used.

"The first question to be considered is, what are the rules by which an *English* Court ought to be governed in construing a

foreign contract? Where a written contract is made in a foreign country and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction." —*Di Sora* v. *Phillipps* (1863), 10 H. L. Cas. 624, at p. 633; 33 L. J. Ch. 129, at p. 131, Lord Cranworth.

"Now, this writing was a business document written in Brazil in the Brazilian language, and with the formalities necessary according to the Brazilian law and custom, by a man of business carrying on business in Brazil. An English Court has to construe it, and the first thing therefore, that the English Court has to do is to get a translation of the language used in the document. Making a translation is not a mere question of trying to find out in a dictionary the words which are given as the equivalent of the words of the document; a true translation is the putting into English that which is the exact effect of the language used under the circumstances. To get at this in the present case you must get the words in English which in business have the equivalent meaning of the words in Brazilian, as used in Brazil, under the circumstances. Therefore you would want a competent translator, competent to translate in that way, and if the words in Brazil had in business a particular meaning different from their ordinary meaning, you would want an expert to say what is that meaning. Amongst those experts you might want a Brazilian lawyer—and a Brazilian lawyer for that purpose would be an expert. That is the first thing the Court has to do. Then, when the Court has got a correct translation into English, it has to do what it always has to do in the case of any such document—either a contract, or such an authority (a power of attorney) as this—that is to say, determine what is to be taken to be the meaning of the party at the time he wrote it; and what is to be inferred from the language which he has used. There are certain inferences which are adopted in ascertaining the meaning of the language used, unless in the particular instance the contrary intention appears. One inference which has been always adopted is this: if a contract is made in a country to be executed in that country, unless there appears something to the contrary, you take it that

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the parties must have intended that that contract, as to its construction, and as to its effect, and the mode of carrying it out (which really are the result of its construction), is to be construed according to the law of the country where it was made. But the business sense of all business men has come to this conclusion, that if a contract is made in one country to be carried out between the parties in another country, either in whole or in part, unless there appears something to the contrary, it is to be concluded that the parties must have intended that it should be carried out according to the law of that other country. Otherwise a very strange state of things would arise, for it is hardly conceivable that persons should enter into a contract to be carried out in a country contrary to the laws of that country. That is not to be taken to be the meaning of the parties unless they take very particular care to enunciate such a strange conclusion. Therefore the law has said that if the contract is to be carried out in whole in another country, it is to be carried out wholly according to the law of that country, and that must have been the meaning of the parties. But if it is to be carried out partly in another country than that in which it is made, that part of it which is to be carried out in t' t other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country."—*Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q. B. 79, at p. 82; 60 L. J. Q. B. 295, at pp. 297, 298, Lord Esher, M. R.

(See also "Latent and Patent Ambiguity," *ante*, p. 83, and *post*, pp. 134, 135.)

Foreign Stamp Laws.

One nation does not take notice of the revenue laws of another.

If, however, a contract is void by reason of being unstamped or insufficiently stamped in the place where it was made, it cannot be sued on anywhere.

"No country ever takes notice of the revenue laws of another."—*Holman* v. *Johnson* (1775), 1 Cowp. 341, at p. 343, Lord Mansfield, C. J.

"One nation does not take notice of the revenue laws of another."—*Planché* v. *Fletcher* (1779), 1 Doug. 251, at p. 253, Lord Mansfield, C. J.

"I should clearly hold that if a stamp was necessary to render this agreement valid in Surinam, it cannot be received in evidence

without that stamp here. A contract must be available by the law of the place where it is entered into, or it is void all the world over. But I must have more distinct evidence of the law of Surinam upon this subject than the parol evidence of a merchant."—*Clegg* v. *Levy* (1812), 3 Camp. 166, at p. 167, Lord Ellenborough, C. J.

"It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke, that in a British Court we cannot take notice of the revenue laws of a foreign State. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid."—*James* v. *Catherwood* (1823), 3 D. & R. 190, at p. 191, Abbott, C. J.

"It is perfectly clear that where parties enter into a contract to contravene the laws of their own country, such a contract is void; but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this; except, indeed, that where he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act."—*Pellecat* v. *Angell* (1835), 2 Cr. M. & R. 311, at p. 313, Lord Abinger, C. B.

"The marginal note of *Alves* v. *Hodgson* [(1797), 7 T. R. 241] is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. The marginal note is in these terms: 'The plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp.' I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree."—*Bristow* v. *Sequeville* (1850), 5 Ex. 275, at p. 279; 19 L. J. Ex. 289, at p. 290, Rolfe, B.

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Section III.

Legal and Equitable Interpretation.

The interpretation of a contract is, and must be, the same in a court of equity as in a court of law.

The equitable doctrine of constructive notice does not apply to commercial transactions.

"Like all mercantile contracts, it [the charter-party] ought to have a liberal interpretation. In construing agreements, I know no difference between a court of law and a court of equity. A court of equity cannot *make* an agreement for the parties; it can only explain what their true meaning was; and that is also the duty of a court of law."—*Hotham* v. *East India Company* (1779), 1 Doug. 272, at p. 277, Lord Mansfield, C. J.

"It is truly said, the construction of covenants is the same in equity as at law. I hope I shall never see the time in which a contrary doctrine can be held."—*Eaton* v. *Lyon* (1798), 3 Ves. 689, at p. 692, Sir Richard Pepper Arden, M. R.

"There is no equitable construction of an agreement distinct from its legal construction. To construe is nothing more than to arrive at the meaning of the parties to an agreement, and this must be the aim and end of all Courts which are called upon to

enforce any rights created by and growing out of contract."—*Scott* v. *Corporation of Liverpool* (1858), 3 De G. & J. 334, at p. 360; 28 L. J. Ch. 230, at p. 235, Lord Campbell, L. C.

"The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a court of law. A court of equity will, indeed, relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said, in *Roberts* v. *Berry* [(1853), 3 D. M. & G. 284, at p. 291; 22 L. J. Ch. 398]) there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that, in equity, time is not of the essence of the contract."—*Tilley* v. *Thomas* (1867), L. R. 3 Ch. 61, at p. 67, Lord Cairns, L. J.

"Now, as a matter of construction merely, I apprehend the words must have the same meaning in equity as at law. The rights and remedies consequent on that construction may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract; and if there is a failure to perform within the time the contract is broken in equity no less than at law. But in equity there may be circumstances which will induce the Court to give relief against the breach, and sometimes even though occasioned by the neglect of the suitor asking relief. Not so at law, the legal consequences of the breach must there be allowed strictly to follow."—*Ibid.*, at p. 69, Sir John Rolt, L. J.

"I quite agree with the Master of the Rolls [Lord Esher]; I know of no distinction between modes of interpreting contracts. The interpretation is and always has been precisely the same both at law and in equity."—*In re Terry and White's Contract* (1886), 32 Ch. D. 14, at p. 28; 55 L. J. Ch. 345, at p. 348, Lindley, L. J.

"The equitable doctrines of constructive notice are common enough in dealing with land and estates, with which the Court is familiar; but there have been repeated protests against the introduction into commercial transactions of anything like an extension of those doctrines, and the protest is founded on perfect good

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sense. In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions, we should be doing infinite mischief and paralyzing the trade of the country. That I am not going too far in making these observations will be found by turning to *English and Scottish Mercantile Investment Co.* v. *Brunton* [[1892] 2 Q. B. 700; 62 L. J. Q. B. 136], and also to what Lord Herschell said about constructive notice, in *London Joint Stock Bank* v. *Simmons* [[1892] A. C. 201; 61 L. J. Ch. 723]."—*Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539, at p. 545; 64 L. J. Q. B. 766, at p. 770, Lindley, L. J.

Decisions on Contracts.

Contracts are made on the footing of the law established by decisions.

"I am bound to state that I agree with what has been said by the other members of the Court as to its not being desirable to interfere with decisions pronounced so long ago; since it is impossible to deny that during the fifty-four years which have elapsed numerous contracts must have been made, and moneys paid, on the footing of the law as established by *Cann* v. *Cann* (1830), 3 Sim. 447, and which law I, for one, am not inclined to alter."—*Putner* v. *Johnson* (1884), 13 Q. B. D. 351, at pp. 358, 359; 53 L. J. Q. B. 348, at p. 351, Fry, L. J.

"There is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense."—*Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484, at p. 490; 56 L. J. Q. B. 626, at p. 628, Lord Halsbury, L. C.

"If this were a contract in daily use, and if the decision had been acted on throughout the country for a long time, it might be that we should feel bound to follow it, on the ground of the number of persons who had acted on it, even though we did not agree with it."—*Phillipps* v. *Rees* (1889), 24 Q. B. D. 17, at p. 21; 59 L. J. Q. B. 1, at p. 4, Lord Esher, M. R.

See also "Long-standing Decisions," *ante*, pp. 20—28.

"I confess I am very jealous of attempting to interpret one contract by another contract made under different circumstances."—*Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109, at p. 112; 74 L. J. K. B. 433, at p. 437, Earl of Halsbury, L. C.

Time, Essence of Contract.

Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. (7): "Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity."

Supreme Court of Judicature Act, 1875, 38 & 39 Vict. c. 77, s. 10: "In sub-section seven of the said section (twenty five of the principal Act, 36 & 37 Vict. c. 66) the reference to the date of the passing of the principal Act shall be deemed to refer to the date of the commencement of the principal Act (viz., the second day of November, 1874)."

Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 10 (1): "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

Greenwich or Dublin Mean Time.

Statutes (Definition of Time) Act, 1880, 43 & 44 Vict. c. 9 (2nd August, 1880), s. 1.

"Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument the time referred [*sic*] shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time, and in the case of Ireland, Dublin mean time." (See *ante*, p. 81.)

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Meaning of the expression "Month."

At common law "month" denotes lunar month, i.e., twenty-eight days.

If the context shows that calendar month was intended, the Court may adopt that interpretation.

If any exception to the general rule is set up it must be proved in each case (unless judicially recognised) as a customary usage in the particular trade or place.

In all mercantile transactions in the City of London a month means calendar month.

In a contract of sale of goods "month" means primâ facie *calendar month.*

"A month is more ambiguous [than a year]; there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year; or, as calendar months of unequal lengths, according to the Julian division in our common almanacks, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks."—2 Bla. Com. 141.

"It is also clear that 'months' denote at law 'lunar months,' unless there is admissible evidence of an intention in the parties using the word to denote 'calendar months.'"—*Simpson* v. *Margitson* (1847), 11 Q. B. 23, at p. 31; 17 L. J. Q. B. 81, at p. 84, Lord Denman, C. J. (cited by Fry, J., in *Hulton* v. *Brown* (1881), 29 W. R. 928; 45 L. T. 343).

"Although in the Ecclesiastical Courts months mean calendar months (see *Catesby's Case* (1606), 6 Rep. 62a, second resolution, and per Knight-Bruce, V.-C., in *Black* v. *Rackham* (1846), 5 Moo. P. C. 305, at p. 308), it is well settled that at common law 'months' denote lunar months; so much so, that when it has been desired to make an alteration, it has been necessary to have recourse to statute or statutory rules—*e.g.*, as to the construction of Acts of Parliament by 13 & 14 Vict. c. 21 [Lord Brougham's Act, 1850, and see also 52 & 53 Vict. c. 63 (Interpretation Act, 1889)], and as to bills of exchange by 45 & 46 Vict. c. 61 (Bills of Exchange Act, 1882) and as to documents which are part of any legal procedure under the rules of Court by Ord. LXIV. (Time), r. 1. It is, therefore, a question of construction in each case, to which the

ordinary rules of construction apply, namely, that words must bear their ordinary primary meaning unless the context of the instrument read as a whole, or surrounding contemporaneous circumstances, show that the secondary meaning expresses the real intention of the parties, or unless the words used in connection with some place, trade, or the like, in which they have acquired the secondary meaning as their customary meaning *quoad hoc*. This is a question of fact which (unless so often proved as to be judicially recognised) has to be proved by evidence. Statements by either party as to the sense in which he used or intended to use the words made subsequently to the execution of the document and subsequent acts of the parties are inadmissible for the purpose of construing the document. This is, in my opinion, the meaning of the judgment in *Simpson* v. *Margitson* ((1847), 11 Q. B. 23, at p. 31; 17 L. J. Q. B. 81, at p. 84), where Lord Denman says: 'It is clear that the construction of a written contract, subject to the exceptions mentioned below, is for the judge. It is also clear that "months" denote at law "lunar months," unless there is admissible evidence of an intention in the parties using the word to denote "calendar months." If the context shows that calendar months were intended, the judge may adopt that construction: *Lang* v. *Gale* (1813), 1 M. & S. 111; 14 L. J. Ex. 48; *Reg.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247; 10 L. J. M. C. 55. If the surrounding circumstances, at the time the instrument was made, show that the parties intended to use the word, not in its primary or strict sense, but in some secondary meaning, the judge may construe it from such circumstances, according to the intention of the parties: *Goldshede* v. *Swan* (1847), 1 Ex. 154; 16 L. J. Ex. 284; *Walker* v. *Hunter* (1845), 2 C. B. 324; 15 L. J. C. P. 12; Bacon's Maxims, Reg. 10, and the examples there given; *Mallan* v. *May* (1844), 13 M. & W. 511; 13 L. J. Ex. 48; *Beckford* v. *Crutwell* (1832), 1 Moo. & R. 187; 5 Car. & P. 242. If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense: *Smith* v. *Wilson* (1832), 3 B. & Ad. 728; 1 L. J. K. B. 194; *Grant* v. *Maddox* (1846), 15 M. & W. 737; 16 L. J. Ex. 227; *Jolly* v. *Young* (1794), 1 Esp. N. P. C. 186. If the meaning of a word depends upon the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury: *Robertson* v. *Jackson* (1845), 2 C. B. 412; 15 L. J. C. P. 28; *Bourne* v.

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Gatliff (1844), 11 Cl. & F. 45; also the jury may have to give the meaning of some technical words.' I have only expressed my own opinion in consequence of Mr. Jenkins' argument that, in addition to the cases mentioned by Lord Denman, there was a general exception of all mercantile or commercial documents, founded on a dictum of Littledale, J., in *Reg.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247; 10 L. J. M. C. 55, and repeated in some of the text-books. In my opinion, there is not, and cannot be, any such general exception. If any such exception be set up, it must be proved in each case (unless judicially recognised) as a customary usage in the particular trade or place. Erle, C. J.'s, ruling in *Turner* v. *Barlow* (1863), 3 F. & F. 946, at p. 949—'The law in all cases, not mercantile transactions, in the City of London, as to the meaning of the word month, meant lunar month. In all mercantile transactions in the City of L..., on a month means calendar month'—accords with this. It is a statement of a judicially recognised custom in the City, and I do not think that Littledale, J., in *Reg.* v. *Inhabitants of Chawton* (1841), 1 Q. B. 247; 10 L. J. M. C. 55, meant to do more than refer generally and tersely to the customary qualification of the meaning of the word. A contrary holding would necessitate a definition of 'mercantile or commercial transactions'—a task of no small difficulty, unless I adopted the plaintiff's suggestion that all contracts for sale of goods and chattels, including patents, are mercantile transactions. I hold, therefore, that 'months' in this contract means lunar months."—*Bromer* v. *Moore*, [1904] 1 Ch. 305, at pp. 309—312; 73 L. J. Ch. 377, at pp. 379, 380, Farwell, J.

Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 40 (2). In a contract of sale "month" means *primâ facie* calendar month.

Original Draft or Printed Form.

It is competent for the Court, for the purpose of interpreting a contract, where there is a doubt about the interpretation of it, to look at what was the original draft or printed form of a contract, but not to receive any parol or other evidence dehors *the document itself.*

"Now, I think that, for the purpose of ascertaining whether or no this was the intention of the parties, we have a right to look at the document as it originally stood, and at the alterations which have been made in it, and to see whether those alterations will throw any light upon the question. The lease is printed in the

most material part of it, and it has originally been a blank printed form, and it is in the printed parts that those stipulations which appear to be inconsistent with a tenancy for a single year are to be found. It is surely competent for the Court to look at what has originally been the printed form, and at what is introduced in writing, to alter the original provisions of that printed form. We have a right to do so, because these matters are apparent on the face of the instrument, and we do not go out of the instrument, or receive any parol or other evidence *dehors* the document itself."—*Strickland* v. *Maxwell* (1834), 2 C. & M. 539, at p. 550, Bayley, B.

"If it were necessary to determine whether or not we could look at the alteration in the draft, as a key to the meaning of the parties, I must confess I should have felt considerable doubt. It might be letting in contradictory parol evidence to show the circumstances under which the alteration was made."—*Cumberland* v. *Rawes* (1854), 15 C. B. 348, at p. 356; 24 L. J. C. P. 46, at p. 48, Jervis, C. J., delivering the judgment of the Court.

"I agree with my brother Crompton, that where there are formal and general words which are the usual terms of a contract, and there are other special and peculiar words, and the question is, which are to have most weight, the terms which a man has thought of for himself and written into the contract, if they conflict and cannot be reconciled with the printed words, ought to have most weight, and that is what Lord Ellenborough said in *Robertson* v. *French* (1803), 4 East, 130, at p. 136."—*Gamm* v. *Tyrie* (1864), 4 B. & S. 680, at pp. 713, 714; 33 L. J. Q. B. 97, at p. 108, Blackburn, J.

"I cannot help saying that I think it is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as showing what the object of the parties was, and what they were about to do, so as to afford a guide in the construction of their words; but you have

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no right for any other purpose to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake."—*Leggott* v. *Barrett* (1880), 15 Ch. D. 306, at pp. 309, 310; 51 L. J. Ch. 90, at p. 92, James, L. J.

"I entirely agree with my Lord [James, L. J.] that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document. If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed."—*Ibid.*, at p. 311; L. J., at p. 93, Brett, L. J.

"Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent."—*Glynn* v. *Margetson & Co.*, [1893] A. C. 351, at p. 355; 62 L. J. Q. B. 466, at p. 468, Lord Herschell, L. C.

"This case is an illustration of a broad principle of law which is perfectly well known and is constantly acted upon, namely, that where a preliminary contract of any description, whether verbal or written, is intended to be superseded by, and is in fact superseded by, one of a superior character, then the later contract—the superior contract—prevails, and the stipulations in the earlier one can no longer be relied upon."—*Greswolde-Williams and others* v. *Barneby* (1901), 49 W. R. 203, at p. 204, Wills, J.

Two Instruments.

"I know the general rule to be that an instrument must be construed by the provisions contained in it, and not by anything

dehors. But, whatever may be the law on the subject, justice requires, in this case, that I should keep in view the language of the second instrument. The same intention seems to have continued for two years; and I think, under the circumstances, I am entitled to use the language of the second bond in construing the first. I state this distinctly, in order that, if it shall be considered worth while to carry this case elsewhere, the manner in which I arrive at my conclusion may be understood."—*Fowler* v. *Hunter* (1829), 3 Y. & J. 506, at p. 513, Sir William Alexander, C. B.

Contemporaneous Documents.

Contemporaneous Documents are to be read together.

"Where there are two contemporaneous documents executed and assented to by the same persons at the same time (and these [memorandum and articles of association] are so substantially, and are therefore to be treated as contemporaneous documents), it appears to me that the ordinary rule applies, according to which contemporaneous documents are to be read together, so that if there is any ambiguity in one it may be explained by the other; and even if there is any inconsistency, you must take the two documents together and see how you can explain the inconsistency."—*Anderson's Case* (1877), 7 Ch. D. 75, at p. 99; 47 L. J. Ch. 273, at p. 285, Jessel, M. R.

Duties of Court and Jury.

It is the duty of the jury to ascertain as facts the true meaning of technical words in a contract, or expressions used in a contract which have in particular trades, businesses, or places a known meaning attached to them, and the surrounding circumstances, and then to take the interpretation of the contract from the judge, otherwise the entire interpretation belongs to the judge.

"It appears to me that the question as to the interpretation of this contract (for delivery of barley) is a question entirely for the Court, and not for the jury. That they should ever be the judges on such a matter was founded on this, that there might be technical words used in a contract, which the jury might understand, and the Court might not; but it would be contrary to all practice to say, after the terms are explained to the satisfaction of the Court,

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that the jury are to have the interpretation of the contract, and not the Court."—*Hutchison* v. *Bowker* (1839), 5 M. & W. 535, at p. 540; 9 L. J. Ex. 24, at p. 25, Lord Abinger, C. B.

"The law I take to be this—that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have, in particular places or trades, a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the *contract* was."—*Ibid.*, at p. 542; L. J. at p. 25, Parke, B.

"If the surrounding circumstances at the time the instrument (a contract) was made show that the parties intended to use the word not in its primary or strict sense, but in some secondary meaning, the judge may construe it from such circumstances according to the intention of the parties—*Goldshede* v. *Swan* [(1847), 1 Ex. 154; 16 L. J. Ex. 284]; *Walker* v. *Hunter* [(1845), 2 C. B. 324; 15 L. J. C. P. 12]; Bacon's Maxims, 10, and examples there given; *Mallan* v. *May* [(1844), 13 M. & W. 511; 14 L. J. Ex. 48], and *Beckford* v. *Crutwell* [(1832), 1 M. & R. 187]. If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense—*Smith* v. *Wilson* [(1832), 3 B. & Ad. 728; 1 L. J. K. B. 194]; *Grant* v. *Maddox* [(1846), 15 M. & W. 737; 16 L. J. Ex. 227]; *Jolly* v. *Young* [(1794), 1 Esp. N. P. C. 186]. If the meaning of a word depends on the usage of the place where anything under the instrument is to be done, evidence of such usage must be left to the jury—*Robertson* v. *Jackson* [(1845), 2 C. B. 412; 15 L. J. C. P. 28]; *Bourne* v. *Gatliff* [(1844), 11 Cl. & F. 45]. Also the jury may have to give the meaning of some technical words."—*Simpson* v. *Margitson* (1847), 11 Q. B. 23, at p. 32; 17 L. J. Q. B. 81, at p. 84, Lord Denman, C. J., delivering judgment.

"When ambiguity exists about the meaning of an expression, and you look at other letters and extrinsic evidence for the purpose of deciding whether the sense in which the defendant says it is to be construed be correct or not, you at once get out of the rule that it is the duty of a judge to explain the document which contains the ambiguity."—*Smith* v. *Thompson* (1849), 18 L. J. C. P. 314, at p. 319, Wilde, C. J.

"It is well known that when expressions in a document are ambiguous, and that the ambiguity appears from extrinsic evi-

dence, extrinsic evidence is also admitted to explain the ambiguity, and then the sense in which the expression is to be understood is for the jury."—*Ibid.*, Maule, J.

"For myself I must confess I feel much disposed to say, that, as it was not suggested at the trial that the words of the contract had any technical meaning (in which case it would have been a question for the jury), but are words of ordinary use in the English language, its construction was for the judge."—*Alexander* v. *Vanderzee* (1872), L. R. 7 C. P. 530, at p. 533, Kelly, C. B.

"Generally speaking, the construction of a written contract is for the Court, unless it contains words of a technical or conventional use in a particular trade, in which case it is for the jury."—*Ibid.*, at pp. 533, 534, Blackburn, J.

"My lords, so far as the construction of the contract expressed in these words is concerned, unless there is something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the Court. That has been said so often that I need not refer your lordships to any authority upon the subject. The Court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of trade, to any of the words of that contract, has to place the construction upon the contract."—*Bowes* v. *Shand* (1877), 2 App. Cas. 455, at p. 462; 46 L. J. Q. B. 561, at p. 564, Cairns, L. C.

"The matter has given rise to some complication, chiefly, as it appears to me, because the learned judge left the construction of an agreement to the jury. There was no term of art and no question of custom the meaning or the existence of which might properly be left to the jury. It was for the judge at the trial to construe the written agreement, and we have now to say what construction should be put upon it."—*Turner* v. *Sawdon & Co.*, [1901] 2 K. B. 653, at p. 656; 70 L. J. K. B. 897, at p. 899, A. L. Smith, M. R.

The reasonableness of a contract in restraint of trade is a question for the Court.

"That [the course which the case took at the trial] raises the point which has been argued before us, namely, whether the ques-

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tion decided by the jury, that is, in substance, whether the covenant [in restraint of trade] was reasonable or not, was one for them. It appears to me that from a very early stage down to the present time that question has really always been treated as being one for the Court, and not for the jury. It is, in my opinion, a question of law. No doubt there may be matters of fact, forming elements in the determination of the question, which, if they are in dispute, may have to be ascertained through the medium of the jury; but it is beyond their province to determine whether the restriction imposed by the covenant is reasonable or not. In *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181, Lord Macclesfield stated the rule on the subject in terms substantially the same as those in which it has been repeatedly stated in subsequent cases. He said, in delivering judgment in that case: 'To conclude, in all restraints of trade, where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances and determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained.' It seems to me clear that, by the word 'Court' in that passage, the judge and not the jury is meant. . . . I do not think that the modern view—namely, that a restriction, even though universal, may be reasonable under special circumstances—has altered in any way the essential nature of the considerations upon which these cases depend, or has made any difference which can affect the old rule that the question of the reasonableness of the covenant is for the judge."—*Dowden and Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45, at pp. 50—52; 73 L. J. K. B. 38, at pp. 43, 44, Collins, M. R.

"The law on this subject seems to have been established so long as nearly two centuries ago. The question is really one of public policy, which is not a question of fact for a jury, but of law for the judge. No doubt the judge who has to decide the question has to consider the particular circumstances of the case."—*Ibid.*, at p. 54; L. J. at p. 45, Cozens-Hardy, L. J.

Intention.

From the whole Instrument—from the Words used—from the Context.

The interpretation of Contracts must be governed by the intention of the parties.

The intention of the parties to a contract is to be collected from the whole instrument.

The words are to be interpreted according to their strict and primary acceptation, unless from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect, and subject always to the observation that the meaning of a particular word may be shown, by parol evidence, to be different in some particular place, trade, or business from its proper and ordinary acceptation.

A contract, being unintelligible, must be treated as void.

"The only safe rule to be followed in the construction of a deed is, the intention of the parties, to be collected from a due consideration of the whole instrument."—*Nind* v. *Marshall* (1819), 1 B. & B. 319, at p. 326, Richardson, J.

"Words are to be construed according to their strict and primary acceptation, unless from the context of the instrument and the intention of the parties to be collected from it, they appear to be used in a different sense, or unless, in their strict sense, they are incapable of being carried into effect, and subject always to the observation that the meaning of a particular word may be shown, by parol evidence, to be different in some particular place, trade, or business, from its proper and ordinary acceptation."—*Mallan* v. *May* (1844), 13 M. & W. 511, at p. 517, 518; 14 L. J. Ex. 48, at p. 51, Pollock, C. B.

"The duty of the Court, or of an arbitrator who is in the place of the Court, is so to construe a contract as to give effect to the intention of the parties. Now, although parol evidence is not admissible to contradict a contract, the terms of which have but one ordinary meaning and acceptation, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to

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the intention, if the terms were interpreted according to their ordinary, and not according to their peculiar, signification. Therefore, whenever such a question has come before the Courts, it has always been held that where the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar and scientific meaning, the parties who have drawn up the contract with reference to some peculiar department of trade or business, must have intended to use the words in the peculiar sense. This is but an application of the well-known rule that the interpretation of contracts must be governed by the intention of the parties."—*Myers* v. *Sarl* (1860), 3 El. & El. 306, at p. 315; 30 L. J. Q. B. 9, at p. 12, Cockburn, C. J.

"I admit the force of the appellant's argument that contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; and another in the case where their conventional meaning is not the same with their legal sense. In the latter case, the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation."—*McCowan* v. *Baine*, [1891] A. C. 401, at p. 408, Lord Watson.

"The agreement being unintelligible must be treated as void."—*In re Vince, Ex parte Baxter*, [1892] 2 Q. B. 478, at p. 479; 61 L. J. Q. B. 836, at p. 837, the Court (Lord Esher, M. R., and Bowen and A. L. Smith, L. JJ.).

"Speaking for myself, I always have some misgiving where presumptions in regard to the interpretation that is to be put upon particular words in a contract apart from their natural significance are put forward. It may be a very useful guide to look at other decisions, but, after all, the question is what the parties said and intended."—*Sir James Laing & Sons, Ltd.* v. *Barclay, Curle & Co., Ltd.*, [1908] A. C. 35, at p. 43, Lord Loreburn, L. C.

Rational Interpretation.

"Where the language of the contract will admit of it, it should be presumed that the parties meant only what was reasonable; yet, if the terms are clear and unambiguous, the Court is bound to

give effect to them without stopping to consider how far they may be reasonable or not."—*Stadhard* v. *Lee* (1863), 3 B. & S. 364, at p. 372; 32 L. J. Q. B. 75, at pp. 77, 78, Cockburn, C. J.

Circumstances—Extrinsic Evidence.

To interpret a contract the circumstances and grounds upon which the contract was entered into may be looked at.

"The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected."—*Blackburn's Contract of Sale* (1st ed. 1845), pp. 49, 50.

"I do not deny that facts existing at the time of making the agreement may be admissible to assist the Court in determining the meaning of the language."—*Monco* v. *Taylor* (1850), 8 Ha. 51, at p. 56, Sir L. Shadwell, V.-C.

"It is always legitimate to look at all the co-existing circumstances in order to apply the language, and so to construe the contract."—*Lewis* v. *Nicholson* (1852), 18 Q. B. 503, at p. 510; 21 L. J. Q. B. 311, at p. 315, Lord Campbell, C. J.

"'The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills and of contracts required to be in writing seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used. But the language used in a contract is the language used to *another* in the course of an isolated transaction, and the words must take their meaning from those things of and concerning which they are used, and those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry.'—*Blackburn's Contract of Sale* (1st ed. 1845), p. 50 (a). No authority is referred to for the proposition, but such was then my opinion, and I still think the same."—*Grant* v. *Grant* (1870), L. R. 5 C. P. 727, at pp. 728, 729; 39 L. J. C. P. 272, at p. 275, Blackburn, J.

"In the case of a contract, the two parties are speaking of

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certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves* v. *Legg* (1854), 9 Ex. 709; 23 L. J. Ex. 228."—*River Wear Commissioners* v. *Adamson* (27th July, 1877), 2 App. Cas. 743, at p. 764; 47 L. J. Q. B. 193, at p. 202, Lord Blackburn.

"Now I apprehend that, in order to construe a written document, the Court is entitled to have all the facts relating to it, and which were existing at the time the written contract was made, and which were known to both parties. Certain facts existing at a time when a written contract is made are sometimes customs of trade or the ordinary usages of trade; sometimes the course of business between the parties; sometimes they consist of a knowledge of the matter about which the parties were negotiating. The Court is entitled to ask for those facts, to enable it to construe the written document; not simply because they are customs of trade, or the course of business between the parties, but because they are facts which were existing at the time, and which have a relation to the written contract, and which must be taken to have been known by both parties to the contract."—*Lewis* v. *Great Western Rail. Co.* (21 Dec. 1877), 3 Q. B. D. 195, at p. 208; 47 L. J. Q. B. 131, at p. 136, Brett, L. J.

See also *ante*, p. 90.

Customs and Usages.

Evidence of customs and known usages is receivable unless it is repugnant or inconsistent with the written contract.

"The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom: for the latter may always be

waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate declarations of the parties."—*The Reside* (1837), 2 Sumn. 567, at pp. 569, 570, Story, J.

"In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included, however, as of course, by mutual understanding. Evidence, therefore, of such incidents is receivable. The contract, in truth, is partly express and in writing, partly implied or understood and unwritten. But in these cases a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence, for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less."—*Owen* v. *Byrne* (1854), 3 El. & Bl. 703, at pp. 715, 716; 23 L. J. Q. B. 313, at p. 316, Coleridge, J., delivering the judgment of the Court (Coleridge, Wightman, Erle and Crompton, JJ.).

See also "Mercantile Instruments," "Customs and Usages," *post*.

Contemporaneous and Continuous Usage.

"Contemporaneous and continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely-framed documents."—*Hebbert* v. *Purchas* (1871), L. R. 3 P. C. 605, at p. 650; 40 L. J. Eccl. 33, at p. 48, Lord Hatherley, L. C.

Contemporanea Expositio.

Optimus interpres rerum usus.—2 Inst. 282; 2 Rep. 81.

Contemporanea exposi'io est optima et fortissima in lege.—2 Coke, Inst., ch. iii. p. 11; ch. xviii. p. 136.

"Now this that hath been said doth agree with our books, and therefore it is *benedicta expositio*, when our ancient authors, and

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our yeare books, together with constant experience doth agree."—2 Coke, Inst., ch. xiii. p. 181.

Subsequent Acts of Parties.

The acts of the parties done under the contract can be looked at to ascertain the intention, if the words of the contract are ambiguous, or to show that the contract does not express that which the parties intended to express in it.

"Upon the general and leading principle in such cases, we are to look to the words of the instrument and to the acts of the parties to ascertain what their intention was; if the words of the instrument be ambiguous, we may call in aid the acts done under it as a clue to the intention of the parties."—*Doe* d. *Pearson* v. *Ries* (1832), 8 Bing. 178, at p. 181, Tindal, C. J.

"There is no better way of seeing what they intended than seeing what they did, under the instrument in dispute."—*Chapman* v. *Black* (1838), 4 Bing. N. C. 187, at p. 193, Tindal, C. J.

"I do not deny that facts existing at the time of making the agreement may be admissible to assist the Court in determining the meaning of the language; nor do I deny that an act done or letter written after the agreement may be evidence of a fact existing at the time, material to the right interpretation of the agreement. But no point of law can, I apprehend, be better settled than this: that in construing an agreement, no acts of the parties subsequent to the making of it are (as such) admissible for the purpose of determining its meaning. The acts of the parties subsequent to the agreement may be material to show that a writing does not express that which the parties intended to express in it; and proof of that may be a reason why this Court should refuse to act upon the written agreement. But that is a very different thing from deducing from the acts of the parties the meaning of the agreement itself."—*Munro* v. *Taylor* (1850), 8 Ha. 51, at p. 56, Sir L. Shadwell, V.-C.

"It is true that the parties interested have acted upon the agreement for more than forty years, and their conduct shows that they have always understood it, until lately, as meaning what the defendants contend it does mean. This circumstance renders it necessary for the Court to be careful not lightly to come to the conclusion that the parties have been for many years labouring under a mistake. But the agreement of 1854 cannot be regarded

as an ancient document, the language of which may not now convey the same meaning as it did when written, and the language of which may therefore be properly construed by the light of contemporaneous and long usage.

"*Wadley* v. *Bagliss* (1844), 5 Tann. 752, was strongly relied upon by the appellants in support of their contention that the construction for many years put on the document by the parties themselves ought to be adopted by the Court in preference to the meaning which the Court would put upon it, apart from the conduct of the parties themselves. But *Wadley* v. *Bagliss* (1844), 5 Tann. 752, was the case of an ambiguous inclosure award, and the acts of the occupiers under it were admissible against them. That case must be compared with other decisions, such as *Clifton* v. *Walmesley* (1794), 5 T. R. 564, which is much more like the present case. On looking into the authorities—amongst them *Clyde Navigation Trustees* v. *Laird* (1883), 8 App. Cas. 658, at pp. 670, 673—I have come to the conclusion that the rights of the parties must be decided now as the Court would have decided them as soon as the agreement became binding, and before the parties had shown by their conduct how they understood it."—*Lord Hastings* v. *North Eastern Railway*, [1899] 1 Ch. 656, at pp. 663, 664; 67 L. J. Ch. 315, at pp. 317, 318, Lindley, M. R.

"The chief argument used to give an unnatural construction of the words [in a deed] is that the parties have so acted during a period of forty years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous."—*North Eastern Railway* v. *Lord Hastings*, [1900] A. C. 260, at p. 263; 69 L. J. Ch. 516, at p. 518, Earl of Halsbury, L. C.

Subsequent Declarations of Parties.

To construe a contract the circumstances and grounds upon which the contract was entered into can be looked at, but subsequent declarations and admissions, either verbal or written, cannot.

"It is always legitimate to look at all the co-existing circumstances in order to apply the language, and so to construe the contract; but subsequent declarations showing what the party

supposed to be the effect of the contract are not admissible to construe it."—*Lewis* v. *Nicholson* (1852), 18 Q. B. 503, at p. 510; 21 L. J. Q. B. 311, at p. 315, Lord Campbell, C. J.

"I think that subsequent admissions, whether in writing or not, are not to be taken into account by us in construing the written instrument in which the contract was contained."—*Ibid.*, at p. 514; L. J. at p. 317, Erle, J.

Altered Circumstances.

If the continuance of the existence of some particular specified thing is implied, the parties are excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor.

"Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor."—*Taylor* v. *Caldwell* (1863), 3 B. & S. 826, at p. 833; 32 L. J. Q. B. 164, at p. 166, Blackburn, J. (cited by Lindley, L. J., in *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544, at pp. 549, 550; 60 L. J. Q. B. 247, at p. 250; and by Jessel, M. R., in *In re Arthur* (1880), 14 Ch. D. 603, at p. 608; 49 L. J. Ch. 556, at p. 558; and by Vaughan Williams, L. J., in *Krell* v. *Henry*, [1903] 2 K. B. 740, at p. 748; 72 L. J. K. B. 794, at p. 796).

"What is the view expressed in *Jackson* v. *The Union Marine Insurance Co.* (1873), L. R. 8 C. P. 572, at p. 581; 42 L. J. C. P. 284, at pp. 288, 289? I read, 'These authorities seem to support the proposition, which appears on principle to be very reasonable, that where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to, or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made.'"—

Bush v. *Whitehaven Trustees* (1888), 52 J. P. 392, at p. 393, Lord Coleridge, C. J.

"The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; 32 L. J. Q. B. 164. . . . Whatever may have been the limits of the Roman law, the case of *Nickoll* v. *Ashton*, [1901] 2 K. B. 126; 70 L. J. K. B. 6..., makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things going to the root of the contract, and essential to its performance."—*Krell* v. *Henry*, [1903] 2 K. B. 740, at pp. 747, 748; 72 L. J. K. B. 794, at p. 796, Vaughan Williams, L. J.

Implied Promise.

Expressum facit cessare tacitum. Co. Litt. 210 a, 183 b.

Expressio unius est exclusio alterius. Co. Litt. 210 a.

The Court will not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for.

The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied.

Where acts to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, there is implied a corresponding and correlative obligation on him to do the things necessary for the completion of the contract, care being taken not to make the contract speak where it was intentionally silent and not to make it speak entirely contrary to the intention of the parties.

"Where parties have entered into written engagements, with expressed stipulations, it is manifestly not desirable to extend that

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by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument."—*Aspdin* v. *Austin* (1844), 5 Q. B. 671, at p. 684; 13 L. J. Q. B. 155, at pp. 158, 159, Lord Denman, C. J., delivering the judgment of the Court.

"We should not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse, and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, this would be no breach of the warranty. So with respect to any other kind of warranty. The maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down—which would be manifestly inconvenient."—*Dickson* v. *Zizinia* (1851), 10 C. B. 602, at pp. 610, 611; 20 L. J. C. P. 73, at p. 75, Maule, J.

"We think the cases have established that where a relation exists between two parties which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him."—*Morgan* v. *Rarey* (1861), 6 H. & N. 265, at p. 276; 30 L. J. Ex. 131, at p. 134, Pollock, C. B.

"I look on the law to be that, if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative."—*Stirling* v. *Maitland* (1864), 5 B. & S. 840, at p. 852; 34 L. J. Q. B. 1, at p. 3, Cockburn, C. J. (approved of by Lord Hatherley in *Rhodes* v. *Forwood* (1876), 1 App. Cas. 256, at pp. 271, 272; 47 L. J. Ex. 396, at p. 404).

"I entirely concur with the position taken by the learned counsel for the suppliant, that although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the

party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract. As in the case cited by Sir Hugh Cairns: if A. covenants or engages by contract to buy an estate of B., at a given price, although that contract may be silent as to any obligation on the part of B. to sell, yet as A. cannot buy without B. selling, the law will imply a corresponding obligation on the part of B. to sell [*Pordage* v. *Cole* (1681), 1 Wms. Saund. 319 l.]. So, if a man engages to work, and render services which necessitate great outlay of money, time, and trouble, and he is only to be paid by the measure of the work he has performed, the contract necessarily presupposes and implies on the part of the person who engages him an obligation to supply the work. So, where there is an engagement to manufacture some article, a corresponding obligation on the other party is implied to take it, for otherwise it would be impossible that the party bestowing his services could claim any remuneration. Numerous other cases might be put of the same kind; but in all these instances, where a contract is silent, the Court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract, must take great care that they do not make the contract speak where it was intentionally silent; and above all, that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract, was the intention of the parties. This I take to be a sound and safe rule of construction with regard to implied covenants and agreements which are not expressed in the contract."—*Churchward* v. *The Queen* (1865), L. R. 1 Q. B. 173, at pp. 195, 196, Cockburn, C. J.

"The proper rule to apply therefore is . . . the ordinary rule, that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined: *expressio unius est exclusio alterius.*"—*North Stafford Steel, &c. Co.* v. *Ward* (1868), L. R. 3 Ex. 172, at p. 177, Willis, J.

"I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that

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each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."—*Mackay* v. *Dick* (1881), 6 App. Cas. 251, at p. 263, Lord Blackburn

"It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."—*Ex parte Ford* (1885), 16 Q. B. D. 305, at p. 307; 55 L. J. Q. B. 406, at p. 407, Lord Esher, M. R.

"No Court has a right to imply any term as between parties which was not clearly and obviously within the contemplation of both the parties."—*Butler* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1888), 21 Q. B. D. 207, at p. 212, Lord Esher, M. R.

"I agree with the rule as laid down by the Master of the Rolls (Lord Esher), viz., that the Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable on principle. . . . The nature and extent of the contract which the Court will imply in such cases is stated by Cockburn, C. J., in the case of *Stirling* v. *Maitland* [(1864), 5 B. & S. 840, at p. 852; 34 L. J. Q. B. 1, at p. 3]. He says: 'I look on the law to be that, if a party enters into an arrangement, which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative.'"—*Hamlyn & Co.* v. *Wood & Co.*, [1891] 2 Q. B. 488, at pp. 494, 495; 60 L. J. Q. B. 734, at pp. 737, 738, Kay, L. J.

"The case comes within the well-known rule that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual."—*Oriental Steamship Co.* v. *Tylor*, [1893] 2 Q. B. 518, at p. 527; 63 L. J. Q. B. 128, at p. 132, Bowen, L. J. (cited by

Stirling, J., in *Holford* v. *Acton Urban Council*, [1898] 2 Ch. 240, at p. 246; 67 L. J. Ch. 636, at p. 639).

"On the question of construction it is necessary to distinguish clearly between the interpretation of the language used and the consequences arising in law from using it. The interpretation of the words ought to precede the implications of law, and the language actually used ought not, in my judgment, to be altered so as to put in an express condition when it is only implied."—*Diederichsen* v. *Farquharson Brothers*, [1898] 1 Q. B. 150, at p. 159; 67 L. J. Q. B. 103, at p. 109, Rigby, L. J.

(See also *post*, p. 172, "Express or Implied Covenants.")

Golden Rule.

"The golden rule of construction is, that words are to be construed according to their natural meaning, unless such a construction would either render them senseless or would be opposed to the general scope and intent of the instrument; or, unless there be some cogent reason of convenience in favour of a different interpretation."—*Fowell* v. *Tranter* (1864), 3 H. & C. 458, at p. 461; 34 L. J. Ex. 6, at p. 7, Bramwell, B.

[N.B.—This is not quite the same as Lord Wensleydale's golden rule stated in *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, at p. 106; 26 L. J. Ch. 473, at p. 481 (see *ante*, p. 75).—AUTHOR.]

Ambiguity.

Contract Operating Several Ways.

If a contract can be performed in several ways, that mode is adopted which is the least profitable to the plaintiff, and the least burdensome to the defendant.

Where a doubt exists the interpretation that renders the contract valid should be accepted, and not that *which renders the contract invalid.*

Where there is any doubt as to the interpretation of any stipulation in a contract, it ought to be interpreted strictly against the party in whose favour it has been made.

"Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff, and the least burthensome to the

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defendant."—*Cockburn* v. *Alexander* (1848), 6 C. B. 791, at p. 814; 18 L. J. C. P. 74, at p. 83, Maule, J.

"But suppose we import into this case the rule that where a doubt exists and one mode of construction renders a contract valid and the other invalid, the former should be adopted."—*Steele* v *Hoe* (1849), 19 L. J. Q. B. 89, at p. 93, Erle, J.

"We think that the words in their ordinary acceptation are capable of expressing a past or a concurrent consideration; and as upon one construction the instrument is void, the other is to be adopted which makes it valid."—*Ibid.*, Patteson, J., delivering the judgment of the Court.

"The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made."—*Burton* v. *English* (1883), 12 Q. B. D. 218, at p. 220; 53 L. J. Q. B. 133, at p. 135, Brett, M. R.

"It is also a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void. This is analogous to the rule laid down in *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473, referred to in *Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68; 28 L. J. Ch. 110."—*Mills* v. *Dunham*, [1891] 1 Ch. 576, at p. 590; 60 L. J. Ch. 362, at p. 367, Kay, L. J.

Latent Ambiguity.

A latent ambiguity is where the words of the contract are free from ambiguity in themselves but difficult as to their application to the external circumstances.

Evidence dehors *the contract is admissible to explain a latent ambiguity.*

"A latent ambiguity is, where you shew that words apply equally to two different things or subject-matters, and then evidence is admissible to shew which of them was the thing or subject-matter intended."—*Smith* v. *Jeffryes* (1846), 15 M. & W. 561, at p. 562; 15 L. J. Ex. 325, Alderson, B.

Patent Ambiguity.

A patent ambiguity is where there is a doubt on the face of the instrument.

Evidence to explain a patent ambiguity is not admissible.

Evidence of the private views or surmised, alleged, or secret intentions and known principles of the parties is never admissible.

"This is a case of *ambiguitas patens*, and according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument, the law admits no extrinsic evidence to explain it."—*Saunderson* v. *Piper* (1839), 5 Bing. N. C. 425, at p. 431, Tindal, C. J.

"In the first place there is no doubt that, not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes. The authorities in support of this position are *Att.-Gen.* v. *The Cast-Plate Glass Co.* [(1787), 1 Anstr. 39]; *Goblett* v. *Beeby* [(1829), 3 Sim. 24]; *Smith* v. *Wilson* [(1832), 3 B. & Ad. 728]; *Richardson* v. *Watson* [(1833), 4 B. & Ad. 787]; and *Clayton* v. *Gregson* [(1836), 5 Ad. & E. 302]. This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate."—*Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at p. 555; 5 Scott, 958, at pp. 1028, 1029, Parke, B.

"The general rule I take to be, that where the words of any instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a

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written instrument, nor any party in taking under it: for the ablest advice might be controlled and the clearest title undermined if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

"The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts which in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired by custom or otherwise a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or judge to construe the instrument, and to carry such real meaning into effect.

"But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above

detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to: it would be evidence which, in most instances, could not be met or countervailed by any of an opposite bearing or tendency, and would in effect cause the secret, undeclared intention of the party to control and predominate over the open intention expressed in the deed."—*Ibid.*, at pp. 565, 566; Scott, at pp. 1037—1039, Tindal, C. J.

Alterations in Contracts.

All contracts which are altered or erased in a material part are thereby avoided.

"The strictness of the rule on this subject, as laid down in *Pigot's Case* [(1615), 6 Coke, p. 47, P. XI. 27 a], can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration, except through fraud or laches on his part. To say that *Pigot's Case* [(1615), 6 Coke, p. 47, P. XI. 27 a] has been overruled, is a mistake; on the contrary, it has been extended; the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it."—*Davidson* v. *Cooper* (1844), 13 M. & W. 343, at p. 352; 13 L. J. Ex. 276, at p. 280, Lord Denman, C. J.

(See also *Pattinson* v. *Luckley* (1875), L. R. 10 Ex. 330; 44 L. J. Ex. 180.)

"I will first of all consider the general law on the subject, which I take to be settled now beyond dispute. The leading case, and which from the time of James I. has always been so treated, is *Pigot's Case* (1615), 6 Coke, p. 47, P. XI. 27 a, and whatever may be said of the first resolution in *Pigot's Case*, no doubt has ever been raised as to the second resolution, which is this, 'that when any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the obligee, be it by inter-

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lineation, addition, rasing, or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void.' So that even if a single word which is material is erased it destroys the instrument. It was next decided that such rule of law which applied to deeds applied to documents not under seal. The case which decided this was the well-known case of *Master* v. *Miller* (1791), 4 T. R. 320, decided in the year 1791. There Lord Kenyon, who was Lord Chief Justice of the Queen's Bench, held that the rule which applied to instruments under seal applied to documents not under seal, 'because,' he said, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event, when it is detected.' Then he added, 'The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions which were indeed confined to deeds applied to the then state of affairs, but they establish this principle, that all written instruments which were altered or erased should be thereby avoided.' Ashhurst, J., said this: 'Now I cannot see any reason why the principle on which a deed would have been avoided should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or wax. And a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is that any alteration avoids the contract.' I will not read the elaborate judgment of Buller, J., because he was in the minority, and when you want to find out the principle of a decision, it is only necessary to refer to the judgments of the judges who were in the majority, and whose decision it really was. I will therefore pass on to the judgment of Grose, J., which on this point is very plain. 'Pigot's is the leading case,' he said; 'from that I collect that when a deed is erased whereby it becomes void, the obligor may plead *non est factum* and give the matter in evidence, because at the time of plea pleaded it was not his deed; and, secondly, that when a deed is altered in a material point by himself, or even by a stranger, the deed thereby becomes void. Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds; but it is said that the law does not extend to the case of a bill of

exchange; whether it does or not must depend on the principle on which this law is founded. The policy of the law has been already stated, namely, that a man shall not take the chance of committing a fraud, and when that fraud is detected recover on the instrument as it was originally made. In such a case the law intervenes, and says that the deed thus altered no longer continues the same deed, and that no person can maintain an action on it. In reading that and the other cases cited, I observe that it is nowhere said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. And this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made from attempting to make an alteration in it. This principle, too, appears to me as applicable to one kind of instrument as to another.' I have read those portions of the judgments, because they state distinctly what the law is. I may mention that the case of *Master* v. *Miller* (1791), 1 T. R. 320, went to the Exchequer Chamber [(1798), 2 H. Bl. 141], and there Eyre, C. B., said, 'When it is admitted that the alteration of a deed would vitiate it, the point seems to me to be concluded, for by the custom of merchants a duty arises on bills of exchange from the operation of law in the same manner as a duty is created on a deed by the act of the parties.' And Macdonald, C. B., added: 'I see no distinction as to the point in question between deeds and bills of exchange, and I entirely concur with my Lord Chief Justice in thinking there would be more dangerous consequences follow from permitting alterations to be made on bills than on deeds.' The result, therefore, is that the law as settled by those cases applied to all instruments in writing without distinction for this purpose between an instrument under seal which is a deed and an instrument without a seal which is not a deed."—*Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555, at pp. 559, 560, 561, 562; 51 L. J. Q. B. 401, at pp. 403, 404, Jessel, M. R.

[See also *Leeds Bank* v. *Walker* (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590, a case of a Bank of England note altered in number and date.]

"It is established that a material alteration in a written instrument does, and an immaterial alteration does not avoid it.

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The rule was first laid down, though not precisely in these words, with reference to deeds conveying freehold property; but it has been discussed in many cases, with the result that the rule as now established is held to be applicable to all written instruments, and is not confined to deeds of purchase and sale of land. It must be taken, however, with this qualification, that, in considering whether an alteration is material or not, you must have regard to the particular instrument to see what its purport is and what its office is. That is the obvious conclusion from the case of *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555; 51 L. J. Q. B. 401, where the Master of the Rolls (Sir George Jessel) and the Lords Justices who took part in the decision, and particularly Cotton, L. J., discussed the particular nature of a Bank of England note to show that the alteration there complained of was material, though that particular alteration might not have been material in another instrument."—*In re Hoargate and Osborn's Contract*, [1902] 1 Ch. 451, at p. 454; 71 L. J. Ch. 279, at pp. 280, 281, Kekewich, J.

Part IV.—DEEDS.

RULES APPLICABLE TO ALL DEEDS.

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Deed Defined.

"Deed (*fait*), Factum, *Anglicè* a deed, and signifieth in the common law an instrument consisting of three things—viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the civilians *literarum obligatio*."—*Co. Litt.* 171 b.

"First, then, a deed is a writing sealed and delivered by the parties. It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed—in Latin *factum*, κατ' ἐξοχήν, because it is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed."—*2 Bl. Com.* p. 295.

"The definition of a deed cited from Spelman [*scriptum solemne quo firmatur donum, concessio, pactum, contractus, et hujusmodi*] seems to me the best."—*Reg.* v. *Morton* (1873), L. R. 2 C. C. R. 22, at p. 27; 42 L. J. M. C. 58, at p. 61, Blackburn, J.

"In some of the definitions given a deed is described as being something of the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further, and say that any instrument delivered as a deed, and which either itself passes an interest or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed. . . . . Many documents under seal are not deeds; for instance, an award, though sealed. Again, a will is often under seal."—*Ibid.*, at p. 27; L. J., at p. 61, Bovill, C. J.

Presumption respecting the Making of Deeds.

Deeds are presumed to be made with great caution, forethought, and advice.

"I must not, however, omit, that in devises by last will and testament (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal

deeds, which are presumed to be made with great caution, forethought, and advice). . . ."—2 *Bl. Com.* p. 172.

Extrinsic Evidence.

Executory or Preliminary Contract.

No parol or extrinsic evidence is admitted to add to, deduct from, or contradict or vary the terms of a deed.

An executory or preliminary contract in writing which is to be carried out by a deed afterwards executed cannot be looked at for the purpose of enlarging, diminishing, or modifying the contract, although it is recited in the deed, except for the purpose of interpreting the deed itself, unless there is a suit for rescinding the deed on the ground of fraud or for altering it on the ground of mistake.

"The rule is perfectly clear, that where there is a deed in writing, it will admit of no contract that is not part of the deed. Whether it adds to, or deducts from, the contract, it is impossible to introduce it on parol evidence."—*Irnham* (*Lord*) v. *Child* (1781), 1 Br. C. C. 92, at p. 93, Lord Chancellor Loughborough.

"It is not necessary to cite any case to prove the proposition that parol evidence of a parol communication between the parties ought not to be received to add a term, not inserted in the specific agreement which they have executed; and for this plain reason, that what passed between them in that communication may have been altered and shifted in a variety of ways, but what they have signed and sealed was finally settled. It would destroy all trust, it would destroy all security and lay it open, unless the parties are completely bound by what they have signed and sealed."—*Haynes* v. *Hare* (1791), 1 H. Bl. 659, at p. 664, Lord Loughborough, L. C. J.

"I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of most dangerous consequence to admit such testimony; for, then, parties dealing in matters on writing made upon advice and consideration, would be subjected either to the uncertain testimony of vague and precarious memory; or, as in the case at bar, to matter, of which at the time of contracting, they might have no knowledge, and never intended

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to be under its control."—*Smith* v. *Doe* d. *Jersey* (1821), 2 Brod. & Bing. 473, at pp. 541, 542, Park, J.

"I cannot help saying that I think it is very important, according to my view of the law of contracts, both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as showing what the object of the parties was, and what they were about to do, so as to afford a guide in the construction of their words; but you have no right for any purpose to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake."—*Leggott* v. *Barrett* (1880), 15 Ch. D. 306, at p. 309; 51 L. J. Ch. 90, at p. 92, James, L. J.

"I entirely agree with my Lord [James, L. J.] that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of the document. If there is any doubt about the construction of the governing words of that document, the recital may be looked at in order to determine what is the true construction; but if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or the deed."—*Ibid.*, at p. 311; L. J., at p. 93, Brett, L. J.

"In *Leggott* v. *Barrett* (1880), 15 Ch. D. 306, at pp. 309, 311; 51 L. J. Ch. 90, at pp. 92, 93, Lord Justice James and the present Master of the Rolls (Sir W. B. Brett) laid down what is indubitably the law, that when a preliminary contract is afterwards

reduced into a deed, and there is any difference between them, the mere written contract is entirely governed by the deed."—*Palmer* v. *Johnson* (1884), 13 Q. B. D. 351, at p. 359; 53 L. J. Q. B. 348, at p. 351, Fry, L. J.

"This case is an illustration of a broad principle of law which is perfectly well known and is constantly acted upon—namely, that where a preliminary contract of any description, whether verbal or written, is intended to be superseded by, and is in fact superseded by, one of a superior character, then the later contract—the superior contract—prevails, and the stipulations in the earlier one can no longer be relied upon."—*Gresswolde-Williams and Others* v. *Barneby* (1901), 49 W. R. 203, at p. 204, Wills, J.

The Interpretation of Deeds should be favourable.

The interpretation of deeds ought to be favourable and as near to the apparent intent of the parties as possibly may be, and as the law will permit.

Too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect.

False English will not make a deed void, if the intent of the parties plainly appears.

Insensible words may be rejected.

"It is a known maxim in law, that *benigne faciendæ sunt interpretationes chartarum ut res magis valeat quam pereat.* (Co. Litt. 36.) There is another, that *verba intentioni et non e contra debent inservire.* (8 Co. 94.)

"It is said in our books that the construction of deeds ought to be favourable and as near to the apparent intent of the parties as possibly may be, and as the law will permit.

"That too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order to bring them to the intent of the parties. For neither false *Latin* nor false *English* will make a deed void, if the intent of the parties doth plainly appear. I have collected these rules and maxims from *Littleton*, *Plowden*, *Coke*, *Hobart*, and *Finch*, persons of the greatest authority. But they are themselves so full of justice and good sense, that they do not want any authority to

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support them, and I do not know that they were ever yet controverted.

"On the foundation of these rules, whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed, as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure, it is the duty of the judges (and this is that *astutia* which is so much commended by Lord *Hobart*, p. 277, in the case of the Earl of *Clanrickard*) to endeavour to find out such a meaning in the words as will best answer the intent of the parties."—*Parkhurst* v. *Smith* (1741, 1742), Willes Reps. 327, at p. 332, Willes, C. J. (c . d applied by Alexander, C. B., in *Colmore* v. *Tyndall* (1828), J. 605, at p. 618, and by Lord Brougham, L. C., in *Langst* .. *Langston* (1834), 2 Cl. & F. 194, at p. 243).

[N.B.—This case is also reported under the name of *Smith* v. *Packhurst*, in 3 Atk. 135, where the judgment is not so full as in the above report. See *infra*.]

"First, it is a maxim that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

"Another maxim is that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor; the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible; these maxims, my Lords, are founded upon the greatest authority—Coke, Plowden, and Lord Chief Justice Hale, and the law commends the *astutia*, the cunning

of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may show the ingenuity of counsel, but is very ill-becoming a judge."—*Smith* v. *Packhurst* (1741, 1742), 3 Atk. 135, at p. 136, Willes, C. J.

"Lord Hobart (who was a very great man) in his report (fo. 277), says: 'I do exceedingly commend the judges that are curious and almost subtil, *astuti*, to invent reason and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the Act'; and my Lord Hale in the case of *Crossing* v. *Scudamore* (1670), 1 Vent. 137, at p. 141, cites and approves of this passage in Hobart."—*Roe* v. *Tranmarr* (*or Tranmer*) (1758), Willes Reps. 682; 2 Wils. 75, Willes, C. J. (applied in *In re Johnston Foreign Patents Co., Ltd.*, [1904] 2 Ch. 234, at p. 247; 73 L. J. Ch. 617, at p. 623, by Vaughan Williams, L. J.

"Undoubtedly the generally received principle of law is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and on the other hand, that the party who receives the instrument and parts with his goods on the faith of it, should rather have a construction put upon it in his favour, because the words of the instrument are not his but those of the other party."—*Mayer* v. *Isaac* (1840), 6 M. & W. 605, at p. 612; 9 L. J. Ex. 225, at p. 226, Alderson, B.

"It is quite true, I am not to conjecture or guess at what might have been the intention of the parties, but I am to consider the whole instrument, and if there appear a plain intention to give interest, then, though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction."—*Clayton* v. *Glengall* (1841), 1 Dr. & W. 1, at p. 14, Sir Edward B. Sugden, L. C.

"That was done in accordance with the maxim which ordinarily governs the interpretation of written instruments — *Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat.*"—*Cheney* v. *Courtois* (1863), 13 C. B. N. S. 634, at p. 640, Erle, C. J.

"All contracts should, if possible, be construed, *ut res magis valeat quam pereat.*"—*Vestry of St. Leonards, Shoreditch* v. *Hughes* (1864), 17 C. B. N. S. 137, at p. 162, Byles, J.

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Supplying or rejecting Words.

"The result of all the authorities is, that when a Court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned."—*Gwyn* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209, at p. 215; 37 L. J. Ex. 122, at p. 126, Kelly, C. B.

(See also, "Insensible Words and Phrases," *ante*, p. 70, and *post*, p. 324, "Statutes.")

Date and Delivery.

A deed has no operation until delivery.

When a deed is dated, the date is the date of delivery and of its execution until the contrary appears.

When a deed is undated or has an impossible date, the word "date" must mean delivery.

A deed is taken to speak from the time of its execution, and not from the date apparent on the face of it.

The date of a deed is only primâ facie *evidence of the time when it was made.*

"Delivery is either actual, *i.e.*, by doing something and saying nothing, or else verbal, *i.e.*, by saying something and doing nothing, or it may be both; and either of these may make a good delivery and a perfect deed."—Sheppard, Touchstone, Ch. IV., p. 57.

"A deed has no operation until delivery, and there may be cases in which, *ut res valeat*, it is necessary to construe date, delivery. Where there is no date, or an impossible date, that word must mean delivery. But where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery."—*Styles* v. *Wardle* (1825), 4 B. & C. 908, at p. 911, Bayley, J.

"Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, it is a valid and effectual

deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential."—*Doe* d. *Garnons* v. *Knight* (1826), 5 B. & C. 671, at p. 692, Bayley, J. (cited by Pigott, B., in *Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, at p. 309; 36 L. J. C. P. 313, at p. 317).

"Now the rule uniformly acted upon from the time of *Clayton's Case* [5 Rep. 1] to the present day is, that a deed or other writing must be taken to speak from the time of the execution, and not from the date apparent on the face of it. That date is indeed to be taken *primâ facie* as the true time of execution; but as soon as the contrary appears, the apparent date is to be utterly disregarded."—*Browne* v. *Burton* (1847), 5 D. & L. 289, at p. 292; 17 L. J. Q. B. 49, at p. 50, Patteson, J., delivering the judgment of the Court.

"It is conceded that, if *Potez* v. *Glossop* [(1848), 2 Ex. 191] is good law, the memorandum is admissible. Now, though some inconvenience might arise from the rule there laid down, we cannot help seeing that more would occur if no effect were given to the date appearing on the face of the document. It is only *primâ facie* evidence of the time when it was made; and it is quite open to the party against whom it is offered to show fraud and misrepresentation."—*Malpas* v. *Clements* (1850), 19 L. J. Q. B. 435, at p. 437, Lord Campbell, C. J.

"In *Jayne* v. *Hughes* [(1854), 10 Ex. 430; 24 L. J. Ex. 115], evidence was admitted to show that a deed (a more solemn instrument, if possible, even than a will) was wrongly dated."—*Reffell* v. *Reffell* (1866), L. R. 1 P. & M. 139, at p. 142; 35 L. J. P. 121, Sir J. P. Wilde.

"In the first place, the efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it. This, as a general proposition of law, cannot be controverted. It is not affected by the circumstance that the maker may so deliver it as to suspend or qualify its binding effect. He may declare that it shall have no effect until a certain time has arrived, or till some condition has been performed, but when the time has arrived, or the condition has been performed, the delivery becomes absolute, and the maker of the deed is absolutely bound by it, whether he has parted with the possession or not. Until the specified time has arrived, or the condition has been performed, the instrument is not a deed. It is

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a mere escrow."—*Xenos* v. *Wickham* (1867), L. R. 2 H. L. 296, at p. 323; 36 L. J. C. P. 313, at p. 325, Lord Cranworth.

(See also "Date," *ante*, p. 80.)

Contemporaneous Deeds.

Contemporaneous deeds representing a single transaction may be treated as one deed between the same parties.

"Where things are done in the same instant, they would transpose them, and suppose a precedency, it being to support common assurances; and so they might suppose the covenant to pay the rent to precede the raising of the use, and then the consideration would be executed."—Per North, C. J., in *Barker* v. *Keete* (1678), 1 Freem. 249, at p. 251. (See also *Taylor* d. *Atkyns* v. *Horde* (1757), 1 Burr. 60, at p. 106.)

"The doctrine as to contemporaneous documents rests on this, that when documents are actually contemporaneous, that is, two deeds executed at the same moment, a very common case, or within so short an interval that having regard to the nature of the transaction, the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to show the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose."—*Smith* v. *Chadwick* (March, 1882), 20 Ch. D. 27, at pp. 62, 63; 51 L. J. Ch. 597, at p. 611, Jessel, M. R.

"I think the law stands in this way, that when two deeds are executed on the same day, the Court must inquire which was in fact executed first, but that if there is anything in the deeds themselves to show an intention, either that they shall take effect *pari passu* or even that the later deed shall take effect in priority to the earlier; in that case the Court will presume that the deeds were executed in such order as to give effect to the manifest intention of the parties."—*Gartside* v. *Silkstone and Dodworth Coal and Iron Co.* (June, 1882), 21 Ch. D. 762, at pp. 767, 768; 51 L. J. Ch. 828, at p. 829, Fry, J.

Time.

Greenwich or Dublin Mean Time.

Statutes (Definition of Time) Act, 1880, 43 & 44 Vict. c. 9 (2nd August, 1880).

Sect. 1. "Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred [*sic*] shall, unless it is otherwise specifically stated, be held, in the case of Great Britain, to be Greenwich mean time, and in the case of Ireland, Dublin mean time."

(See also *ante*, pp. 81, 82.)

Punctuation and Brackets.

"By putting stops, or using the parenthesis, as pointed out by the plaintiff's counsel (at p. 49), it becomes perfectly clear: and we know that no stops are ever inserted in Acts of Parliament, or in deeds; but the Courts of Law in construing them must read them with such stops as will give effect to the whole."—*Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39, at pp. 65, 66, Lord Kenyon, C. J.

Object.

"It has been truly said, in some cases, that the construction of a deed does not depend on the order of the covenants, or upon the precise terms of them; but that regard must be had to the object, and the whole scope of the instrument."—*Richards* v. *Black* (1848), 6 C. B. 437, at p. 441; 6 D. & L. 325, at p. 328; 18 L. J. C. P. 15, at p. 17, Wilde, C. J.

Intention of Parties.

Distinction between the Case of a Deed and a Will.

"He (Lord Eldon) first adverts to the well-known distinction which has at all times prevailed as to the construction of deeds and wills, and which I have always understood to be this, that, although in both cases the Courts look to the intention of the parties, yet in construing a deed, unless there be in the deed some manifest contrariety or contradiction, rendering a different interpretation necessary in order to effectuate the intention of the

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parties, the Courts are guided by the strict legal meaning of words; but in the case of a will, the testator is supposed to have been *inops consilii*, and on that ground alone a greater latitude is allowed in the construction of legal terms."—*Lewis* v. *Rees* (1856), 3 K. & J. 132, at pp. 146, 147; 26 L. J. Ch. 101, at p. 104, Page Wood, V.-C.

Inconsistent Parts of Deed.

Deeds shall operate according to the intention of the parties.

The intention is to be collected from the whole context and subject-matter of the deed, so as to make one entire and consistent construction of the whole.

Where there are inconsistent parts, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it ought to be rejected.

"Such construction is always to be made of a deed that all the words (if possible) agreeable to reason and conformable to law, may take effect according to the intent of the parties without rejecting of any, or by any construction to make them void."—1 *Coke*, p. 233, Part 1., 95 b (*Shelley's Case*).

"But surely it is a rule, both in law and equity, so to construe the whole deed or will as that every clause should have its effect."—*Butler* v. *Duncombe* (1719), 1 P. Wms. 449, at p. 457, Parker, L. C.

"Whenever it is necessary to give an opinion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all. But if the intent of the parties be plain and clear, we ought, if possible, to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law, nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest and the words doubtful and obscure, it is the duty of the judges (and this is that *astutia* which is so commended by Lord *Hobart*, p. 277, in the case of the Earl of *Clanrickard*) to endeavour to find out such a meaning in the words as will best

answer the intent of the parties."—*Parkhurst* v. *Smith* (1741, 1742), Willes' Reps. 327, at p. 332, Willes, C. J. (cited and applied by Alexander, C. B., in *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605, at p. 618, and in *Langston* v. *Langston* (1834), 2 Cl. & F. 194, at p. 243, by Lord Brougham, L. C.).

"The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense: That they shall operate according to the intention of the parties, if by law they may: and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention."—*Goodtitle* v. *Bailey* (1777), 2 Cowp. 597, at p. 600, Lord Mansfield, C. J.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus*: every part of it may be brought into action in order to collect from the whole one uniform and consistent sense, if that may be done."—*Barton* v. *Fitzgerald* (1812), 15 East, 530, at p. 541, Lord Ellenborough, C. J.

"According to the authority of *Browning* v. *Wright* [(1799), 2 B. & P. 13, at p. 22], covenants ought to be construed with due regard to the intention of the parties as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole."—*Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9, at p. 12, Lord Ellenborough, C. J.

"I agree that in construing this covenant we are to look to the subject-matter of the contract, and to consider all the terms of the deed; I admit that a positive covenant may sometimes be controlled or qualified by other clauses in the deed."—*Savard* v. *Austey* (1825), 2 Bing. 519, at p. 522, Best, C. J.

"It is a good rule of construction that deeds should be construed so as to give effect to the intention of the parties."—*Evans* v. *Vaughan* (1825), 4 B. & C. 261, at p. 266, Abbott, C. J.

"If the provisions are clearly expressed, and there is nothing to enable the Court to put upon them a construction different from that which the words import, no doubt the words must prevail; but if the provisions and expressions be contradictory, and if there be grounds appearing on the face of the instrument, affording proof of the real intention of the parties, then that intention will prevail against the obvious and ordinary meaning of the words. If the parties have themselves furnished a key to the meaning of the words used, it is not material by what expression they convey

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their intention."—*Lloyd* v. *Lloyd* (1837), 2 My. & Cr. 192, at p. 202, Lord Cottenham, L. C.

"It is quite true, I am not to conjecture or guess at what might have been the intention of the parties; but I am to consider the whole instrument, and if there appear a plain intention to give interest, then though there should be no express words to that effect, and this is the case of a deed, yet I am bound to give it that construction."—*Clayton* v. *Gilsgall* (1841), 1 Dr. & W. 1, at p. 14, Sir Edward B. Sugden, L. C.

"As the different parts of the deed are inconsistent with each other, the question is, to which part effect ought to be given. There is no doubt that, applying the approved rules of construction to this instrument, effect ought to be given to that part which is calculated to carry into effect the real intention, and that part which would defeat it should be rejected."—*Walker* v. *Giles* (1848), 6 C. B. 662, at p. 702; 18 L. J. C. P. 323, at p. 330, Wilde, C. J.

"One suggestion is, to reject the proviso altogether, as wholly inconsistent with the previous trusts, according to the well-known rule, that in deeds containing two clauses absolutely inconsistent with each other, the latter is to be rejected, being, in that respect, the converse of the rule which obtains in construing wills. This is an expedient to which the Court will very reluctantly, in any case, have recourse, and never, unless absolutely compelled to do so, having exhausted every other means in its power to reconcile apparent inconsistencies."—*Bush* v. *Watkins* (1851), 14 Beav. 425, at p. 432, Sir John Romilly, M. R.

"I adopt the observations of C. B. Alexander in *Colmore* v. *Tyndall* (1828), 2 Y. & J. 605, at p. 622, that this Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. If the Court sees an intention clearly and distinctly established by it, it has no difficulty in carrying that into effect; subject, of course, to any rules of law that may be applicable to it, but only qualified to that extent."—*Beaumont* v. *The Marquis of Salisbury* (1854), 19 Beav. 198, at p. 206; 24 L. J. Ch. 94, at p. 97, Sir J. Romilly, M. R.

"Undoubtedly, as Sheppard says (Touchstone, p. 87), in the construction of all parts of all kinds of deeds, amongst the rules to be universally observed is one, 'that the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected.' Where words are ambiguous, or the intention

is not manifest and plain, it is useful and sometimes necessary to recur to other parts of the deed for interpretation."—*Mongpenny* v. *Mongpenny* (1859), 3 De G. & J. 572, at p. 587; 28 L. J. Ch. 303, at p. 306, Lord Chelmsford, L. C.

"The question is not what the parties to a deed may have intended to do by entering into that deed (a marriage settlement), but what is the meaning of the words used in the deed: a most important distinction in all cases of construction, and the disregard of which often leads to erroneous conclusions."—*Mongpenny* v. *Mongpenny* (1861), 9 H. L. Cas. 111, at p. 146; 31 L. J. Ch. 269, at p. 275, Lord Wensleydale.

"The result of all the authorities is, that when a Court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessarily to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned."—*Girgu* v. *Neath Canal Co.* (1868), L. R. 3 Ex. 209, at p. 215; 37 L. J. Ex. 122, at p. 126, Kelly, C. B.

"The settlement is one which I cannot help thinking was never intended by the framer [illegible]t to have the effect I am going to attribute to it; but, of course, as I very often say, one must consider the meaning of the words used, not what one may guess to be the intention of the parties."—*Smith* v. *Lucas* (1881), 18 Ch. D. 531, at p. 542, Jessel, M. R.

"I conceive that all deeds are to be construed, not only strictly according to their words, but so far as is possible without infringing any rule of law, in such a way as to effectuate the intention of the parties."—*Hilbers* v. *Parkinson* (1883), 25 Ch. D. 200, at pp. 203, 204, Pearson, J.

"The principle on which an instrument of this description [a deed] should be construed is not doubtful. It is (to quote the words of Lord Watson in an unreported case [*Chamber Colliery Co., Ltd.* v. *Twycrosse*, H. L., July 20, 1893]) that the deed must be read as a whole in order to ascertain the true meaning of its several clauses, and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible, or (as was said by Lord Selborne) you may disregard the literal meaning of the words and give them another meaning if the words are sufficiently flexible to bear that interpretation: *Caledonian Rail. Co.* v. *North British*

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Rail. Co. (1881), 6 App. Cas. 114, at p. 122."—*North Eastern Railway* v. *Lord Hastings*, [1900] A. C. 260, at pp. 267, 268; 69 L. J. Ch. 516, at p. 520, Lord Davey.

"Now, I agree that in a conveyance of leaseholds, however inartistic, untechnical, or uncertain the words used may be, if you see an apparent intention that the legal estate shall pass, then it may be held to pass. Looking, then, at the deed before us, and endeavouring to ascertain the intention, I should not myself come to the conclusion that it was the obvious intention of the parties—or, indeed, their intention at all—that the legal estate should pass. I adopt the principle stated by my brother Vaughan Williams in the course of the argument, that on granting or assigning a term of years, there must, in order that the legal estate may pass, be some words which imply the intention to part with the possession."—*In re Beachey, Heaton* v. *Beachey*, [1904] 1 Ch. 67, at pp. 74, 75; 73 L. J. Ch. 68, at p. 70, Lord Alverstone, C. J.

(See also *post*, Repugnancy in Deeds.)

Ambiguities.

"It holdeth generally that all ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or in some case by election, but never by averment, but rather shall make the deed void for uncertainty. But if it be *ambiguitas latens*, then otherwise it is."—*Bac. Max. of the Law*, Reg. 23.

"It is also a settled canon of construction that where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void. This is analogous to the rule laid down in *Grey* v. *Pearson* (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473, referred to in *Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68; 28 L. J. Ch. 110."—*Mitts* v. *Dunham*, [1891] 1 Ch. 576, at p. 590; 60 L. J. Ch. 362, at p. 367, Kay, L. J.

(See also *ante*, pp. 83, 133—137.)

Deed operating Two Ways.

If a deed can operate two ways, that consistent with the intent should have effect given to it.

The plaintiff should be put in the least profitable position and the defendant in the least burthensome.

The construction that renders the deed valid should be adopted.

"If a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute

so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed."—*Solly* v. *Forbes* (1820), 2 B. & B. 38, at pp. 48, 49, Dallas, C. J. (This rule was referred to and applied by Wilde, C. J., in the case of *Ford* v. *Beech* (1848), 11 Q. B. 852, at p. 870; 17 L. J. Q. B. 114, at p. 117.)

"Generally speaking, where there are several ways in which the contract might be performed, that mode is adopted which is the least profitable to the plaintiff and the least burthensome to the defendant."—*Cockburn* v. *Alexander* (1848), 6 C. B. 791, at p. 814; 18 L. J. C. P. 74, at p. 83, Maule, J.

"But suppose we import into this case the rule that where a doubt exists and one mode of construction renders a contract valid and the other invalid, the former should be adopted."—*Steele* v. *Hoe* (1849), 19 L. J. Q. B. 89, at p. 93, Erle, J.

"We think that the words in their ordinary acceptation are capable of expressing a past or a concurrent consideration; and as upon one construction the instrument is void, the other is to be adopted which makes it valid."—*Ibid.*, Patteson, J., delivering the judgment of the Court.

"If a deed can, therefore, operate two ways, one consistent with the intent and the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed."—*Squire* v. *Ford* (1851), 9 Hare, 47, at p. 57; 20 L. J. Ch. 308, at p. 312, Turner, V.-C.

"As it seems to me, the words of the agreement have not a double intendment; but even if they had, then, according to the ninth rule for the construction of deeds, given in Sheppard's Touchstone, p. 88, 'If words have a double intendment, and the one standeth with law and the other is against law, they are to be taken in that sense which is agreeable to law.'"—*Fussell* v. *Daniel* (1854), 10 Ex. 581, at p. 597; 24 L. J. Ex. 130, at p. 133, Martin, B.

"It is undoubted law, that a deed that is intended and made to one purpose, may enure to another; for if it will not take effect that way it is intended, it may take effect another way." [Sheppard's Touchstone, 82.] "There is an admirable judgment of Lord Chief Justice Willes on this subject, in *Roe* d. *Wilkinson* v. *Tranmarr* (1758), 1 Willes, 682, which has a considerable bearing on the point in question."—*Mountpenny* v. *Mountpenny* (1859), 3 De

G. & J. 572, at p. 589; 28 L. J. Ch. 303, at p. 307, Lord Chelmsford, L. C.

"It seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the Court allowed that."—*Gandy* v. *Gandy* (1885), 30 Ch. D. 57, at p. 82; 54 L. J. Ch. 1154, at p. 1163, Bowen, L. J.

Words how Interpreted.

The words of a deed are to be interpreted like the words of any other writing.

The words of a deed should be read in their ordinary primary and grammatical sense unless such an interpretation would lead to some absurdity or inconvenience or would be plainly repugnant to the intention of the parties to be collected from other parts of the deed.

"The same sense is to be put upon the words of a contract in an instrument under seal as would be put upon the same words in any instrument not under seal; for the same intention must be collected from the same words of a contract in writing, whether with or without a seal."—*Seddon* v. *Senate* (1810), 13 East, 63, at p. 74, Lord Ellenborough, C. J.

"It is equally a settled rule of law, where ambiguous expressions are used, though you are not at liberty to prove by their declarations what the parties meant, you are not only at liberty, but you are driven to supply yourself with evidence to know what is the meaning of such expressions. If I have to decide on the meaning of a deed, in which some technical word, some word of art, of which I may be ignorant, is used, I must have recourse to dictionaries and lexicons, in order that they may instruct me."—*The Att.-Gen.* v. *Drummond* (Jan. 1842), 1 Dru. & Warr. 353, at p. 368, Sugden, L. C.

"The words of a deed are to be construed like those of any other writing, according to the ordinary use and application of them."—*Bain* v. *Cooper* (Ap. 1842), 9 M. & W. 701, at p. 708; 11 L. J. Ex. 325, at p. 327, Lord Abinger, C. B.

"I believe the authorities to be numerous and clear (too numerous and clear to make it convenient or necessary to cite them) that, where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it; such meaning, in that case, conclusively states the writer's intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations; the first, that if the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary meaning; the second, that by 'sensible with reference to the extrinsic circumstances' is not meant that the extrinsic circumstances make it more or less reasonable or probable is what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning."—*Shore* v. *Wilson* (August, 1842), 9 Cl. & F. 355, at p. 525; 5 Scott, 958, at pp. 1001, 1002, Coleridge, J.

"In construing the deed, we must adopt the established rule of construction, to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience, or would be plainly repugnant to the intention of the parties, to be collected from other parts of the deed."—*Bland* v. *Crowley* (1851), 6 Ex. 522, at pp. 529, 530, Parke, B.

"Then comes another rule, and that is, that you must not capriciously interfere with the ordinary meaning of the words, and further, that if you do interfere with the ordinary meaning, you must interfere as little as possible."—*Lucena* v. *Lucena* (1877), 7 Ch. D. 255, at p. 260; 47 L. J. Ch. 203, at p. 205, Jessel, M. R.

Technical Words and Phrases.

Technical words and phrases have their correct technical meaning given to them unless contrary to the real meaning and intention of the parties.

"The real intention of the framer of the deed, the written declaration of whose mind it is always considered to be, is the end

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and object, to the discovery and effectuating of which all the rules of construction, properly so called, are uniformly directed. Where technical words or phrases are made use of, the strong presumption is, that the party intended to use them according to their correct technical meaning; but this is not conclusive evidence that such was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose. The deed may be drawn inartificially, from ignorance or inadvertence, or other causes; but still, if there is enough clearly to convey information as to the real meaning, the object is attained. The mind is with certainty discovered, and being known, must be the guide, or the act and deed would not be the act and deed of the party, but of the Court. Because the words, which are the signs of the ideas of the persons using them, are in general, and in the correct use of them, the signs of ideas different from those of which in the particular case they are found less technically and correctly, but with equal certainty, to be the signs: can it follow that they are to be construed, to represent the ideas of which they are known not to be the signs, in preference to those of which they appear to be the signs? Where is the authority that compels the Court to go this length in its adherence to technical meaning? The contrary has been long and universally established to be the rule by the highest authorities from the earliest period, without a single one to the contrary. Many cases may doubtless be found, in which technical meaning has been allowed to prevail, notwithstanding some appearance of a contrary intent; but this has been where the manifestation of intent was not deemed sufficient, to get over the presumption in favour of the legal construction. . . . There is no case or dictum to be found which requires the Court to adopt the technical sense, in opposition to the actual meaning of the party: on the contrary, the authorities uniformly demand the preference to be given to intent, over technical import and form."—*Cholmondeley (Marquis)* v. *Clinton (Lord)* (1820), 2 Ja. & W. 1, at pp. 91, 92, 93, Sir Thomas Plumer, M. R.

Words capable of a Two-fold Interpretation.

Where words are capable of a two-fold interpretation, such interpretation should be received as tends to make the deed good.

"Where words are capable of a two-fold construction, even in the case of a deed (and much more of a will), it is just and reasonable that such construction should be received as tends to make it good."—*Atkinson* v. *Hutchinson* (1734), 3 P. Wms. 258, at p. 260, Lord Talbot, L. C.

"It is a rule that, where words are capable of a two-fold construction, even in the case of a deed, and much more in the case of a will, such a construction shall be received as tends to make it good."—*Thellusson* v. *Woodford* (1798), 4 Ves. 227, at p. 312, Lawrence, J.

Same Words in Different Parts of Deed.

The same words in different parts of a deed should be given the same meaning.

"I do not know whether it is law, or a canon of construction, but it is good sense to say whenever in a deed or will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear."—*In re Birks, Kenyon* v. *Birks*, [1900] 1 Ch. 417, at p. 418; 69 L. J. Ch. 124, at p. 126, Lindley, M. R.

General and Special Words.

Doctrine of Ejusdem Generis or Noscitur a sociis.

General words of a deed are primâ facie *to be taken in their usual sense.*

General words of a deed are to be restrained by the other parts of a deed, if the intent so to restrain them be apparent.

General words in a deed following special words are primâ facie *to be taken in their general sense unless the reasonable interpretation of the deed requires them to be used in a sense limited to things* ejusdem generis *with the special words.* (See *ante*, p. 63, and *post*, p. 311, Statutes.)

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Where general words are followed by special words, the special words limit the general words.

If the particular words exhaust the whole genus, *the general word refers to some larger* genus.

"The third and the principal reason is upon a maxim and principle of the law, *scil. quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia.* The same rule almost word for word is put and agreed on both sides in 7 Ed. III., 10 a, *Margery Mortimer's Case* [Lit. Rep. 345; Hob. 172], *scil.*, 'where a deed speaks by general words, and afterwards descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words.'" —4 *Coke*, p. 449, Part VIII., 154 b (*Altham's Case*).

"Another rule or principle in law, *scil.*, *generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa;* and therefore, when the deed at the first contains special words and afterwards concludes in general words, both words, as well general as special, shall stand; and it is well said in 35 H. VIII., Dyer, 56, subsequent words may qualify and abridge, but not destroy, the generality of the words precedent."—4 *Coke*, p. 450, Part VIII., 154 b.

"From all the cases upon this subject it appears to be determined, that however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words. The question, therefore, always has been, whether such an irresistible inference does arise? for if such an inference does arise from concomitant covenants they will control the general words of an independent covenant in the same deed."—*Hesse* v. *Stevenson* (1803), 3 B. & P. 565, at pp. 574, 575, Lord Alvanley, C. J., delivering the judgment of the Court.

"I have admitted, and again still admit, the general rule to be that the general words of a deed are to be restrained by the other parts of a deed, if the intent so to restrain them be apparent; yet I think it would be of the most dangerous consequence if the judges of the land were to permit themselves (which they have no right to do) to exercise vague conjectures about the hardship of cases, and to consider ingeniously what the parties must have

meant, when the words used are clear and precise, admitting of no ambiguity at all; and when the mode, which the plaintiff points out, gives to every branch of the covenant a clear and determinate meaning. This would be to make a new deed for the parties, not to pronounce upon the contract which they have made for themselves."—*Nind* v. *Marshall* (1819), 1 B. & B. 319, at p. 338, Park, J.

"General words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated."—*Harrison* v. *Blackburn* (1864), 17 C. B. N. S. 678, at p. 690; 34 L. J. C. P. 109, at p. 112, Erle, C. J. (cited by Hawkins, J., in *Hawke* v. *Dunn*, [1897] 1 Q. B. 579, at p. 586; 66 L. J. Q. B. 364, at p. 369).

"That case [*Reg.* v. *Payne* (1866), L. R. 1 C. C. 27; 35 L. J. M. C. 170] falls within the rule, that if the particular words exhaust the whole *genus*, the general word must refer to some larger *genus*."—*Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at p. 315; 37 L. J. C. P. 78, at p. 80, Willes, J.

"It is to be observed that the rule admits, as every rule of construction of documents must admit, as it is after all but a working canon to enable us to arrive at the meaning of the particular document—it admits of being qualified by the contents of the document itself, and there are many classes of cases in which it is obvious that the rule would have to bend."—*Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union* (1889), 22 Q. B. D. 555, at pp. 561, 562; 58 L. J. Q. B. 573, at p. 577, Bowen, L. J.

"Where you find the word 'whatsoever' following, as it does, upon certain substantives, it is often intended to repel, and in this case does effectually repel, the implication of the so-called doctrine of *ejusdem generis*, which, I think, has often been urged for the sake of giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have."—*Ibid.*, at p. 566; L. J. at p. 578, Fry, L. J.

"Nothing can well be plainer than that to show that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before."—*Anderson* v. *Anderson*, [1895] 1 Q. B. 749, at p. 753; 64 L. J. Q. B. 457, at p. 459, Lord Esher, M. R.

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"General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in *Payler* v. *Homersham* (1815), 4 M. & S. 423, and *Lindo* v. *Lindo* (1839), 1 Beav. 496."—*In re Perkins*, [1898] 2 Ch. 182, at p. 190; 67 L. J. Ch. 454, at p. 458, Lindley, M. R., delivering the judgment of the Court (Lindley, M. R., Rigby and Collins, L. JJ.).

(See also *ante*, p. 63, and *post*, p. 311, Statutes.)

Exceptions.

"His lordship [Lord Kenyon, C. J.] then observed, that the general mode of construing deeds to which there are exceptions, is to let the exception control the instrument as far as the words of it extend and no further; and then upon the case being taken out of the letter of the exception, the deed operates in full force."—*Bowring* v. *Elmslie* (1790), 7 T. R. 216, note (*a*).

"It is a rule of construction, that where there is a grant and an exception out of it, the words of the exception are to be considered as the words of the grantor, and to be construed in favour of the grantee."—*Bullen* v. *Denning* (1826), 5 B. & C. 842, at p. 850, Holroyd, J.

"It is a settled rule of construction that, where there is a grant and an exception out of it, the exception is to be taken as inserted for the benefit of the grantor, and to be construed in favour of the grantee. (See Sheppard's Touchstone, 7th ed. (1820), p. 100; *Cardigan* (*Earl*) v. *Armitage* (1823), 2 B. & C. 197, and *Bullen* v. *Denning* (1826), 5 B. & C. 842; 4 L. J. (O. S.) K. B. 314.) If, then, the grant be clear, but the exception be so framed as to be bad for uncertainty, it appears to us that, on this principle the grant is operative and the exception fails."—*Savill Brothers, Ltd.* v. *Bethell*, [1902] 2 Ch. 523, at pp. 537, 538; 71 L. J. Ch. 652, at pp. 657, 658, Stirling, L. J., delivering the judgment of the Court (Collins, M. R., Stirling and Cozens-Hardy, L. JJ.).

Transposing Words.

"It has been truly said, in some of the cases, that the construction of a deed does not depend on the order of the covenants, or upon the precise terms of them; but that regard must be had to the object and whole scope of the instrument."—*Richards* v.

Black (1848), 6 C. B. 437, at p. 441 ; 18 L. J. C. P. 15, at p. 17, Wilde, C. J.

Changing Words.

"Here, therefore, in order to give effect to the intention of the surrenderor, we must say that when he used the word *or* he meant *and*. And there is no case in which any difference has been made, as to this point, between a will and a deed, when the Court are considering how the intention of the parties can be effected."—*Wright* v. *Kemp* (1789), 3 T. R. 470, at p. 473, Lord Kenyon, C. J.

Operative Part and Recitals.

When the operative part of a deed is clear it cannot be controlled by the recitals or other parts of the deed.

When the operative part of a deed is ambiguous, or goes beyond the recitals, it may be controlled by the recitals and other parts of the deed.

When the words of the operative part of a deed are general, they may be controlled by the recitals or other parts of the deed.

If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is preferred.

"The reciting part of a deed is not at all a necessary part either in law or equity. It may be made use of to explain a doubt of the intention and meaning of the parties, but it hath no effect or operation."—*Bath and Montague's Case* (1693), Cas. Ch. 3rd ed. 55, at p. 101, Holt, C. J.

"If the operative part of a deed be doubtfully expressed, there the recital may safely be referred to as a key to the intention of the parties; but where the operative part of the deed uses language which admits of no doubt, it cannot be controlled by the recital."—*Bailey* v. *Lloyd* (1829), 5 Russ. 330, at p. 344, Sir John Leach, M. R.

"When the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. On the other hand, when those words are of doubtful meaning, the recitals and other parts of the deed may be used as a test to discover the intention of the parties, and to fix the true meaning of those words."—*Walsh* v. *Trevanion*

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(1850), 15 Q. B. 733, at p. 751; 19 L. J. Q. B. 458, at p. 462, Patteson, J., delivering the judgment of the Court.

"It is true that the Courts have held—and the authorities are very numerous on this subject, I will just state their result, they may be found in almost every text-book on conveyancing—that you cannot control clear words of conveyance by words of recital. That is one canon undoubtedly. But the expression 'clear words of conveyance' is subject to interpretation. For instance, the doctrine is as applicable to releases as to anything else, and the exception will be found to be always, that general words are not within that description of clear words of conveyance which cannot be controlled by the recital."—*Rooke* v. *Lord Kensington* (1856), 2 K. & J. 753, at p. 769; 25 L. J. Ch. 795, at p. 799, Sir W. Page Wood, V.-C.

"I do not dispute the proposition which was argued, that if you find in a settlement recitals indicating various parcels enumerated, from whence it is to be inferred, from reading the recitals alone, that these parcels, and these alone, are to be included in and made subject to the provisions of the deed, but yet you find that in the operative part of the deed one or two of these parcels are omitted, the Court may be of opinion, upon the construction of the deed, that the parcels, which are omitted in the operative part, are omitted by mistake, and are not included in the provisions of the deed. And the converse of that proposition is also true; parcels may be included in the operative part of the deed which the recitals and the rest of the deed show to have been inserted there by mistake. There are several cases to that effect, and amongst them the well-known case, before Lord Mansfield, of *Moore* v. *Magrath* [(1774), 1 Cowper, 9]."—*Barratt* v. *Wyatt* (1862), 30 Beav. 442, at p. 443, Sir J. Romilly, M. R.

"It was argued, that the covenant ought to be limited by the recital, and it certainly ought, if there were any ambiguity about it."—*Selby* v. *Crystal Palace Gas Co.* (1862), 30 Beav. 606, at p. 612, Sir J. Romilly, M. R.

"It is of the greatest consequence to keep distinct the different parts of deeds, and to give to recitals and to the operative part their proper effects. I have always held, that where the recitals and the operative part of a deed are at variance, the operative part must be officious, and the recitals inofficious. I do not say inoperative, for the recitals may be useful in explaining ambiguities, but I cannot give to them such effect as to introduce a new covenant into the

deed."—*Young* v. *Smith* (1865), L. R. 1 Eq. 180, at p. 183; 35 Beav. 87, at p. 90, Sir J. Romilly, M. R.

"I had to consider the whole of this subject in the case of *Rooke* v. *Lord Kensington* [(1856), 2 K. & J. 753; 25 L. J. Ch. 795], and I am quite satisfied, after having heard the able argument of Mr. Turner, even upon the authorities he has cited, that, where there is a manifest discrepancy between the recital and the conveyance, the recital being clear as to what was intended to be conveyed, and the conveyance going beyond the recital, the conveyance will have to be restricted. No doubt that rule has more frequently been held to apply to the case of releases than of any other deed; but that does not arise from any difference in principle, but simply because the inconsistency is found in releases more frequently than in other deeds."—*Jenner* v. *Jenner* (1866), L. R. 1 Eq. 361, at pp. 364, 365; 35 L. J. Ch. 329, Sir W. Page Wood, V.-C.

"Another thing which I think we may consider settled by authority is, that where the words of a covenant are ambiguous and difficult to deal with, we may resort to the recitals to see whether they throw any light on its meaning."—*In re Michell's Trusts* (1878), 9 Ch. D. 5, at p. 9, Jessel, M. R.

"The rule is, that a recital does not control the operative part [illegible] where the operative part is clear."—*Davies* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 358, Jessel, M. R.

"The true rule is given in the language of Lord Hatherley in *Rooke* v. *Lord Kensington* [(1856), 2 K. & J. 753, at p. 769; 25 L. J. Ch. 795, at p. 799], 'that you cannot control clear words of conveyance by words of recital,' but he goes on to point out that 'the exception will be found to be always, that general words are not within that description of clear words of conveyance which cannot be controlled by the recital.' And in *Jenner* v. *Jenner* [(1866), L. R. 1 Eq. 361; 35 L. J. Ch. 329], where the authorities are collected and examined, the same learned judge acted upon that principle, relying upon Lord Ellenborough's words in *Payler* v. *Homersham* [(1815), 4 M. & S. 423, at p. 426], 'the general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument rightly, you must have regard to all its parts, and most especially to the particular words of it.'"—*Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500, at p. 514; 54 L. J. Ch. 577, at p. 579, Kay, J.

"From that case [*Moore* v. *Magrath* (1774), 1 Cowp. 9] I get

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in addition the leading principle laid down, that the recitals are the key to what is intended to be done by the deed, and that though general words may be put in to guard against an accidental omission, yet in the absence of any indication of a larger meaning, the deed must be held to refer to estates or things of the same nature or description with those which have been already mentioned."—*Crompton* v. *Jarratt* (1885), 30 Ch. D. 298, at p. 307; 54 L. J. Ch. 1109, at p. 1115, North, J.

"Although it is true, as Mr. Wolstenholme said, that words of general description like these are introduced in order to carry into the assurance anything which by mistake has been omitted, yet in my opinion the things to be swept in must, *primâ facie*, be of the same class and nature as those which have been specifically enumerated."—*Ibid.*, at p. 316; L. J. at p. 1119, Cotton, L. J.

"Now there are three rules applicable to the construction of such an instrument (an assignment).

"If the recitals are clear and the operative part is ambiguous, the recitals govern the construction.

"If the recitals are ambiguous, and the operative part is clear, the operative part must prevail.

"If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part is to be preferred."—*Ex parte Dawes* (1886), 17 Q. B. D. 275, at p. 286, Lord Esher, M. R.

Ibid. at p. 289, Lopes, L. J., stated same rules in a slightly different way.

"I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention."—*Mackenzie* v. *Duke of Devonshire*, [1896] A. C. 400, at p. 408, Lord Davey.

Covenants.

Definition of a Covenant.

A covenant is a clause of agreement contained in a deed (whether by recital, provision, or exception), whereby either party stipulates for the truth of certain facts, or binds himself to perform, or forbear doing, something or other.

"A covenant is the agreement or consent of two or more by deed

in writing sealed and delivered, whereby one of the persons doth promise to the other that something is done already, or shall be done afterwards. And he that makes the covenant is called the covenantor; and he to whom it is made the covenantee." —*Shep. Touch.* p. 160.

"There needs not, in this case, formal and orderly words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made, may have this action upon the breach of the agreement."—*Shep. Touch.* p. 162.

"Any words in a deed, which show an agreement to do a thing, make a covenant: as if it be agreed by articles between A. and B. that stock shall be in hands of B. until a jointure be made, B. *solvendo proinde* the interest to A.; covenant lies against B. for interest."—*Comyns' Dig.* Covenant, A 2 (cited by Grove, J., in *Brookes* v. *Drysdale* (1877), 3 C. P. D. 52, at p. 57).

"The word 'covenant' seems to be borrowed from the Latin *convenire* or *conventus*, which signifies a mutual agreement and accord, upon conditions propounded and accepted by the parties concerned. A covenant then is a mutual consent and agreement entered into between persons, whereby they stand bound each to the other to perform the conditions contracted and indented for. So that a covenant in this larger sense is the very same thing with a contract or bargain. But the word is generally taken in the law of England, and indeed is here considered, in a more restrained sense, and applied only to an agreement in writing under seal. By covenants, therefore, are meant those clauses of agreement contained in a deed, whereby either party stipulates for the truth of certain facts, or binds himself to perform, or forbear doing, something or other."—2 *Bac. Abr.* p. 336, "Covenant."

"Neither the word covenant, nor the word agreement, is necessary to an action of covenant, but a deed under hand and seal, testifying an agreement."—*Holles* v. *Carr* (1676), 3 Swans. 638, at pp. 647, 648, Lord Nottingham's MSS.

"No particular technical words are requisite towards making a *covenant*."—*Lant* v. *Norris* (1757), 1 Burr. 287, at p. 290, Lord

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Mansfield (cited by Lord Chelmsford, L. C., in *Monypenny* v. *Monypenny* (1859), 3 De G. & J. 572, at p. 590; 28 L. J. Ch. 303, at p. 307).

"The Court, however, must look at the whole of this instrument, and if they find it contains a clear agreement to do any act, whether in the way of covenant, provision, or even exception, then it is clear that an action of covenant may be maintained on the instrument."—*Saltoun* v. *Houstoun* (1824), 1 Bing. 433, at p. 444, Lord Gifford, C. J. (cited by Lord Tenterden, C. J., in *Sampson* v. *Easterby* (1829), 9 B. & C. 505, at pp. 513, 514).

"It is fully established that no precise form of words is necessary to constitute a covenant; 'any words in a deed which *show an agreement* to do a thing make a covenant' [Com. Dig. 'Covenant,' A. 2]; but it must be clear that they are meant to operate *as an agreement*, and not merely as words of condition or qualification [Com. Dig. 'Covenant,' A. 3]."—*Wolveridge* v. *Steward* (1833), 1 Cr. & M. 644, at p. 657, Denman, C. J.

"It will be found in those cases [*Sampson* v. *Easterby* (1829), 9 B. & C. 505; 6 Bing. 644; *Saltoun* v. *Houstoun* (1824), 1 Bing. 433; and several earlier cases] that, where the words of the recital or reference manifested a clear intention that the parties should do certain acts, the Courts have from these inferred a covenant to do such acts, and sustained actions of covenant for the nonperformance, as if the instruments had contained express covenants to perform them. . . . Where parties have entered into written engagements, with expressed stipulations, it is manifestly not desirable to extend that by any implications; the presumption is, that, having expressed some, they have expressed all the conditions by which they intend to be bound. . . . It is one thing for the Court to effectuate the intention of parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to an instrument all such covenants as upon a full consideration the Court may deem fitting for the completing the intentions of the parties, but which they either purposely or unintentionally have omitted."—*Aspdin* v. *Austin* (1844), 5 Q. B. 671, at p. 683; 13 L. J. Q. B. 155, at pp. 158, 159, Lord Denman, C. J., delivering the judgment of the Court.

"No particular form of words is necessary to constitute a covenant; whenever a party by deed obliges himself to do an act, that amounts in law to a covenant."—*Rigby* v. *The Great Western*

Rail. Co. (1845), 14 M. & W. 811, at p. 815; 13 L. J. Ex. 60, at p. 62, Parke, B.

"It is undoubted law, that no particular word, or form of words, is necessary to create a covenant; but that any words are sufficient for that purpose which show an intention to be bound by the deed to do or omit that which is the subject of the covenant: any such words are sufficient, and some such words are necessary, to make a covenant."—*Rashleigh* v. *South Eastern Rail. Co.* (1851), 10 C. B. 612, at p. 632, Maule, J., delivering the judgment of the Court.

"No particular form of words is necessary to form a covenant; but, wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it amounts to a covenant, whether it is in the recital or in any other part of the instrument."—*The Great Northern Rail. Co.* v. *Harrison* (1852), 12 C. B. 576, at p. 609; 22 L. J. C. P. 49, at p. 51, Parke, B.

"There are several authorities that a recital in a deed may amount to a covenant. Thus, in *Sevem* v. *Clerk* (1588) [1 Leo. 122], it was held that, where A. by his deed-poll, after reciting that he was possessed of certain lands for years of a certain term, assigned the same to S. G., with divers covenants, articles, and agreements in the said deed contained, it was held that this recital ('whereas he was,' &c.) amounted to an agreement within the meaning of the condition of the obligation, which was to perform all agreements in the deed [see also *Johnson* v. *Procter* (1611), Yelv. 175; and the remarks of Lord Eldon on that case, in his judgment in *Browning* v. *Wright* (1799), 2 B. & P. 13, at p. 25]."—*Farrell* v. *Hilditch* (1859), 5 C. B. N. S. 840, at p. 853; 28 L. J. C. P. 221, at pp. 223, 224; Williams, J., delivering the judgment of the Court.

"It is urged that the word 'covenant' is inapplicable to anything but an instrument under seal. It is true that the word in strictness does not apply otherwise than to such agreements as are executed under the solemnity of a seal. But, in common parlance, it is applied to any agreement whether under seal or not: see the several Dictionaries [Richardson, Johnson and Webster]. . . Neither does the word 'condition' necessarily apply to a condition under seal. In Comyns' Digest, *Condition*, where the subject of conditions properly so called is discussed, a case is put in which no

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condition under seal exists."—*Hayne* v. *Cummings* (1864), 16 C. B. N. S. 421, at pp. 426, 427, Willes, J.

"There is another rule that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-matter."—*Davies* v. *Tredwell* (1881), 18 Ch. D. 354, at p. 359, Jessel, M. R.

Express or Implied Covenants.

An express covenant is one that is expressed by words in the deed.

An implied covenant is founded on the presumed intention of the parties, there being no such express covenant in the deed, and it must be a necessary implication, collected by interpretation and inference from the terms used in the deed.

An implied covenant in its proper sense differs in no respect from an express covenant in its effect or legal consequence.

Covenants are in law implied by the use of certain words, and by force of various Acts of Parliament, e.g., 1 & 2 *Vict. c.* 20, *s.* 22; 8 & 9 *Vict. c.* 18, *s.* 132; 44 & 45 *Vict. c.* 41, *s.* 7.

"Covenants are distinguished into express and implied covenants—express, when they are expressed in a deed; implied, when the deed doth not express them, but the law doth make and supply them."—2 *Bac. Abr.* "Covenant."

"To charge a party with a covenant, it is not necessary that there should be express words of covenant or agreement. It is enough if the intention of the parties to create a covenant be apparent."—*Courtney* v. *Taylor* (1843), 6 M. & G. 851, at p. 867, Tindal, C. J. (cited by Malins, V.-C., in *Jackson* v. *North Eastern Rail. Co.* (1877), 7 Ch. D. 573, at p. 583).

"'There are two kinds of covenants,' says Lord Coke, 1 Inst. 139 b. (b), 'viz., a covenant in deed and a covenant in law;' or, as it is put in Vaughan's Reports, p. 118, *Hayes* v. *Bickerstaffe* (1681), 'All covenants between a lessor and his lessee are either covenants in law or express covenants. . . .'

"A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate: so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by

those words already created; as, if a man by deed demise land for years, covenant lies upon the word 'demise,' which imports, or makes, a covenant in law for quiet enjoyment; or, if he grant land by feoffment, covenant will lie upon the word '*dedi*.'

"In every case, it is always matter of construction to discover what is the sense and meaning of the words employed by the parties in the deed. In some cases that meaning is more clearly expressed, and therefore more easily discovered; in others, it is expressed with more obscurity, and discovered with greater difficulty. In some cases it is discovered from one single clause; in others, it is only to be made out by the comparison of different and perhaps distant parts of the same instrument. But, after the intention and meaning of the parties is once ascertained, after the agreement is once inferred from the words employed in the instrument, all difficulty which has been encountered in arriving at such meaning is to be entirely disregarded; the legal effect and operation of the covenant, whether framed in express terms, that is, whether it be an express covenant, or whether the covenant be matter of inference and argument, is precisely the same; and an implied covenant, in this sense of the term, differs nothing in its operation or legal consequences from an express covenant."—*Williams* v. *Burrell* (1845), 1 C. B. 402, at pp. 429, 430, 431; 14 L. J. C. P. 98, at p. 104, Tindal, C. J.

"Now, as to the doctrine of implied agreements, the doctrine which is to be collected from the cases is involved in much difficulty. It is not always possible to see what is and what is not sufficient to raise an implied agreement. This, however, is a plain, intelligible, sensible and settled rule, that, whereas you ought never to imply a covenant against the intention of the parties, so it goes further, and you ought not to imply an agreement unless, in the fair and honest construction of the deed, it appears that it was the intention of the parties, or unless it is absolutely necessary to imply it; and when it is said you ought not to imply a covenant unless it is necessary, that must be taken to mean when it is necessary, in order to carry into effect the intention of the parties, that it should be implied, and that means not the intention of the parties merely that payment should be made, but their intention that the deed should operate by way of agreement to pay."—*Ireu* v. *Elues* (1854), 3 Drew. 25, at p 34; 24 L. J. Ch. 249, at p. 251, Kindersley, V.-C.

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"Much the safest rule in such cases [implying a covenant], in my opinion, to follow, when there is any reasonable doubt whether the parties did intend to enter into a covenant such as is sought to be implied here [a contract to keep a patent on foot], is to look at the deed and at the circumstances under which the deed was made; and if you find that there is no such covenant in the deed, and that there has been no bad faith on the part of those against whom it is sought to imply such a covenant, the Court ought to be extremely careful how it implies such a covenant in a well-considered deed, when there are no words whatever which express that covenant in any way."—*In re Railway and Electric Appliances Company* (1888), 38 Ch. D. 597, at p. 608; 57 L. J. Ch. 1027, at p. 1032, Kay, J.

"An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties, with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."—*The Moorcock* (1889), 14 P. D. 64, at p. 68; 58 L. J. P. 73, at p. 75, Bowen, L. J.

"I have for a long time understood that rule to be (as to implying a stipulation) that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense I have mentioned. In the case of *The Moorcock* [(1889), 14 P. D. 64, at p. 68; 58 L. J. P. 73, at p. 75], Bowen, L. J., laid down the principle upon which such implications must be made in terms which seem to me to be really an expansion of the terms I have used, and with which I entirely agree."—*Hamlyn & Co.* v. *Wood & Co.*,

[1891] 2 Q. B. 488, at p. 491; 60 L. J. Q. B. 734, at pp. 735, 736, Lord Esher, M. R.

"It is clear from *Kemp* v. *Bird* (1877), 5 Ch. D. 974; 46 L. J. Ch. 828, that in cases like this [a restrictive covenant as to the letting or user of property] the Court ought not, on the ground of presumed intention, to extend a covenant such as this beyond what on the face of it is the purpose of it. As was said by James, L. J., in *Kemp* v. *Bird* (1877), 5 Ch. D. 974, at p. 976; 46 L. J. Ch. 828, at p. 830: 'Persons who are men of business, as they were here, are able to get protection and advice, and they must make their covenants express, so as to state what they really mean, and they cannot get a Court of law or of equity to supply something which they have not stipulated for in order to get a benefit which is supposed to have been intended.'"—*Brigg* v. *Thornton*, [1904] 1 Ch. 386, at p. 395; 73 L. J. Ch. 301, at p. 307, Romer, L. J.

(See *ante*, p. 129, "Contracts, Implied Promise.")

Covenants interpreted against Covenantor.

The words of a covenant are to be taken most strongly against the covenantor, due regard being paid to the intention of the parties as collected from the whole context of the deed. This rule ought to be applied only where other rules of interpretation fail.

"That the deed be taken most strongly against him that is the agent or contractor, and in favour of the other party, '*Verba fortius accipiuntur contra proferentem.*' As, if tenant in fee simple grants to anyone an estate for life, generally it shall be construed an estate for the life of the grantee. For the principle of self-preservation will make men sufficiently careful not to prejudice their own interest by the too extensive meaning of their words; and hereby all manner of deceit in any grant is avoided; for men would always affect ambignous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed-poll; for the words of an indenture, executed by both parties, are to be considered as the words of them both; for though delivered as the words of one party, yet they are not his words only, because the other party

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hath given his consent to every one of them. But in a deed-poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And, in general, this rule, being a rule of some strictness and rigour, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail."—2 *Bl. Com.* p. 380.

"If there be a doubt upon the words, it is true that they are to be taken most strongly against the covenantor."—*Rubery* v. *Jerroise* (1786), 1 T. R. 229, at p. 234, Willes, J.

"It is certainly true that the words of a covenant are to be taken most strongly against the covenantor, but that must be qualified by the observation that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument."—*Browning* v. *Wright* (1799), 2 B. & P. 13, at p. 22, Lord Eldon, C. J. (cited by Lord Ellenborough, C. J., in *Sicklemore* v. *Thistleton* (1817), 6 M. & S. 9, at p. 12).

"Then comes the general covenant in the words which have been mentioned; and by the well-known rule of law the words of a covenant are to be taken most strongly against the covenantor. I admit, however, that they may be restrained by other words in the deed, if we can see a clear intention to restrain them from the other parts of the deed. But it would be a very dangerous rule if it were to be applied to every case where ingenuity can show that by giving the natural meaning to the words of the general covenant, other words in other parts of the deed might be rendered nugatory. The intention, therefore, to restrain the general words, as it is to be collected from the other parts of the deed, must clearly appear."—*Barton* v. *Fitzgerald* (1812), 15 East, 530, at p. 545, Bayley, J.

"For although the words of a covenant are to be construed according to the intent of the parties, yet they are to be taken most strongly against the party who stipulates."—*Webb* v. *Plummer* (1819), 2 B. & Ald. 746, at p. 751, Holroyd, J.

"Now, I admit that although the maxim '*verba cartarum fortius accipiuntur contra proferentem*' is to be qualified by this observation, that regard must be paid to the intention of the parties as it is to be collected from the whole context of the instrument, still I dare not reject words which the parties have chosen to introduce into their contract. I know, that in all the

eases no word ought, if possible, to be rendered inoperative."—*Nind* v. *Marshall* (1819), 1 B. & B. 319, at p. 335, Parke, J.

"It is a general rule that ambiguous words are to be taken most strongly against the covenantor."—*Fowle* v. *Welsh* (1822), 1 B. & C. 29, at p. 35, Bayley, J.

"The principle of construction which has been so strenuously contended for, viz., that the terms of a grant are to be construed as favourably as possible for the grantee, the Court is not disposed to controvert."—*In re Stroud* (1849), 8 C. B. 502, at p. 529; 19 L. J. C. P. 117, at p. 120, Wilde, C. J.

"The principle of construction of covenants is, that they are to be construed most strongly against the covenantor, and most beneficially in favour of the covenantee."—*Warde* v. *Warde* (1852), 16 Beav. 103, at p. 105, Sir John Romilly, M. R.

"I had at first an inclination of opinion that, if the words were doubtful, and it could be construed in favour of the defendants, the general rule would be this, that, it being equivalent to a grant on the part of the vendor, the construction must be taken most strongly against the grantor. But, on the other hand, there is another rule of construction well established, namely, that it is right to give effect to every word, if it can reasonably and properly be done."—*Patching* v. *Dubbins* (1853), Kay 1, at pp. 13, 14; 23 L. J. Ch. 45, at p. 48, Sir W. Page Wood, V.-C.

"The rule '*verba fortius accipiuntur contra proferentem*' which, however, ought to be applied only where other rules of construction fail."—*Lindus* v. *Melrose* (1858), 3 H. & N. 177, at p. 182; 27 L. J. Ex. 326, at p. 329, Coleridge, J., delivering the judgment of the Exchequer Chamber.

"As regards a maxim quoted by Mr. Christie, and which is to be found, I believe, in a great many text-books, and I am afraid also in a great many judgments of ancient date, and that is, that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor, I do not see how, according to the now established rules of construction, as settled by the House of Lords in the well-known case of *Grey* v. *Pearson* [(1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473], followed by *Roddy* v. *Fitzgerald* [(1858), 6 H. L. Cas. 823], and *Abbott* v. *Middleton* [(1858), 7 H. L. Cas. 68; 28 L. J. Ch. 110], that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its

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meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled."—*Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. 264, at pp. 270, 271; 46 L. J. Ch. 857, at p. 859, Jessel, M. R.

"It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee."—*Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135, at p. 149, Lord Selborne, L. C.

Grants of the Crown.

All grants of the Crown are to be strictly interpreted against the grantee.

"All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away."—*The Rebeckah* (1799), 1 Ch. Rob. 227, at p. 230, Sir Wm. Scott.

"It is established on the best authority that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment, in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown. The rule is nowhere better expressed than in the clear and perspicuous language of Lord Stowell in the case of *The Rebeckah* (1799), 1 Ch. Rob. 227, at p. 230."—*Feather* v. *The Queen* (1865), 6 B. & S. 257, at pp. 283, 284; 35 L. J. Q. B. 200, at p. 204, Cockburn, C. J.

"I entirely concur with the reasons given in the case of *Feather* v. *Reg.* (1865), 6 B. & S. 257; 35 L. J. Q. B. 200, for that judgment. It appears to me necessarily to follow from the well-established rule of law, that in the construction of Acts of Parliament, and in the construction of grants by the Crown, the Crown is not bound unless expressly mentioned. By which I understand that an Act of Parliament or a grant professing to bind all persons in general is not sufficient to bind the Crown, but that it must in terms say that it is intended to be applicable to the case of the Crown."—*Dixon* v. *London Small Arms Co.* (1876), 1 Q. B. D. 384, at p. 396; 46 L. J. Q. B. 617, at p. 621, Mellish, L. J.

(See also, *post*, p. 213, "Miscellaneous Instruments—Grants from the Crown.")

Dependent and Independent Covenants.

Covenants are to be interpreted to be either dependent or independent according to the intention of the parties to be collected from the whole deed.

Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.

Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant.

"The rule was well laid down by Lord Mansfield in *Boone* v. *Eyre* [(1777), 1 H. Bl. 273, n.], that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part*, there a remedy lies on the covenant to recover damages for the breach of it; but it is not a condition precedent."—*Ritchie* v. *Atkinson* (1808), 10 East, 295, at p. 306, Lord Ellenborough, C. J.

"Whatever confusion may prevail among the earlier cases on the subject of dependent and independent covenants, the rule seems now to be well understood, as ably and clearly laid down by Mr. Serjeant Williams in his note to *Pordage* v. *Cole* (1681) [1 Wms. Saund. 320 b], namely, 'That where a covenant goes only to *part* of the consideration on both sides, and a breach of such

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covenant may be paid for in damages, it is an independent covenant.'"—*Carpenter* v. *Cresswell* (1827), 4 Bing. 409, at p. 411, Park, J.

"The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention has been laid down with great accuracy by Lord Ellenborough, in the case of *Ritchie* v. *Atkinson* [(1808), 10 East 295], to be this: 'that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to *a part*, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent.'"—*Stavers* v. *Curling* (1836), 3 Bing. N. C. 355, at p. 368, Tindal, C. J.

"In the numerous cases on the subject, in which it has been laid down that the general rule is to construe covenants and agreements to be dependent or independent, according to the intent and meaning of the parties, to be collected from the instrument, and, of course, the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, ... and the cases of *Campbell* v. *Jones* [(1796), 6 T. R. 570], and *Boone* v. *Eyre* [(1777), 1 H. Bl. 273, n.; 2 W. Bl. 1312], are instances of the application of the rule. But there it appears, as Mr. Serjeant Williams observes, in 1 Saund. 320 b (and the Lord Chief Baron [Pollock], in delivering the judgment of this Court in *Ellen* v. *Topp* [(1851), 6 Ex. 424, at p. 441; 20 L. J. Ex. 241, at p. 245], adopts the observation), 'the reason of the decision in these and similar cases, besides the inequality of the damages, seems to be that, where a person has received part of the consideration for which he entered into the agreement, it would be unjust that, because he had not the whole, he should, therefore, be permitted to enjoy that part without either payment or doing anything for it. Therefore, the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damage he may

have sustained in not having received the whole consideration.'" —*Graves* v. *Legg* (1854), 9 Ex. 709, at p. 716; 23 L. J. Ex. 228, at p. 231, Parke, B., delivering the judgment of the Court.

"These rules [laid down in the notes to *Pordage* v. *Cole* (1681), 1 Wms. Saund. 320 b] are not proposed for the purpose of absolutely determining the dependence or independence of covenants in all cases, but merely as furnishing a guide to the discovery of the intention of the parties. For, as Lord Kenyon said, in *Porter* v. *Shephard* [(1796), 6 T. R. 665, at p. 668], 'conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and technical words (if there be any to encounter such intention) should give way to that intention.'"—*Roberts* v. *Brett* (1865), 11 H. L. Cas. 337, at p. 354; 34 L. J. C. P. 241, at p. 247, Lord Chelmsford.

"The Court must ascertain the intention of the parties, as is said by Parke, B., in delivering the judgment of the Court in *Graves* v. *Legg* [(1854), 9 Ex. 709, at p. 716; 23 L. J. Ex. 228, at p. 231], 'to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed.' He adds, 'one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract.'"—*Bettini* v. *Gye* (1876), 1 Q. B. D. 183, at p. 186; 45 L. J. Q. B. 209, at p. 212, Blackburn, J.

"The rule of construction is settled. The Court must ascertain the intention of the parties 'to be collected from the instrument and the circumstances legally admissible in evidence with reference to which it is to be construed.' That is the law as laid down by Parke, B., in *Graves* v. *Legg* (1854), 9 Ex. 709, at p. 716; 23 L. J. Ex. 228, at p. 231, cited by Blackburn, J., in *Bettini* v. *Gye* (1876), 1 Q. B. D. 183, at p. 186; 45 L. J. Q. B. 209, at p. 212. I have come to the conclusion that the provision in question in this contract [sale of goods] is not a condition precedent."—*Kidston* v. *Monceau Ironworks* (1902), 7 Com. Cas. 82, at p. 86, Kennedy, J.

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Conditions Precedent and Subsequent.

Conditions are to be interpreted to be either precedent or subsequent according to the intention of the parties to be collected from the whole deed.

"If a condition precedent to a feoffment, &c. be impossible at the time or afterwards becomes impossible, the feoffment shall be of no effect, for, till performance, the estate cannot vest."—Comyns' Digest, tit. Condition (D).

"If a condition subsequent to a feoffment be impossible at the time of the making, the estate of the feoffee is absolute, and the condition shall be void."—*Ibid.*

"If a condition to a feoffment, &c. be possible at the making, and afterwards becomes impossible by the act of God, the estate of the feoffee is absolute; for being vested, it cannot be devested without the performance of the condition, which was for the benefit of the feoffee. So, if it becomes impossible by the act of the feoffor himself."—Comyns' Digest, tit. Condition (D_1).

"So, if a condition precedent to a feoffment be illegal or repugnant, the estate can never vest."—*Ibid.* (D_3).

"The words of a condition shall be liberally expounded to serve the intent of the parties."—Comyns' Digest, tit. Condition (E).

"All the instances of conditions against law in a proper sense are reducible under one of three heads:—1st. Either to do something that is *malum in se*, or *malum prohibitum*. 2ndly. To omit the doing of something that is a duty. 3rdly. To encourage such crimes and omissions. Such conditions as these the law will always and without any regard to circumstances defeat, being concerned to remove all temptations and inducements to those crimes."—*Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181, at p. 189, Lord Macclesfield, C. J. (cited by Sir John Stuart, V.-C., in *Wilkinson* v. *Wilkinson* (1871), L. R. 12 Eq. 604, at p. 608).

"There are no precise technical words required in a deed to make a stipulation a condition *precedent* or *subsequent*; neither doth it depend on the circumstance whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction."—*Hotham* v. *The East India Co.* (1787), 1 T. R. 638, at p. 645, Ashhurst, J., delivering the judgment of the Court.

"It has frequently been said, and common sense justifies it, that conditions are to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and technical words (if there be any to encounter such intention) should give way to that intention."—*Porter* v. *Shephard* (1796), 6 T. R. 665, at p. 668, Lord Kenyon, C. J. (cited by Lord Chelmsford in *Roberts* v. *Brett* (1865), 11 H. L. Cas. 337, at p. 354; 34 L. J. C. P. 241, at p. 247).

"The question is, Whether it be a condition precedent? And that depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract: whether of two things reciprocally stipulated to be done, the performance of the one in sense and reason depend upon the performance of the other."—*Ritchie* v. *Atkinson* (1808), 10 East, 295, at p. 306, Lord Ellenborough, C. J.

"Now, whatever might have been the question if it had been raised whilst the agreement was executory, we are clearly of opinion that, the defendant having received a substantial portion of the consideration, it is no longer competent to him to rely upon the non-performance of that which might have been originally a condition precedent [*per* Parke, B., in *Graves* v. *Legg* (1854), 9 Ex. 709, at p. 716; 23 L. J. Ex. 228, at p. 231; *White* v. *Bedow* (1861), 7 H. & N. 42; 30 L. J. Ex. 313; and see the judgment of the Court in *Elton* v. *Topp* (1851), 6 Ex. 424, at p. 441; 20 L. J. Ex. 241, at p. 245]. This doctrine is well and firmly established, and is in accordance with principles of common sense and justice."—*Carter* v. *Scargill* (1875), L. R. 10 Q. B. 564, at pp. 567, 568, Field, J., delivering the judgment of the Court (Cockburn, C. J., Quain and Field, JJ.).

Clauses against Public Policy or the Policy of the Law.

"Public policy, like other things, must depend on a balance of what is politic or right. In this very matter of public policy we find that the principle has been sometimes applied (for instance) to a covenant in restraint of trade deliberately entered into by a man who afterwards wishes to avoid its enforcement against him, because he says restraint of trade is against public policy. In the old days that used to be strictly so held. But in modern days the Court looks at the whole subject-matter, and bears in mind that, though, on the one hand, it may be contrary to public policy that there should be restraint of trade, on the other hand, it is contrary

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to public policy that a man should be allowed to evade engagements into which he has entered."—*Marlborough (Lily Duchess of)* v. *Marlborough (Duke of)*, [1901] 1 Ch. 165, at p. 172; 70 L. J. Ch. 244, at p. 249, Vaughan Williams, L. J.

"The phrase most frequently used in argument was 'public policy'; but, following the example of many eminent judges, I prefer 'the policy of the law.'"—*In re Hope Johnstone*, [1904] 1 Ch. 470, at p. 474; 73 L. J. Ch. 321, at p. 322, Kekewich, J.

"Performing" Covenants.

"The original dictum of Lord Coke [Co. Litt. 303 b] is no doubt by a very high authority, but it is in terms limited to the mode of alleging performance of covenants in pleading. He says that a man is bound to 'perform' all his covenants, but in pleading he must plead specially with regard to negative covenants; and it is worthy of observation that in that very sentence he uses the word 'perform' in the general sense of giving effect to the obligation created by a covenant, whether affirmative or negative. The difficulty in these cases appears to me to have arisen from a confusion of the obligation accepted with the mode of performing it. When one speaks of 'performing' a covenant, it is in the sense of fulfilling the duty created by it, whether to do or to abstain from doing a thing. The word 'perform' is, no doubt, inapplicable to not doing a thing, but the obligation to abstain from doing something may, I think, be said to be 'performed' by not doing it. If a man promises not to do a thing he fulfils his obligation, or, in other words, 'performs' his contract, if he abstains from doing it."—*Harman* v. *Ainslie*, [1904] 1 K. B. 698, at pp. 704, 705; 73 L. J. K. B. 539, at p. 542, Collins, M. R.

"It may be admitted that the word 'perform' may, in ordinary cases, be said to be more specially appropriate to positive covenants. But it cannot, I think, be laid down, as a hard and fast rule, that it is inappropriate, when applied at any rate to some negative covenants. I agree with the Master of the Rolls [Collins] that, speaking broadly, it may properly be said, as Martin, B., said in *Croft* v. *Lumley* (1858), 6 H. L. C. 672, at p. 719; 27 L. J. Q. B. 321, at p. 336, that there is not 'any inaccuracy in language in saying that a man has performed his covenant, when he has not done what he covenanted not to do, or that he made default in performing his covenant, when he has done it.' After what the

Master of the Rolls has said, I do not intend to go through the various cases on the subject and the *dicta* contained in them. All I need say is that the result of them appears to me to be that we are not bound to hold, and that it would not be right to hold, as a general rule of construction, that, in clauses of re-entry, the word 'perform' must be construed as excluding all covenants by the lessee which may be called negative covenants."—*Ibid.*, at p. 710; L. J. at p. 545, Romer, L. J.

"It is difficult to define a negative covenant, for it is clear that many so-called negative covenants readily assume a positive and affirmative aspect for some purposes."—*Ibid.*, at p. 712; L. J. at p. 546, Mathew, L. J.

(See *post*, "Wills," "Conditions.")

Restrictive Clauses—Extension of.

"If a restrictive clause be in the first or last part of a sentence, or at the beginning of the first or at the end of the last sentence, which in good sense may be applied to the one and the other, then it shall extend to both sentences, but otherwise it is if such sentence be placed in the middle of one or two sentences."—*Gainsford* v. *Griffith* (1678), 1 Saund. 58.

"Where any sentence contains several covenants, and there are words of restriction either [illegible] concluding part, those words must be extended [illegible] sentence, unless the intention of the parties [illegible] contrary construction. This is laid down in [illegible] *ing* v. *Wright* (1799), 2 Bos. & P. 13, at p. 27, [illegible]

Affirmative and Negative Covenants—"Performing."

The word "perform" is more specially appropriate to affirmative covenants than it is to negative covenants.

"A man is bound to perform all the covenants in an indenture; if all the covenants be in the affirmative, he may generally plead performance of all; but, if any be in the negative, to so many he must plead specially (for a negative cannot be performed), and to the rest generally."—*Co. Litt.* 303 b.

Partly Affirmative and partly Negative.

"Whether you regard it (the restrictive covenant) as an affirmative covenant with a negative element in it, or whether you regard

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it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced." —*Clegg* v. *Hands* (1890), 44 Ch. D. 503, at p. 522; 59 L. J. Ch. 477, at p. 484, Lindley, L. J.

Covenants Real and Personal—Defined.

Covenants "are distinguished also into real and personal; real when they pass lands, or are annexed to and run with land; personal when they attach upon or run in the personalty, and charge or benefit some person in particular. Personal covenants, again, may be distinguished into such as are transitive or intransitive; intransitive, when the duty of performing them is limited to the covenantor himself; transitive, when it passes to his representatives."—2 *Bac. Abr. Covenant.*

"Covenants are also divided into real and personal. Covenants real are those which have for their object land or other real property, or something annexed thereto or connected therewith, and which run with the land, so that he which hath the land hath the benefit, or is subject to the burden of the covenants. Covenants personal are those which do not run with the land, but of which the benefit or the burden goes with some particular person."—1 *Dav.*, 5th ed., p. 88.

Joint and Several Covenants.

No particular words are necessary to constitute a joint or a several covenant.

A covenant will be interpreted to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction.

If the interest be joint, the action must be joint, although the words of the covenant be several.

If the interest be several, the action will be several, although the words of the covenant be primâ facie *joint.*

"But the implication or construction of law, when the words are ambiguous, or are left to the interpretation of law, will be, that the words have an import corresponding to the interest, so as to be joint when the interest is joint, and several when the interest is several; notwithstanding language which, under different cir-

cumstances, would give to the covenant a different effect."—1 *Wms. Saund.* ed. 1871, pp. 165, 166.

"The principle is well known, and fully established, that if the interest be joint, the action must be joint, although the words of the covenant be several; and if the interest be several, the covenant will be several, although the terms of it be joint."—*James* v. *Emery* (1818), 8 Taunt. 245, at p. 248; 2 Moore, 195, at p. 203, Gibbs, C. J.

"I think the correct rule is laid down by Gibbs, C. J., in *James* v. *Emery* [(1818), 8 Taunt. 245], with the qualification stated by Mr. Preston, in the note in Sheppard's Touchstone, p. 166. That rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. Suppose there were a covenant with A. and B. *jointly* that a certain thing should be done by the covenantor, both of those persons must sue. But where it appears upon the face of the deed that A. and B. have several interests, they must sue separately; for though the words be *primâ facie* joint, they will be construed to be several, if the interest of either party appearing upon the face of the deed shall require that construction. That I take to be the true rule."—*Sorsbie* v. *Park* (1843), 12 M. & W. 146, at p. 158; 13 L. J. Ex. 9, at p. 11, Parke, B. (cited and followed by Cotton, L. J., in *Palmer* v. *Mallett* (1887), 36 Ch. D. 411, at p. 421; 57 L. J. Ch. 226, at p. 268).

"There is no occasion to refer to the cases relating to the rule of construction as to covenants being joint or several according to the interest of the parties, which is perfectly well established. In the case of *Sorsbie* v. *Park* [(1843), 12 M. & W. 146; 13 L. J. Ex. 9], Lord Abinger and myself, on referring to the established rule as laid down by Lord Chief Justice Gibbs in the case of *James* v. *Emery* [(1818), 8 Taunt. 245; 2 Moore, 195], approved Mr. Preston's qualification and explanation of it in his edition of the Touchstone, p. 166, namely, that if the language of the covenant *was capable of being so construed*, it was to be taken to be joint or several according to the interest of the parties to it. Mr. Preston adds, that the general rule proposed by Sir Vicary Gibbs, and to be found in several books, would establish that there was a rule of law too powerful to be controlled *by any intention, however express;* and I consider such qualification to be perfectly correct, and at variance with no

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decided case, as it is surely as competent for a person, by express joint words, strong enough to make a joint covenant, to do one thing for the benefit of one of the covenantees, and another for the benefit of another, as it is to make a joint demise where it is for the benefit of one."—*Bradburne* v. *Botfield* (1845), 14 M. & W. 559, at p. 572; 14 L. J. Ex. 330, at pp. 332-3, Parke, B., delivering the judgment of the Court.

"The rule that covenants are to be construed according to the interest of the parties is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest."—*Keightley* v. *Watson* (1849), 3 Ex. 716, at p. 722; 18 L. J. Ex. 339, at p. 341, Parke, B.

"The late Mr. Platt, on page 117 of his work on Covenants, published more than half a century ago, puts the proposition in words that have never been questioned, as far as I am aware, since his time. With respect to the form he says: 'No particular words are necessary to constitute a covenant of either kind' (that is to say, either joint or several). 'If two covenant generally *for themselves*, without any words of severance, or that they *or* one of them shall do such a thing, a joint charge is created; which shows the necessity of adding words of severalty where the covenantor's liability is to be confined to his own acts.' See *May* v. *Woodward* (1677), Freem. 248; *Robinson* v. *Walker* (1694), 1 Salk. 393."—*White* v. *Tyndall* (1888), 13 App. Cas. 263, at p. 269; 57 L. J. P. C. 114, at p. 116, Lord Halsbury, L. C.

Covenant for Another.

One person may covenant for another.

"The Court said that it was impossible to contend that where one covenants for another he is not to be bound by it; the covenant being in *his own* name 'for himself, his heirs,' &c. There was nothing unusual or inconsistent in the nature of the thing

that one should covenant to another that a third person should do a certain thing, as that he should go to Rome. The party to whom the covenant is made may prefer the security of the covenantor to that of his principal. Here the defendant covenants *for himself*, not in the name of his principal, and puts his own seal upon it. There is nothing against law in it, if he will bind himself for his principal. He probably consented to it upon an indemnity."—*Appleton* v. *Binks* (1804), 5 East, 148, at p. 149.

Repugnancy in Deeds.

Where there is a repugnancy, the first words, clauses, or parts of a deed shall be received and the latter rejected.

A proviso may give the covenant a limited interpretation.

"The general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail."—*Doe, Lessee of Leicester and Others* v. *Biggs* (1809), 2 Taunt. 109, at p. 113, Mansfield, C. J.

"If the defendants have entered into a covenant which, to any extent, binds them personally, this proviso is at variance with such covenant, and consequently must be rejected as repugnant according to the authorities cited."—*Furnivall* v. *Coombes* (1843), 5 M. & G. 736, at p. 751; 6 Scott, N. R. 522, at p. 537; 12 L. J. C. P. 265, at p. 269, Tindal, C. J.

"It is said that the proviso qualifies the full extent of the covenant, and gives it a *limited* construction. If that had really been so, I should have thought the argument a sound one."—*Ibid.*, at p. 752; L. J. at p. 269, Erskine, J.

"The rule in construing a deed was, that the first words were the controlling ones, and if, therefore, the second portion was inconsistent with the first, it must be disregarded."—*In re Webber's Settlement* (1850), 17 Sim. 221, at p. 222; 19 L. J. Ch. 445, at p. 446, Sir Richard T. Kindersley, V.-C.

"The rule of law is clear, that, if there be two clauses or parts of a deed repugnant the one to the other, the first part shall be received and the latter rejected, except there be some special reason to the contrary. That rule was applied to a release in the case of *Solly* v. *Forbes* [(1820), 2 B. & B. 38]."—*Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9, at p. 12, Willes, J.

"It is said that if you find a personal covenant followed by a proviso that the covenantor shall not be personally liable under the

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covenant, the proviso is repugnant and void. I agree that that is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining; in that case the proviso is perfectly valid. There is no authority against that view. A distinction has always been taken between a proviso which is repugnant to the covenant and therefore void, and a proviso which can be incorporated in the covenant, and be made consistent with it."—*Williams* v. *Hathaway* (1877), 6 Ch. D. 544, at p. 549, Jessel, M. R.

(See also the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 7, sub-s. 7, as to varying or extending covenants implied under that Act. See also "Inconsistent Parts of Deeds," *ante*, p. 152.)

Legal and Illegal Parts.

Where a deed contains legal and illegal parts, the deed is altogether void if the legal parts cannot be separated from the illegal parts; but if they can be severed the illegal parts may be rejected and the legal parts retained.

"It is unanimously agreed in (1523) 14 H. 8, 25, 26, &c., that if some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against the law, and some good and lawful, that in this case, the covenants or conditions which are against the law are void *ab initio*, and the others stand good."—6 *Coke*, p. 49, Part XI. 27 b (*Pigot's Case*).

"The general rule is that, when you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good."—*Pickering* v. *Ilfracombe Rail. Co.* (1868), L. R. 3 C. P. 235, at p. 250; 37 L. J. C. P. 118, at p. 123, Willes, J. (Adopted by Court of Appeal, Lord Esher, M. R., and Fry and Lopes, L. JJ., in *In re Bardett* (1888), 20 Q. B. D. 310, at p. 314; 57 L. J. Q. B. 263, at p. 264; and agreed with by Bigham, J., in *Royal Exchange Assurance* v. *Vega* (1901), 6 Com. Cas. 189, at p. 195.)

Matters referred to.

Matters referred to are regarded as actually inserted in a deed.

"'*Verba relata inesse videntur*,' according to which we must consider it to be the same thing here as if the map or plan, which is there referred to, had been actually inserted in the deed."—*Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183, at p. 189; 12 L. J. Ex. 243, at p. 246, Parke, B.

Misdescription—Misnomer.

Falsa demonstratio non nocet.—6 T. R. 676.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.—Bac. Max. Reg. 24.

"The name of the persons in grants is set down only to distinguish persons, and to make the person intended certain; and, therefore, howsoever it be best and most safe to describe the person by his true and proper name of baptism, and also by his surname, and if it be a corporation, by the true name whereby the corporation is made, yet mistakes in this case, unless they be very gross, will not make void the grant: *nihil facit error nominis cum de corpore constat*."—*Shep. Touch.* 233.

"The rule is clearly settled that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration."—*Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43, at p. 51, Parke, J.

"Now, it is an old and rational maxim of the law that where the party to a transaction, or the subject of a transaction, are either of them actually or corporeally present, the calling of either by a wrong name is immaterial: '*Præsentia corporis tollit errorem nominis*.' Lord Bacon, in his maxims [Regula. 24], fully explains and copiously illustrates this rule of law and good sense, and shows how it applies, not only to persons, but to things."—*Reg.* v. *Mellor* (1858), 27 L. J. M. C. 121, at p. 143, Byles, J.

Erroneous Additions to Deeds.

Erroneous additions do not vitiate a deed.

"Then the other rule of law applies, that as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous

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addition will not vitiate it, according to the maxim '*falsa demonstratio non nocet*.'"—*Llewellyn* v. *Earl of Jersey* (1843), 11 M. & W. 183, at p. 189; 12 L. J. Ex. 243, at p. 246, Parke, B.

"The principle upon which the cases bearing on the point have been decided has been variously stated. One way in which it may be put is the following:—'In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name or of an erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect.' And Parke, J., in *Doe* d. *Smith* v. *Galloway* [(1833), 5 B. & Ad. 43, at p. 51], stated the principle as follows:—'The rule is clearly settled that when there is a sufficient description set forth of premises by giving the particular name of a close, or otherwise, we may reject a false demonstration.'"—*Cowen* v. *Truefitt, Ltd.*, [1898] 2 Ch. 551, at p. 554; 67 L. J. Ch. 695, at p. 696, Romer, J.

"I must, however, protest against the way in which the doctrine was stated by the appellants' counsel—that the maxim '*Falsa demonstratio non nocet*' only applies when there is some incorrect description at the end of the sentence. That is whittling away the doctrine and making it ridiculous: it is a misapprehension. I do not know that the principle can be better put than it is in Jarman on Wills, 5th ed. p. 742, where it is said the rule means 'that where the description is made up of more than one part, and one part is true, but the other false, then, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. "The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all, and, so far as it is true, applies to one only" [*per* Alderson, B., *Morrell* v. *Fisher* (1849), 4 Exch. 591]. Thus in *Day* v. *Trig* (1715), 1 P. Wms. 286 [and see *Cox* v. *Bennett* (1868), L. R. 6 Eq. 422], where one devised "all his freehold houses in Aldersgate Street, London," having in fact only leasehold houses there, it was held that the word "freehold" should rather be rejected than the will be wholly void, and that the leasehold houses should pass.'

"To limit that doctrine in the way that counsel suggested is to deprive it of half its merit. The rule is a rule of good sense. If the language is clear, but does not fit because of some words which have been inserted, then, if it is possible to reject the part that makes it inapplicable, the Court will do so."—*Cowen* v. *Truefitt*,

Ltd., [1899] 2 Ch. 309, at pp. 311, 312; 68 L. J. Ch. 563, at p. 564. Lindley, M. R. (cited by Joyce, J., in *Anderson* v. *Berkley*, [1902] 1 Ch. 936, at p. 940; 71 L. J. Ch. 444, at p. 446).

"I agree, however, that the doctrine is not to be cut down, as was suggested by the appellants' counsel, by saying that it is to be limited to cases where the false part of the description follows the true. That would be cutting down what is a rational and useful canon of construction."—*Ibid.*, at p. 313; L. J. at p. 565, Sir F. H. Jeune.

"Any erroneous statement as to dimensions or quantity or any inaccuracy in the plan will not vitiate the description or have any effect: see *Morrell* v. *Fisher* (1849), 4 Ex. 591, at p. 604; 19 L. J. Ex. 273, at p. 277; *Doe* d. *Smith* v. *Galloway* (1833), 5 B. & Ad. 43, at p. 51; *Horne* v. *Straben*, [1902] A. C. 454; Sheppard's Touchstone, 247."—*Mellor* v. *Walmesley*, [1904] 2 Ch. 525, at p. 533; 73 L. J. Ch. 756, at p. 759, Swinfen Eady, J.

"I cannot, however, agree with the learned judge [Swinfen Eady, J.] that the present case is one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition. The dimensions in this case, to use the words appearing on p. 247 of Sheppard's Touchstone, are an essential part of the description in a case in which there is in the first place a sufficient certainty and demonstration."—*Mellor* v. *Walmesley*, [1905] 2 Ch. 164, at pp. 174, 175; 74 L. J. Ch. 475, at p. 479, Vaughan Williams, L. J.

(See also "Wills," "Misdescription," "Misnomer," *post*, p. 577.)

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Alterations in Deeds.

An alteration in a material point avails a deed, unless the alteration is made with the privity of obligor and obligee.
An alteration in an immaterial point does not avoid a deed.

"If there be any alteration, erasure, or interlining made in any part of the deed before the delivery of it, this act will not hurt the deed."—*Sheppard's Touchstone*, 7th ed. (Preston's), p. 55.

"It was resolved that when any deed is altered in a point material by the plaintiff himself, or by any stranger, without the privity of the obligee, be it by interlineation, addition, rasing, or by drawing of a pen through a line, or through the midst of any material word, that the deed thereby becomes void.

"So if the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed."—6 *Coke*, p. 48 (*Pigot's Case*), Part XI. 27 a.

"An interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after."—*Touret* v. *Castle* (1673), 1 Keb. 21.

"The whole deed may be considered as one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of opinion that any alteration made in the progress of such a transaction still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood."—*Doe* d. *Lewis* v. *Bingham* (1821), 4 B. & Ald. 672, at p. 675, Bayley, J.

"In the case of deeds, the authorities seem to show that, when there are interlineations, the presumption is that they were made before execution. . . . And this is consistent with good sense; for every deed expresses the mind of the parties at the time of its execution; and so, to alter it afterwards, would be fraudulent, and in many cases highly criminal."—*Simmons* v. *Rudall* (1850), 1 Sim. N. S. 115, at p. 136, Lord Cranworth, V.-C.

"In Co. Litt. 225 b, it is said that, 'of ancient time if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view, the deed to be void. But of later times the judges have left that to the jurors to try whether the rasing or

interlining were before the delivery.' In a note, (1) [136], to that passage, in Hargrave & Butler's edition of Coke upon Littleton, ''Tis to be presumed that an interlining, if the contrary was not proved, was made at the time of making the deed.' This doctrine seems to us to rest on principle. A deed cannot be altered after it is executed without fraud or wrong; and the presumption is against fraud or wrong."—*Doe* d. *Tatum* v. *Catomore* (1851), 16 Q. B. 745, at pp. 746, 747; 20 L. J. Q. B. 364, Lord Campbell, C. J.

"This being the state of the authorities, we think we are not bound by the doctrine in *Pigot's Case* [11 Rep. at fol. 27 a], or the authority cited for it [*Dyer*, 261 b]; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice anyone, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written."—*Addons* v. *Cornwell* (1868), L. R. 3 Q. B. 573, at p. 579; 37 L. J. Q. B. 201, at p. 203, Lush, J., delivering the judgment of the Court (Cockburn, C. J., Blackburn and Lush, JJ.).

"The rule laid down in *Pigot's Case* (1614), 11 Rep. 27 a, 'If the obligee himself alters the deed by any of the said ways, although it is in words not material, yet the deed is void; but if a stranger, without his privity, alters the deed by any of the said ways in any point not material, it shall not avoid the deed,' must in the present day be taken to apply only where the alteration is in a material point. In *Pigot's Case* (1614), 11 Rep. 26 b, it was found as a fact that the alteration was not material and was made by a stranger, and judgment was given for the plaintiff. In the case of *Dyer* (1567), Dyer, 261 b, quoted in *Pigot's Case* (1614), 11 Rep. 26 b, the alteration was material. *Pigot's Case* (1614), 11 Rep. 26 b, was considered in *Addons* v. *Cornwell* (1868), L. R. 3 Q. B. 573, at p. 579; 37 L. J. Q. B. 201, at p. 203, where the judgment of the Court, consisting of Cockburn, C. J., Blackburn and Lush, JJ., was delivered by Lush, J., and after going through the authorities he says: 'This being the state of the authorities we think we are not bound by the doctrine in *Pigot's Case* (1614), 11 Rep. 26 b, or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice

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anyone, destroys the validity of the note.' In other words, *Pigot's Case* (1614), 11 Rep. 26 b, is not now any authority that where the alteration is not material the deed is made void. The passage in Sheppard's Touchstone and other authorities which have been cited are to the same effect"—*Crediton (Bishop)* v. *Exeter (Bishop)*, [1905] 2 Ch. 455, at pp. 458, 459; 74 L. J. Ch. 697, at pp. 698, 699, Swinfen Eady, J.

(See also "Alterations in Contracts," *ante*, p. 137.)

Releases.

A release is not to be construed as applying to something of which the party was ignorant at the time he executed it.

The general words of a release may be controlled by recitals and context.

"The general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it."—*Pugler* v. *Hounersham* (1815), 4 M. & S. 423, at p. 426, Lord Ellenborough [cited by Sir W. Page Wood, V.-C., in *Jenner* v. *Jenner* (1866), L. R. 1 Eq. 361, at p. 365; 35 L. J. Ch. 329, at p. 330, and by Kay, J., in *Danby* v. *Coutts & Co.* (1885), 29 Ch. D. 500, at p. 514; 54 L. J. Ch. 577, at p. 579, Kay, J.].

"If there be introductory matter, that will qualify the general words of the release."—*Lampon* v. *Corke* (1822), 5 B. & Ald. 606, at p. 611, Best, J.

"It is a principle, long sanctioned in Courts of Equity, that a release cannot apply, or be intended to apply, to circumstances of which a party had no knowledge at the time he executed it, and if that be so general in its terms as to include matters never contemplated the party will be entitled to relief."—*Lyall* v. *Edwards* (1861), 6 H. & N. 337, at p. 347; 30 L. J. Ex. 193, at pp. 196, 197, Pollock, C. B.

"The doctrine of the Courts of Equity is founded on the simple and convenient rule of justice, that a release is not to be construed as applying to something, of which the party was ignorant, and we have now to act on that doctrine in a Court of Law."—*Ibid.*, at p. 348; L. J. at p. 197, Wilde, B.

"The general words in a release are limited always to that thing or those things which were specially in the contemplation of the

parties at the time when the release was given."—*London and South Western Rail. Co.* v. *Blackmore* (1870), L. R. 4 H. L. 610, at p. 623; 39 L. J. Ch. 713, at p. 720, Lord Westbury (cited in *Turner* v. *Turner* (1880), 14 Ch. D. 820, at pp. 834, 835, by Malins, V.-C.).

"General words of release are always controlled by recitals and context which show that, unless the general words are restricted, the object and purpose of the document in which they occur must necessarily be frustrated. General words are always construed so as to give effect to, and not so as to destroy, the expressed intentions of those who use them. Good illustrations of this principle will be found in *Payler* v. *Homersham* (1815), 4 M. & S. 423, and *Linde* v. *Linde* (1839), 1 Beav. 496."—*In re Perkins*, [1898] 2 Ch. 182, at p. 190; 67 L. J. Ch. 454, at p. 458, Lindley, M. R., delivering the judgment of the Court (Lindley, M. R., Rigby and Collins, L. JJ.).

Argument of Inconvenience.

The argument of inconvenience is a very strong argument where the construction is ambiguous.

"Now I have always said, and I am repeating, I am afraid, what I have been compelled to repeat over and over again, that the argument of inconvenience is a very strong argument where the construction of a document is ambiguous—where it is fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences of that construction which will cause inconvenience, and were probably not contemplated by the framers of the documents."—*Bottesford's Case* (1880), 16 Ch. D. 681, at p. 686; 50 L. J. Ch. 167, at p. 170, Jessel, M. R.

Ancient Deeds—Contemporanea Expositio.

"In the construction of ancient grants and deeds there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by."—*Att.-Gen.* v. *Parker* (1747), 3 Atk. 576, at p. 577, Lord Hardwicke.

"However general the words of the ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner

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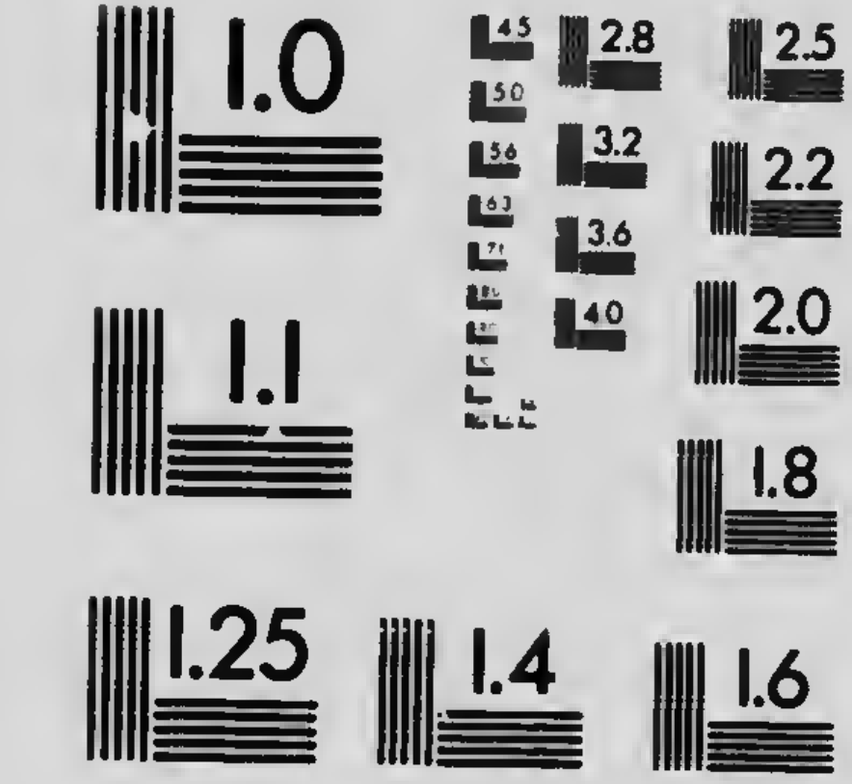

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in which the thing has been possessed and used."—*Weld* v. *Hornby* (1806), 7 East, 195, at p. 199, Ellenborough, C. J.

"One of the most settled rules of law for the construction of ambiguities in ancient instruments is, that you may resort to contemporaneous usage to ascertain the meaning of the deed; tell me what you have done under such a deed, and I will tell you what that deed means."—*Att.-Gen.* v. *Drummond* (1842), 1 Dr. & War. 353, at p. 368, Sugden, C.

"Contemporaneous usage is, indeed, a strong ground for the interpretation of doubtful words or expressions."—*Drummond* v. *Att.-Gen.* (1849), 2 H. L. Cas. 837, at p. 861, Lord Brougham.

"In construing such an instrument [an ancient one] you may look to the usage to see in what sense the words were used at the time; you may look to contemporaneous documents, as well as to Acts of Parliament, to see in what sense the words were used in the age in which the deeds were executed."—*Ibid.*, p. 863, Lord Campbell.

"If there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it."—*Sadlier* v. *Biggs* (1853), 4 H. L. Cas. 435, at p. 458, Lord Cranworth, L. C.

"It is not to be disputed that when the necessity of the case requires it, evidence of more recent usage and custom may be adduced for the purpose of explaining old, or obsolete, or even imperfect expressions to be found in ancient documents. But the necessity must be apparent, the ambiguity must be found to be existing."—*Earl de la Warr* v. *Miles* (1881), 17 Ch. D. 535, at p. 573; 49 L. J. Ch. 476, at p. 487, Bacon, V.-C.

"There can be no doubt that contemporaneous usage may be resorted to for the purpose of explaining any uncertainty or ambiguity in an ancient grant; but then there must be 'uncertainty or ambiguity': *Doe* d. *Kinglake* v. *Beriss* (1849), 7 C. B. 456, at pp. 504, 505; 18 L. J. C. P. 128, at pp. 132, 133, Coltman, J."—*Lord Hastings* v. *North Eastern Railway*, [1899] 1 Ch. 656, at p. 661; 68 L. J. Ch. 315, at p. 317, Vaughan Williams, L. J.

"The chief argument used to give an unnatural construction of the words [occurring in a deed] is that the parties have so acted during a period of forty years that the only reasonable inference to be derived from their conduct is that they have understood and

acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous."—*North Eastern Railway* v. *Lord Hastings*, [1900] A. C. 260, at p. 263; 69 L. J. Ch. 516, at p. 518, Earl of Halsbury, L. C

Limitations by Deed of Settlement.

"There is a distinction between limitations by settlement and limitations by will; in the latter case they are construed according to the intention of the testator, and then the trustees, under a limitation of this sort, might be considered as having an estate commensurate with the subsequent limitations: but that mode of construction cannot be applied to a limitation by settlement."—*Blaker* v. *Anscombe* (1804), 1 Bos. & Pul. N. R. 25, at p. 27, Heath, J.

"This question arises on the construction of a deed, but the authorities show conclusively that the same principles apply in construing a deed and in construing a will. In *Cole* v. *Sewell* (1843), 4 Dr. & War. 1, at p. 33, Lord St. Leonards says: 'It has been insisted that *Doe* v. *Wainwright* (1793), 5 T. R. 427, is not an authority to rule this case, and that it has not been acted on with respect to deeds: but I cannot agree with this position, for I have always thought that the judges in that case only applied to deeds that sound and sensible construction, which had previously been confined to wills.'"—*In re Friend's Settlement*, [1906] 1 Ch. 47, at p. 52; 75 L. J. Ch. 14, at p. 17, Farwell, J.

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Part V.—MERCANTILE INSTRUMENTS.

Generally.

General Principles.

"Thus the matter stood till within these thirty years. . . . From that time (Lord *Hardwicke's*) we all know the great study has been to find out some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord *Mansfield*, who may be truly said to be the founder of the commercial law of this country."—*Lickbarrow* v. *Mason* (1787), 2 T. R. 63, at p. 73, Buller, J.

Definition of Mercantile Transactions.

"A contrary holding would necessitate a definition of 'mercantile or commercial transactions'—a task of no small difficulty, unless I adopted the plaintiff's suggestion that all contracts for sale of goods and chattels, including patents, are mercantile transactions."—*Bruner* v. *Moore*, [1904] 1 Ch. 305, at p. 311; 73 L. J. Ch. 377, at p. 380, Farwell, J.

There is no difference of interpretation between mercantile contracts and other instruments.

"The first observation which I wish to make is that, so far as I know there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted unless there be reason to the contrary."—*Southwell* v. *Bowditch* (1876), 1 C. P. D. 374, at p. 376; 45 L. J. C. P. 630, at p. 631, Jessel, M. R.

The whole instrument and subject-matter are to be looked at.

"In looking at a document between business men I do not think it wise to look at technical rules of construction. I think it is well to look at the whole document, to look at the subject-matter with which the parties are dealing, and then to take the words in their natural and ordinary meaning and construe the document in that way."—*Tatham, Bromage & Co.* v. *Burr*, [1898] A. C. 382, at p. 386; 67 L. J. P. 61, at p. 63, Earl of Halsbury, L. C.

Mercantile contracts should have a liberal interpretation.

"Like all mercantile contracts it [a charter-party] ought to have a liberal interpretation."—*Hotham* v. *East India Company* (1779), 1 Doug. 272, at p. 277, Lord Mansfield, C. J.

Uniformity of interpretation should prevail in this country and its dependencies.

"We feel that it is extremely desirable that the law regulating the construction of mercantile contracts and the remedies for breach of them should, as much as possible, proceed on the same principle in all parts of the world, and especially that this uniformity should prevail in respect of this country and its dependencies."—*Dimech* v. *Corlett* (1858), 12 Moore, P. C. C. 199, at p. 229, Sir J. T. Coleridge, delivering the judgment of the Judicial Committee.

(See also *The City of Chester* (1884), 9 P. D. 182, *ante*, p. 43.)

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Evidence of Customs and Usages.

Evidence of known customs and usages is admissible to annex incidents to mercantile instruments in matters with respect to which they are silent, provided such evidence is not repugnant, or inconsistent with such instruments.

"It has long been settled that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent."—*Hutton* v. *Warren* (1836), 1 M. & W. 466, at p. 475; 5 L. J. (N. S.) Ex. 234, at p. 236, Parke, B., delivering the judgment of the Court (cited by Blackburn, J., in *Myers* v. *Sarl* (1860), 30 L. J. Q. B. 9, at p. 12).

"If a legislator were called to consider the expediency of passing a law upon this subject, the conclusion at which he would arrive is hardly open to a doubt. He would decide at once that the written contract must speak for itself on all occasions; that nothing should be left to memory or speculation. There is no inconvenience in requiring parties making written contracts to write the whole of their contracts; while, in mercantile affairs, no mischief can be greater than the uncertainty produced by permitting verbal statements to vary bargains committed to writing. But the nature of this explanatory evidence renders it peculiarly dangerous. Those who have heard it must have been struck with the hesitating strain in which it is given by men of business, and their wish to secure the correctness of their answer by referring to the written document. Again, what can be more difficult than to ascertain, as a matter of fact, such a prevalence of what is called a custom in trade as to justify a verdict that it forms a part of every contract? Debate may also be fairly raised as to the right of binding strangers by customs probably unknown to them; a conflict may exist between the customs of two different places; and supposing all these difficulties removed, and the custom fully proved, still it will almost always remain doubtful whether the parties to the individual contract really meant that it should include the custom."—*Trueman* v. *Loder* (1840), 11 A. & E. 589, at pp. 597, 598, Lord Denman, C. J.

"Upon the first point [the admissibility of the evidence given at the trial] we take the acknowledged distinction to be this: if the evidence offered at the trial, by either party, is evidence by

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law admissible for the determination of the question before a jury, the judge is bound to lay it before them, and to call upon them to decide upon the effect of such evidence; but, whether such evidence when offered is of that character and description which makes it admissible by law, is a question which is for the determination of the judge alone, and is left solely to his decision. On the present occasion the question was, whether there was a recognised practice and usage, with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used those words in such sense. The character and description of the evidence admissible for that purpose, is the fact of a general usage and practice prevailing in the particular trade or business, not the judgment and opinion of the witnesses; for the contract may be safely and correctly interpreted by reference to the fact of usage, as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto; but the judgment or opinion of witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge." —*Lewis* v. *Marshall* (1844), 7 M. & Gr. 729, at pp. 743, 744; 13 L. J. C. P. 193, at p. 195, Tindal, C. J.

"The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable."—*Gibson* v. *Small* (1853), 4 H. L. Cas. 353, at p. 397, Parke, B.

"Mercantile contracts are very commonly framed in a language peculiar to merchants: the intention of the parties, though perfectly well known to themselves, would often be defeated if this language were strictly construed according to its ordinary import in the world at large; evidence, therefore, of mercantile custom and usage is admitted in order to expound it and arrive at its true meaning. Again, in all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding: evidence therefore of such incidents is receivable. The contract in truth is partly express

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and in writing, partly implied or understood and unwritten. But, in these cases, a restriction is established on the soundest principle, that the evidence received must not be of a particular which is repugnant to, or inconsistent with, the written contract. Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect, more or less; neither, in the construction of a contract among merchants, tradesmen or others, will the evidence be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is, that words perfectly unambiguous in their ordinary meaning are used by the contractors in a different sense from that."—*Brown* v. *Byrne* (1854), 3 El. & Bl. 703, at pp. 715, 716; 23 L. J. Q. B. 313, at p. 316, Coleridge, J., delivering the judgment of the Court (Coleridge, Wightman, Erle and Crompton, JJ.).

Peculiar Commercial Meaning of Words.

"I agree with my brother *Hill* that the words of a written commercial contract are to be understood in the sense which they have acquired in the trade to which the contract relates. It is a *primâ facie* presumption that, if the parties to such a contract use expressions which bear a peculiar meaning in the trade, they use them in that peculiar meaning; which can be ascertained only by parol evidence. I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. . . . That [the rule laid down in Smith's Leading Cases, Vol. 1, p. 529 (ed. 5)] I take to be the true rule of law upon the subject; that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the contract relates, that meaning is, *primâ facie*, to be attributed to it, unless, upon the construction of the whole contract, enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail."—*Myers* v. *Sarl* (1860), 3 El. & El. 306, at pp. 319, 320; 30 L. J. Q. B. 9, at p. 14, Blackburn, J.

"I wish to say, with the utmost respect for the argument of counsel, I cannot agree in what I think was the contention, that there is a canon of construction by which the rigour of interpreta-

tion in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading having regard to the whole document."—*Nelson Line (Liverpool), Ltd.* v. *James Nelson & Sons, Ltd.*, [1908] A. C. 16, at p. 20; 77 L. J. K. B. 82, at p. 84. Lord Loreburn, L. C.

"The only observation I wish to add is one on the subject which the Lord Chancellor has just dealt with in reference to the language used by commercial men. Lord Blackburn used to say that the contest between commercial men and lawyers was that the commercial man always wished to write it short and the lawyers always wished to write it long; but a mixture of the two renders the whole thing unintelligible. I can quite understand that among commercial men documents passing from hand to hand, from hour to hour very often during the day, acquire a peculiar meaning, and when that is expanded the Courts will give effect to what is the known interpretation of such words."—*Ibid.*, at pp. 20, 21; L. J. at pp. 84, 85, Earl of Halsbury.

(See also *ante*, p. 124, "Contracts—Customs and Usages.")

Intention.

Ascertain the intention of the parties through the words they have used.

"In mercantile contracts, and indeed in all contracts where the meaning of language is to be determined by the Court, the governing principle must be to ascertain the intention of the parties, through the words they have used. This principle is one of universal application. It is seldom, in mercantile contracts, that any technical or artificial rule of law can be brought to bear upon their construction. The question really is the meaning of the language, and must be the same everywhere."—*McConnel* v. *Murphy* (1873), L. R. 5 P. C. 203, at pp. 218, 219, Sir Montague E. Smith (delivering the judgment of their lordships).

Accepted interpretation should not be in the least altered.

"Now charterparties, bills of lading, and policies of marine-insurance are documents which do not materially differ from an ordinary daily form of each. As mercantile business has been

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enlarged they have differed from time to time, but they do not differ from day to day, and in their substantial structure, which is very peculiar, they are much the same as they have been from the beginning. Where documents are in daily use in mercantile affairs, without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago, and which has from that time been accepted in the courts of law, and in the mercantile world, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore, whether one thinks that one would oneself have come to the same conclusion as the judges did in the beginning is immaterial. One ought to adhere strictly to the construction which has been put upon such documents. Moreover, if those documents, construed as the judges have construed them for many years, have also for many years been applied in a particular way to facts similar to those which are in question at this day in a cause, it is equally material, in my opinion, to adhere to that application, or else mercantile business becomes wholly uncertain."—*Pandorf* v. *Hamilton* (1886), 17 Q. B. D. 671, at pp. 673, 674; 55 L. J. Q. B. 546, at p. 547, Lord Esher, M. R.

Bill of Lading.

A bill of lading expresses the terms of the contract between shipper and shipowner.

"The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner."—*Glyn, Mills & Co.* v. *East and West India Dock Co.* (1882), 7 App. Cas. 591, at p. 596, Lord Selborne, L. C. (cited in *Leduc* v. *Ward* (1888), 20 Q. B. D. 475, at p. 480; 57 L. J. Q. B. 379, at p. 381, by Lord Esher, M. R.).

Clause exempting a Shipowner from Liability.

"Unquestionably, if in a clause in a bill of lading exempting a shipowner from liability there is an ambiguity, the document must be construed in favour of the shipper."—*Baerselman* v. *Bailey*, [1895] 2 Q. B. 301, at p. 305; 64 L. J. Q. B. 707, at p. 710, Rigby, L. J.

General common law liabilities will not be held to have been excepted unless it plainly appears that it was intended to except them.

"With great deference to the opinion of the learned judge (Walton, J.) especially in a case of this kind [a bill of lading], I have come to the conclusion that he did not give sufficient effect to certain broad considerations, which should be borne in mind in construing documents. It appears to me to be true with regard to a bill of lading, as with regard to any other legal document, that, where there are several clauses, as far as possible they must be construed consistently with one another, and one of them ought not to be treated as surplusage, and rejected, unless it is impossible to read it with other clauses. Another general consideration is that which was expressed by Vaughan Williams, L. J., in *Rathbone Brothers & Co.* v. *McIver Sons & Co.*, [1903] 2 K. B. 378, at pp. 383, 384; 72 L. J. K. B. 703, at p. 705, in the following terms: 'Before I go into the case in detail I wish to point out the broad principle, which I think ought to be applied in the construction of a bill of lading, or indeed of any other contract relating to the carriage of goods by sea—for instance, a charter-party. The principle was laid down by Bigham, J., and by the Court of Appeal, in *Owners of Cargo on Waikato* v. *New Zealand Shipping Co.*, [1898] 1 Q. B. 645, at p. 647; 67 L. J. Q. B. 514, at p. 515; to the effect that, with reference to the carriage of goods by sea, the law implies certain warranties on the part of the shipowner. It puts upon him certain obligations, which will always bind him, unless there are in the contract clear and express words, which without ambiguity relieve him from that which I may call his common law obligations.' Romer, L. J., in that case (at pp. 388, 389; L. J. at p. 708), also expressed the same principle as follows: 'As I understand shipowners have been for a long time endeavouring to limit the general liability cast upon them as carriers by sea, by inserting special exceptions, without going the length of excepting their liability in respect of the warranty of seaworthiness, and they have been, as I understand, from time to time extending the special exceptions. I think, however, I am right in saying that, as a principle of construction, the warranty of seaworthiness will be held not to have been excepted, unless it plainly appears that it was intended to except it. In other words the Court will not readily infer an exception of that warranty.' Those two passages

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appear to me to state in clear language the general principle of construction applicable to these documents."—*Bathurick* v. *Elderslie Steamship Co.*, [1904] 1 K. B. 319, at pp. 324, 325; 73 L. J. K. B. 240, at p. 243, Lord Alverstone, C. J.

Charterparty.

"It is to be borne in mind that we are here dealing with a mercantile instrument, in the interpretation of which we must look at the substance of the matter, and are not restrained to such nicety of construction as is the case with regard to conveyances, pleadings and the like."—*Cockburn* v. *Alexander* (1848), 6 C. B. 791, at p. 814; 18 L. J. C. P. 74, at pp. 82, 83, Maule, J.

"It appears to me that this case [of a charterparty] is to be determined by the general rule of construction, so often referred to as the golden rule, which is equally applicable to Acts of Parliament and to private contracts—viz., that the grammatical sense of the words must be adhered to, unless such a construction would be contrary to the expressed intention of the parties, or would involve some absurdity, repugnance, or inconsistency."—*Gether* v. *Capper* (1855), 15 C. B. 696, at p. 706; 24 L. J. C. P. 69, at p. 71, Maule, J.

"Moreover, to use the words of Lord Ellenborough, in *Barker* v. *Hodgson* [(1814), 3 M. & S. 267, 270], the merchant is 'the adventurer who chalks out the voyage, who is to furnish at all events the subject-matter out of which the freight is to arise.' He is, in most cases, as he certainly was in the present instance, the party best acquainted with the trade for which the ship is taken up, and with the difficulties which may impede the performance by him of his contract; words, therefore, in a charterparty, relaxing in his favour a clause by which an allowance to him of time for a specified object is in the interest of the ship precisely limited, must be read as inserted on his requirement, and construed at the least with this degree of strictness against him, that they shall not have put upon them an addition to their obvious meaning. Nevertheless, where the meaning is ambiguous, as it is in the present case, we think that it must be gathered from the surrounding circumstances to which the charterparty was intended to apply."—*Hudson* v. *Ede* (1867), L. R. 2 Q. B. 566, at p. 578; 36 L. J. Q. B. 273, at p. 281, Blackburn, J., delivering the judgment of the Court (Cockburn, C. J., Blackburn, Mellor, and Shee, JJ.).

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"There is, in the second place, another rule of construction which one would bring to bear upon this charterparty, and that is, that one must see if this stipulation which we have got to construe is introduced by way of exception or in favour of one of the parties to the contract, and, if so, we must take care not to give it an extension beyond what is fairly necessary, because those who wish to introduce words in a contract in order to shield themselves ought to do so in clear words."—*Barton* v. *English* (1883), 12 Q. B. D. 218, at p. 222; 53 L. J. Q. B. 133, at p. 136, Bowen, L. J.

Writing and Print.

"In construing a charterparty no greater effect can be given to writing than to print, although a different rule may prevail with reference to policies of insurance. *Alsager* v. *St. Katharine Docks Co.* [(1845), 14 M. & W. 794; 15 L. J. Ex. 34]."—*Baumwoll Manufactur Von Scheibler* v. *Gilchrest*, [1891] 2 Q. B. 310, at p. 317; 60 L. J. Q. B. 605, at p. 608, Charles, J.

(See also, *ante*, p. 114, "Contracts—Original Draft or Printed Form.")

Memorandum of Association.

General Words.

"In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shown by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are."—*In re German Date Coffee Company* (1882), 20 Ch. D. 169, at p. 188; 51 L. J. Ch. 564, at p. 569, Lindley, L. J. (cited by Swinfen Eady, J., in *Stephens* v. *Mysore Reefs (Kanguudy) Mining Co., Ltd.*, [1902] 1 Ch. 745, at p. 749; 71 L. J. Ch. 295, at p. 298, and by Warrington, J., in *Pedlar* v. *Road Block Gold Mines of India, Ltd.*, [1905] 2 Ch. 427, at pp. 434, 435; 74 L. J. Ch. 753, at p. 756).

"You ought to give a wider construction to the words of a memorandum of association creating and defining the powers of a

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purely commercial company having no compulsory powers and no monopoly than you would give to the words of a statute creating a company, like the railway company [the Mersey Railway], having compulsory powers of land purchase and a practical monopoly."—*Attorney-General* v. *Mersey Railway*, [1907] 1 Ch. 81, at p. 106; 76 L. J. Ch. 121, at p. 136, Vaughan Williams, L. J.

Policy of Insurance.

"The same rule of construction which applies to all instruments applies equally to a policy of insurance (set out, *ante*, pp. 55-85) . . . The only difference between policies of insurance and other instruments in this respect is, that the greater part of the printed language of them, being invariable and uniform, has acquired, from use and practice, a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled, nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects."—*Robertson* v. *French* (1803), 4 East, 130, at pp. 135, 136, Lord Ellenborough, C. J. (cited by Bowen, L. J., in *Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, at p. 501; 58 L. J. Q. B. 284, at p. 286; and by Lord Halsbury in *Glynn* v. *Margetson & Co.*, [1893] A. C. 351, at p. 358; 62 L. J. Q. B. 466, at pp. 469, 470).

"The ordinary and general rule in the case of a policy of insurance, of course, is that we must construe the policy as we find it; it is in a printed form, with written parts introduced into it, and we are to take the whole together, both the written and the printed parts. Although it has sometimes been endeavoured to be argued that we ought to bestow no more attention on the written parts than on the printed parts which are uniform in most policies of insurance, there is no doubt that we do, and ought to, make a difference between them. The part that is specially put into a particular instrument is naturally more in harmony with what the

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parties are intending than the other, although it must not be used to reject the other, or to make it have no effect."—*Joyce* v. *Realm Insurance Co.* (1872), L. R. 7 Q. B. 580, at p. 583; 41 L. J. Q. B. 356, at p. 358, Blackburn, J.

The best and safest way to arrive at a true decision as to what is recoverable under a policy.

"I have found from experience in cases of marine insurance that a case, which is in itself tolerably clear, is often obscured by the putting by the learned counsel of numerous instances said to be analogous, and which upon their face are somewhat similar to the case in hand, but are not so when understood. In my opinion, unless the case is concluded by authority, the best and safest way to arrive at a true decision as to what is recoverable under a policy of marine insurance is to ascertain in the first place what constitutes the subject-matter of the insurance, and next against what perils that subject-matter is insured. When this is arrived at, what is covered—that is, what is recoverable under the policy—will be understood."—*Field Steamship Co.* v. *Burr*, [1899] 1 Q. B. 579, at p. 583; 68 L. J. Q. B. 426, at p. 429, A. L. Smith, L. J.

Warranty in a Policy.

"The first question in this case is what is the rule of construction to be adopted in the case of a warranty in a policy. Now the rule laid down in Marshall on Marine Insurance is, that a warranty, like every other part of the contract, is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words. This has been adopted by later writers, both American and English, and is a declaration that the words are not to be construed in the sense in which they would be used amongst men of science, but as they would be used in mercantile transactions."—*Hart* v. *Standard Marine Insurance Co.* (1889), 22 Q. B. D. 499, at p. 500; 58 L. J. Q. B. 284, at p. 285, Lord Esher, M. R.

Rules for ascertaining Amount of a Loss under a Policy.

"The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognized

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rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognized by the Courts without further proof. Since those decisions, and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a Court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as part of the contract or as agreed modes of carrying it out."—*Lohre* v. *Aitchison* (1878), 3 Q. B. D. 558, at p. 561; 47 L. J. Q. B. 534, at pp. 535, 536, Brett, L. J., delivering the judgment of the Court (cited by Pearson, J., in *In re Rosher* (1884), 26 Ch. D. 801, at pp. 821, 822; 53 L. J. Ch. 722, at p. 731).

For rules for construction of policy in the statutory or other like form, where the context does not otherwise require, see Marine Insurance Act, 1906, 6 Edw. 7, c. 41, First Schedule.

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Pt. VI.-MISCELLANEOUS INSTRUMENTS.

Grants from the Crown.

"If the King's grant can enure to two intents, it shall be taken to the intent that makes most for the King's benefit, and therefore it shall be construed strictly."—*Comyns' Digest, tit. Grant* (G. 12).

"Words too general are not sufficient in the King's grant."—*Comyns' Digest, tit. Grant* (G. 7).

Counsel in arguing said :—"The rule is clear that the Crown is not bound by general words, or words of reference, and that in all cases of royal grant express words are necessary to confer or revive a franchise [Graham, B., mentioned the *Marquis of Downshire's Case* (13th June, 1816, 5 Pri. 269), recently determined in this Court [Exchequer] as having so decided]."—*Rex* v. *Capper* (23rd Dec., 1817), 5 Pri. 217, at p. 249.

"I can see no reason why the grant of letters patent is not to be construed like all other grants on behalf of the Crown."—*Dixon* v. *London Small Arms Co.* (1876), 1 Q. B. D. 384, at p. 396; 46 L. J. Q. B. 617, at p. 621, Mellish, L. J.

(See *ante*, p. 178, "Grants of the Crown.")

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PATENTS.

Patents are to be interpreted as bargains between the inventor and the public.

"Lord Eldon lays down the principle so long ago as 1800. He says, patents are to be considered as bargains between the inventor and the public, to be judged of on the principles of good faith, by making a fair disclosure of the invention, and to be construed as other bargains. That is the principle which must be taken to be the sound principle."—*Neilson* v. *Harford* (1841), Webs. Pat. Cas. 295, at p. 341, Alderson, B.

Patents, Designs and Trade Marks Act, 1883 (46 & 47 Vict. c. 57).

Sect. 27. "A patent shall have to all intents the like effect as against Her Majesty the Queen, her heirs and successors, as it has against a subject."

Sect. 45 (2). "Every patent granted before the commencement of this Act, or on an application then pending, shall remain unaffected by the provisions of this Act relating to patents binding the Crown, and to compulsory licences."

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Specification.

A specification should be in the clearest and most unequivocal terms of which the subject is capable.

The interpretation of a specification is for the Court.

The specification is to be fairly supported by the Court.

The specification is to be interpreted like every other written instrument.

"I think that, as every patent is calculated to give a monopoly to the patentee, it is so far against the principles of law, and would be a reason against it, were it not for the advantages which the public derive from the communication of the invention after the expiration of the time for which the patent is granted. It is therefore incumbent on the patentee to give a specification of the invention in the clearest and most unequivocal terms of which the subject is capable. And if it appear that there is any unnecessary ambiguity affectedly introduced into the specification, or anything which tends to mislead the public, in that case the patent is

void."—*Turner* v. *Winter* (1787), 1 T. R. 602, at p. 605, Ashhurst, J.

"In the construction of a patent, the Court is bound to read the specification so as to support it, if it can fairly be done."—*Russell* v. *Cowley* (1835), 1 C. M. & R. 864, at p. 876, Parke, B.

"Then we come to the question itself, which depends on the proper construction to be put on the specification. It was contended that of this construction the jury were to judge. We are clearly of a different opinion. The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject of redress in a Court of Error; but a misconstruction by the jury cannot be set right at all effectually."—*Neilson* v. *Harford* (1841), 8 M. & W. 806, at p. 823; 11 L. J. Ex. 20, at p. 25, Parke, B.

The specification ought to be construed according to its ordinary and proper sense, "unless there be something in the context to give it a different meaning, or unless the facts properly in evidence, and with reference to which the patent must be construed, should show that a different interpretation ought to be made."—*Elliott* v. *Turner* (1845), 2 C. B. 446, at p. 461; 15 L. J. C. P. 49, at p. 51, Parke, B.

"Is not the judge bound to know the meaning of all words in the English language, or, if they are used technically or scientifically, *to inform his own mind* by evidence, and then to determine the meaning?"—*Hills* v. *The London Gaslight Co.* (1857), 27 L. J. Ex. 60, at p. 63, Martin, B.

"Where the meaning of a document depends on facts *dehors* the document, those facts must be first ascertained, and then it is for the judge, no doubt, to determine the meaning."—*Ibid.*, at p. 64, Bramwell, B.

"Where *novelty* or *infringement* depends merely on the construction of the specification, it is a pure question of law for the judge;

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but where the consideration arises how far one machine, or a material part of one machine, imitates or resembles another in that which is the alleged invention, it generally becomes a mixed question of law and fact which must be left to the jury."—*Seed* v. *Higgins* (1860), 8 H. L. Cas. 550, at p. 561; 30 L. J. Q. B. 314, Lord Campbell, L. C.

"It is true, as a proposition of law, that the construction of a specification (like the construction of all other written instruments) belongs to the Court; but the specification of an invention contains generally, if not always, some technical terms, some phrases of art, some description of processes, which require the light to be derived from what are called surrounding circumstances. It is, therefore, an admitted rule of law, that the explanation of the words or technical terms of art, the phrases used in commerce, and the proof and results of the processes which are described (and in a chemical patent the ascertainment of chemical equivalents), that all these are matters of fact upon which evidence may be given, contradictory testimony may be adduced, and upon which, undoubtedly, it is the province and right of the jury to decide. But when those portions of a specification are abstracted, and made the subject of evidence, and therefore brought within the province of the jury, the direction to be given to the jury with regard to the construction of the rest of the patent, which is conceived in ordinary language, must be a direction as to the meaning of the patent upon the hypothesis or the basis of the jury arriving at a certain conclusion with regard to the meaning of those terms, the signification of those phrases, the truth of those processes, and the result of the technical procedure described in the specification. And so the rule is given by Parke, B., in delivering the judgment of the Court of Exchequer in the case, I think, of *Neilson* v. *Harford* [(1841), 8 M. & W. 806; 11 L. J. Ex. 20]." *Hill* v. *Evans* (1862), 4 De G. F. & J. 288, at pp. 293, 294; 31 L. J. Ch. 457, at p. 460, Lord Westbury, L. C.

"The construction of a specification, like other written documents, is for the Court. If the terms used require explanation, as being terms of art or of scientific use, explanatory evidence must be given, and with its aid the Court proceeds to the office of construction."—*Simpson* v. *Holliday* (1866), L. R. 1 H. L. 315, at p. 320; 35 L. J. Ch. 811, at p. 816, Lord Chelmsford, L. C.

"With respect to the rules that govern the construction of specifications, they are the ordinary rules for the interpretation of written instruments, having regard especially to the fact that the

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specification must clearly fulfil the obligation imposed on the patentee by the proviso contained in all letters patents, viz., that the grant shall be void if the patentee shall not particularly describe and ascertain the nature of his invention, and in what manner the same is to be performed. It is therefore made a settled rule, that the specification must be so expressed as to be perfectly intelligible to a workman of ordinary knowledge, and it must follow that, if there be any obscurity or ambiguity in the specification which is likely to mislead, this ought not to be helped by any refined or secondary interpretation of the language."—*Simpson* v. *Holliday* (1866), 13 W. R. 577, at p. 578; L. R. 1 H. L. 315; 35 L. J. Ch. 811, at p. 817, Lord Cranworth.

"I do not think that the proper way of dealing with this question [whether the claim was too large] is to look first at the claims, and then see what the full description of the invention is; but rather first to read the description of the invention, in order that your mind may be prepared for what it is the inventor is about to claim."—*Arnold* v. *Bradbury* (1871), L. R. 6 Ch. 706, at p. 712, Lord Hatherley, L. C. (cited by Lord Esher, M. R., in *Edison Bell Phonograph Corporation* v. *Smith and Young* (1894), 11 R. P. C. 389, at pp. 395, 396).

"In the construction of a specification it appears to me that it ought not to be subjected to what has been called a benign interpretation or to a strict one. The language should be construed according to its ordinary meaning—the understanding of technical words being, of course, confined to those who are conversant with the subject-matter of the invention—and if the specification is thus sufficiently intelligible, it performs all that is required of it."—*Harrison* v. *Anderston Foundry Co.* (1876), 1 App. Cas. 574, at p. 581, Lord Chelmsford.

"It cannot be effectually contended that there is any principle to be applied to the construction of specifications which differs from that applicable to the construction of every written instrument whatever. Of course, in ascertaining the meaning of words, you endeavour to put yourself as much as possible in the position of the person using them."—*Adie* v. *Clark* (1876), 3 Ch. D. 134 at p. 143, James, L. J., delivering the judgment of the Court (James, L. J., Mellish, L. J., and Baggallay, J. A.).

"In construing the specification, we must construe it like all written documents, taking the words and seeing what is the meaning of those words when applied to the subject-matter; and in the

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case of a specification, which is addressed not to the world at large, but to a particular class, for instance, skilled mechanicians, possessing a certain amount of knowledge, it is material for the tribunal to put itself in the position of such a class, namely, skilled mechanicians, and to see what the words of the specification mean when applied to such a subject as skilled mechanicians would know, and, as the tribunal has now, by the admission of evidence or otherwise, put itself in a position to understand, and then to say what the words of the specification mean when applied to such a subject-matter."—*Clark* v. *Adie*, No. 2 (1877), 2 App. Cas. 423, at pp. 436, 437; 46 L. J. Ch. 598, at p. 607, Lord Blackburn.

"I have remarked before, in the case of *Hinks and Son* v. *Safety Lighting Co.* [(1876), 4 Ch. D. 607, at p. 612; 46 L. J. Ch. 185, at p. 187], that it is the duty of the judge to construe a specification fairly, with a judicial anxiety to support a really useful invention, if it can be supported upon a reasonable interpretation of the patent; or, as Mr. Aston said, that a judge is not to be astute to find flaws in small matters in a specification with a view to overthrow it."—*Plimpton* v. *Spiller* (1877), 6 Ch. D. 412, at p. 422, Jessel, M. R.

"I apprehend the duty of the Court is fairly and truly to construe the specification, neither favouring the one side nor the other, —neither putting an unfair gloss or construction upon the specification for the purpose of saving a patent if it is said that the patent is void, nor putting an unfair gloss or construction upon it in order to extend the patent and make it take in something which you may think was an unhandsome taking of the fruits of his invention from the patentee if it is not really an infringement of the patent." —*Dudgeon* v. *Thomson* (1877), 3 App. Cas. 34, at pp. 53, 54, Lord Blackburn.

"We ought if possible to construe a claim so as to support a patent."—*Needham* v. *Johnson* (1884), 1 R. P. C. 49, at p. 55, Brett, M. R.

"If any patent is capable of more constructions than one, the general rule would be applied that you would put upon it that construction which makes it a valid patent, rather than a construction which renders it invalid."—*Ibid.*, at p. 58, Lindley, L. J.

"It (the specification) ought to be construed, like any other legal document, as a whole. It certainly ought not to be construed malevolently—I will not say it ought to be construed benevolently; I do say it ought to be construed fairly. It must

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be read by a mind willing to understand, not by a mind desirous of misunderstanding."—*Lister* v. *Norton Brothers & Co.* (1886), 3 R. P. C. 200, at p. 203, Chitty, J.

"Every claim in every patent must be read and construed with reference to the specification, and not as if the claim was an isolated sentence having no connection with or reference to what precedes it."—*Edison & Swan United Electric Light Co* v. *Woodhouse & Rawson* (1887), 4 R. P. C. 99, at p. 107, Lindley, L. J.

"How are we to get at what is the real object of the plaintiff's patent? I think it is true to say that you may look for that purpose at the provisional specification. For the object of the complete specification is to carry out in detail that which is more generally expressed in the provisional specification."—*Parkinson* v. *Simon* (1894), 11 R. P. C. 493, at p. 503, Lord Esher, M. R.

"I am further of opinion that the canons of construction of a patent are the same canons of construction that are to be applied to every written instrument which has to be construed by the Court. Now, what is the very first canon of construction of all written business documents? Why, that the Court ought to construe them as if it had to construe them the day after they were published."—*Nobel's Explosives Co., Ltd.* v. *Anderson* (1894), 11 R. P. C. 519, at p. 523, Lord Esher, M. R.

"A specification ought, I apprehend, to be regarded in the same manner as any other document which has to be interpreted by the Court. It must be looked at as a whole. The claims must not be looked at as if they stood alone. A strained and unnatural interpretation must be avoided. The true meaning and extent of the claims must be sought for without reference to the effect this may have upon the validity of the patent."—*Electric Construction Co., Ltd.* v. *Imperial Tramways Co., Ltd.* (1900), 16 R. P. C. 631, at p. 638, Cozens-Hardy, J.

"I agree that one ought to construe a specification and every other document fairly, and if I may say so, in a liberal spirit *ut res magis valeat*."—*British Motor Syndicate, Ltd.* v. *J. E. H. Andrews & Co., Ltd.* (1901), 18 R. P. C. 85, at p. 94, Lord Davey.

"In construing the specification your Lordships necessarily have regard to the state of knowledge, and the stage of advancement in invention which had been reached at the time of the letters patent in question."—*Ibid.*, at p. 95, Lord Robertson.

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In Cases of Alleged Infringement.

Previous state of knowledge—Words of claim to be followed.

"In patent cases I have always felt that there is a line of thought which is most likely to lead you to the right result in the speediest way. The first thing, assuming you understand the alphabet of the science or art, is to clearly understand what was the previous state of knowledge. Having got, either by agreement or deduction from the evidence, a clear view as to what was the previous state of knowledge, you must then construe the specification with reference to that, disregarding issues of novelty or subject-matter which may arise in the particular case, and you then have to consider whether or not the infringement comes within the fair meaning of the claims—not anything else, but the claims read in the light of the previous state of knowledge, and without altering their words unduly in favour of the patentee or the infringer. I will say one word more with regard to the law: that in my judgment, be it in a combination claim or be it not, you are only allowed to follow the words of the claim, but you are not to permit mere mechanical equivalents or mere colourable alterations to prevent a thing being an infringement, having regard to what the meaning of the claim is."—*Presto Gear Case and Components Co., Ltd.* v. *Orme, Evans & Co., Ltd.* (1901), 18 R. P. C. 17, at p. 23, Lord Alverstone, L. C. J.

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PLEADINGS.

Pleading Defined.

"Pleading in strictness is no more than setting forth that fact which in law shows the justness of the demand made by the plaintiff, or the discharge and defence made by the defendant." —6 *Bac. Abr. Pleas and Pleadings.*

"The use of pleading is to reduce the matters in litigation to a single point."—*Douglas* v. *Patrick* (1790), 3 T. R. 383, at p. 684, Lord Kenyon, C. J.

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are proved."—*Rules of the Supreme Court, Ord. XIX.* r. 4.

Pleading over.

"Now, although in general in pleading, an equivocal expression is to be construed against the party using it, yet where the opposite party has pleaded over, that is an admission that the expression is to be taken in that sense which will support the previous pleading."—*Hobson* v. *Middleton* (1827), 6 B. & C. 295, at p. 302, Bayley, J.

How Interpreted.

Pleadings are to be reasonably interpreted, and according to the subject-matter.

When there is an ambiguity in the pleading, it is to be interpreted most strongly against the pleader.

If a pleading admits of two interpretations, one sensible and the other insensible, the former is adopted.

"There is also another rule in pleading, which is, that if the meaning of the words be equivocal, they shall be taken

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strongly against the party pleading them."—*Doraston* v. *Payne* (1795), 2 Black. H. 528, at p. 530, Buller, J.

"Interpreting the language of the declaration according to the subject-matter."—*Hallewell* v. *Morrell* (1849), 1 M. & G. 367, at p. 383, Tindal, C. J.

"It is a maxim in the construction of pleadings that everything shall be taken most strongly against the pleader."—*Howard* v. *Gossel* (1845), 10 Q. B. 359, at p. 383; 14 L. J. Q. B. 367, at p. 376, Coleridge, J.

"If a plea admits of two constructions, one of which gives a sensible effect to the whole, and the other makes a portion of it idle and unsensible, the Court is bound to adopt the former construction."—*Peter* v. *Daniel* (1848), 5 C. B. 568, at pp. 579, 580; 17 L. J. C. P. 177, at p. 181, Williams, J.

"It is a clear rule of law that if a declaration contains allegations capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will not, after verdict it must be construed in the sense which will sustain the action."—*Emmens* v. *Elderton* (1853), 4 H. L. Cas. 624, at p. 678, Lord Truro.

"I think that there ought to be no distinction made in the mode of construing a plea, whether it comes before the Court on demurrer or on a motion to enter judgment *non obstante veredicto*. In either case, the plea ought to receive a reasonable construction. It may be when there is any ambiguity that it ought to be taken as much as possible against the party pleading it."—*Goldham* v. *Edwards* (1856), 25 L. J. C. P. 223, at p. 224, Pollock, C. B.

"But this rule [that pleadings are to be taken most strongly against the party pleading] does not apply to the pleading of matters which are peculiarly within the knowledge of the opposite party: *Hobson* v. *Middleton* [(1827), 6 B. & C. 295, at p. 302]. And with reference to this equitable plea, it may be observed, that the same exception to the rule that pleadings are to be taken most strongly against the party pleading is recognized in Courts of Equity. See Mitford on Pleading [5th ed.], pp. 45, 347."—*Murphy* v. *Glass* (1869), L. R. 2 P. C. 408, at p. 419, Lord Chelmsford, pronouncing the judgment of the Judicial Committee.

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POWERS.

Intention to Exercise.

"In the execution of powers, the material object to be attended to is the intention of the person creating the power; and that intention is to be collected from the words of the will, or other instrument giving the power, according to the ordinary and common acceptation of the words, and not according to any legal or technical exposition of them."—*Griffith* v. *Harrison* (1792), 4 T. R. 737, at pp. 748, 749, Ashhurst and Buller, JJ.

"The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard to the intention of a man of whose intention you know nothing except what you find in his will."—*Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172, at pp. 179, 180; 55 L. J. Ch. 121, at p. 124 Pearson, J. (adopted by North, J., in *In re Cotton* (1888), 40 Ch. D. 41, at p. 44; 58 L. J. Ch. 174, at p. 176, and applied by Stirling, J., in *In re Molaer, Bray* v. *Milner*, [1899] 1 Ch. 563, at p. 565; 68 L. J. Ch. 255, at p. 257).

"The rules for construing a will exercising a power are, except so far as they are altered by the Wills Act, the same as those for construing a will disposing of a testator's own property. In each case it is a question of intention, to be gathered from the words used, and not from speculation as to what the testator would probably have desired. If the language used is such that a devise of his own property would have failed by reason of some sub-

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sequent act, an appointment under a special power in the same language must equally fail. The subsequent act need not be the act of the testator himself. For example, a devise of Blackacre, which is subject to a mortgage, will be defeated if the mortgagee sells under his power of sale in the testator's lifetime, and the devisee will not take the surplus proceeds in the hands of the mortgagee. A will may, however, be so framed as to indicate an intention to give or appoint property, however invested, or notwithstanding any change of investment. An illustration of this is furnished by the decision of Malins, V.-C., in *In re Johnstone's Settlement* (1880), 14 Ch. D. 162; 49 L. J. Ch. 596."—*In re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, at p. 123; 71 L. J. Ch. 101, at pp. 110, 111, Cozens-Hardy, L. J.

Naked Powers.

Must be taken strictly.

"This is the first time I have heard that the execution of naked powers should be construed more favourably than that of powers coupled with an interest. The rule of law is otherwise; because the party there in some measure parts with his own property, as a kind of dominion he has over the estate, those powers being construed liberally; but naked powers always strictly."—*Duke of Marlborough* v. *Lord Godolphin* (1750), 2 Ves. Sen. 61, at p. 79, Lord Hardwicke, L. C.

"It is true, naked powers must be taken strictly, both in Courts of law and in equity."—*Zouch* v. *Woolston* (1761), 1 Wm. Bl. 281, at p. 283, Lord Mansfield, C. J.

By whom a Naked Power given to several can be Exercised.

"It is settled, by repeated authorities, that where a naked power is given to several persons, it cannot be executed by the survivors. It is a power, the execution of which is entrusted to several individual persons jointly, which can only be executed by them all, and if one of them should die the authority will not survive. It is also equally well settled, that if the power be annexed to the office any persons who fill the office of executor will have also the power which is attached to that office."—*Brassey* v. *Chalmers* (1852), 16 Beav. 223, at p. 233, Sir John Romilly, M. R.

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Powers to appoint Portions charged on Land.

"The results at which I have arrived from a careful examination of all the authorities which I have examined are as follows:

"1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry.

"2. That where the language of the power is clear and unambiguous, effect must be given to it.

"3. That where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

"4. That where upon the true construction of both instruments the portion has vested in the appointee the portion is raisable even although the appointee dies under twenty-one or (if a daughter) unmarried.

"5. That appointments vesting portions charged on land in children of tender years who die soon afterwards are looked at with suspicion; and very little additional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so."—*Henty* v. *Wrey* (1882), 21 Ch. D. 332, at pp. 359, 360; 53 L. J. Ch. 667, at p. 681, Lindley, L. J. (cited in *In re De Hoghton*, [1896] 2 Ch. 385, at p. 396; 65 L. J. Ch. 667, at p. 672, by Stirling, J.).

Powers of Attorney.

"Our books say that these kind of authorities [letters of attorney] are to be pursued strictly; they instance that an authority given to three cannot be executed by a less number than the whole, and the statute of 21 Hen. 8, c. 4 [Sales of Land by Acting Executors, 1529], was thought necessary to be made, to remedy the inconvenience arising from it in the case of executors, where some have declined to act. But our books also say, that they are to be so construed as to include all the necessary means

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of executing them with effect. Thus an authority to receive and recover debts includes a power to arrest."—*Howard* v. *Baillie* (1796), 2 H. Bl. 618, at p. 620, Lord Loughborough, L. C. J.

"I fully agree with the cases cited by Mr. Craig to show that, if there is a power of attorney to do a particular act, followed by general words, these general words are not to be extended beyond what is necessary for doing that particular act for which the power of attorney is given."—*Perry* v. *Holl* (1860), 2 De G. F. & J. 38, at p. 48; 29 L. J. Ch. 677, at p. 682, Lord Campbell, L. C.

"Nor was it disputed that powers of attorney are to be construed strictly; that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication. It was pointed out, indeed, that the decisions on which the learned counsel for the appellant mainly relied in support of these propositions were decisions of English judges, but it was not shown that there is any difference in this respect between the law of Canada and the law of England. The provisions of the Civil Code of Lower Canada, and the Canadian authorities which were cited to their lordships, appear to be in harmony with English law and English authorities."—*Bryant, Powis and Bryant* v. *La Banque du Peuple*, [1893] A. C. 170, at p. 177; 62 L. J. P. C. 68, at p. 72, Lord Macnaghten delivering the judgment of the Judicial Committee (cited by Farwell, J., in *Jacobs* v. *Morris*, [1901] 1 Ch. 261, at p. 267; 70 L. J. Ch. 183, at pp. 186, 187).

(See *In re Dowson and Jenkins's Contract*, [1904] 2 Ch. 219; 73 L. J. Ch. 684.)

Copulatio verborum indicat acceptationem in eodem sensu. Bac. Wks., Vol. iv., p. 26.

"It seems to have been thought by two of the learned judges of the High Court [in Bengal], that it was laid down in this case [*Bank of England* v. *Fagan* (1849), 5 Moo. Ind. App. 1, at p. 40], as a rule of construction, that words used in a power of attorney to express the objects of the power are always to be construed disjunctively. Their Lordships cannot agree with this view of the case. The words there may have been used disjunctively, but they

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do not see any reason why the rule laid down by Lord Bacon, *Copulatio verborum indicat acceptationem in eodem sensu* [Bac. Wks. Vol. iv., p. 26], which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power of attorney as much as any other instrument."—*Jonmenjoy Coondoo* v. *Watson* (1884), 9 A. C. 561, at p. 569; 53 L. J. P. C. 80, at p. 83, Sir Richard Couch delivering the judgment of the Judicial Committee.

Treaties, International.

"That rule [that the treaties of 1850, being in the nature of international compacts, ought to be liberally construed] where rightly applied, in circumstances which admit of its application, is useful and salutary but it goes no farther than this, that the stipulations of an international treaty ought, when the language of the instrument permits, to be so interpreted as to promote the main objects of the treaty. Their Lordships venture to doubt whether the rule has any application to those parts, even of a proper international treaty, which contain the terms of an ordinary mercantile transaction, in which the respective stipulations of the contracting parties are expressed in language which is free from ambiguity."—*Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario*, [1897] A. C. 199, at p. 211, Lord Watson delivering the judgment of the Judicial Committee.

Trusts.

Estate and Interest of Trustee.

"Now, the rule of construction in such cases is, that the trustees take estates co-extensive with the trusts they have to perform; and that, if the performance of the trust require only that the legal estate shall be vested in them for a limited time, they take it only for that period: 2 Jarman on Wills, p. 271, 3rd ed.; p. 1155, 5th ed., and cases there cited."—*Stevenson* v. *Mayor of Liverpool* (1874), L. R. 10 Q. B. 81, at p. 85; 44 L. J. Q. B. 34, at p. 36, Quain, J.

"In Lewin on Trusts, 10th ed. p. 117, the rule is thus stated: 'In creating a trust, a person need only make his meaning clear as to the interest he intends to give, without regarding the technical terms of the common law in the limitation of legal estates. An

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equitable fee may be created, without the word "heirs," and an equitable entail without the words "heirs of the body," provided words be used which, though not technical, are yet popularly equivalent, or the intention otherwise sufficiently appears upon the face of the instrument.'"—*In re Tringham's Trusts*, [1904] 2 Ch. 487, at p. 492; 73 L. J. Ch. 693, at p. 695, Joyce, J. (Adopted as a correct statement of the law by Farwell, J., in *In re Oliver's Settlement*, [1905] 1 Ch. 191, at pp. 194, 195; 74 L. J. Ch. 62, at p. 64.)

(See also "Wills—Precatory Trusts" and "Executory Trusts.")

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Part VII.—STATUTES.

Section I.

PRELIMINARY.

Statute Defined.

A statute is the will of the legislature enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons in Parliament assembled.

"Although the original or authentic transcripts of Acts of Parliament are not before the time of Henry III. (1216), and many that were in his time are perished and lost, *yet certainly such there were*; and many of those things that we now take for common law were undoubtedly Acts of Parliament, though now not to be found of record."—*Hale's Hist. of Com. Law* (published in 1713), p. 89.

"The statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time; all our law began by consent of the legislature, and whether it is now law by usage or writing, it is the same thing."—*Collins* v. *Blantern* (1767), 2 Wilson, 347, at p. 348, Wilmot, C. J.

"Statute law and common law both originally flowed from the same fountain, the *legisla*— —*Ib.*, at p. 35[illegible]

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"The statute law is the will of the legislature in writing; the common law is nothing else but statutes worn out by time. All our law began by consent of the legislature; and whether it is now law by usage or writing is the same thing. For many of those things that we now take for common law were undoubtedly Acts of Parliament, though not now to be found on record. Indeed, our lawyers have made a distinction between statutes themselves; they have distinguished between statutes made before the time of legal memory—viz., 1 Ric. I. (1189)—and those made since. The former are considered as part of the common law—the *leges non scriptæ*; for notwithstanding copies of them may be found, their provisions obtain at this day, not as Acts of Parliament, but by immemorial usage and custom. The latter, or those since time of memory, are again distinguished; those from 1 Ric. I. (1189) to Edw. III. (1326) are called *antiqua statuta*; and all subsequent statutes are called *nova statuta*."—*Bac. Abr.*, 7th ed., 1832, Vol. VII., p. 431.

"A statute is a written law, made by the King, with the advice and consent of the two Houses of Parliament."—*Ibid.*

"It is said that the last will of a party is to be favourably construed, because the testator is *inops consilii*. That we cannot say of the legislature, but we may say that it is '*magnas inter opes inops*.'"—*Sutees* v. *Ellison* (1829), 9 B. & C. 750, at pp. 752, 753, Lord Tenterden, C. J.

"The ground on which the Courts have declared a testator's will void for uncertainty really is that the testator was *inops consilii*, and it would be impossible for me to apply such a consideration as that to the legislature of this country."—*Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, at p. 361; 69 L. J. Ch. 850, at p. 855, Farwell, J.

Canons and Rules of Interpretation.

"The subjects of this country are bound to construe rightly the statute law of the land; it is not competent to them to aver in a court of justice that they have mistaken the law; it is a plea which no court of justice is at liberty to receive."—*The Charlotta* (1814), 1 Dods. Adm. 387, at p. 392, Sir W. Scott.

See also *post*, p. 372.

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Statutes must be interpreted according to well recognized rules of interpretation.

"We must construe Acts of Parliament according to the well recognized rules of construction."—*Fletcher* v. *Hudson* (1880), 5 Ex. D. 287, at p. 293; 49 L. J. Ex. 793, at p. 796, Brett, L. J.

"I should like to say a word or two as to the rules which are binding on all Courts in regard to the construction of statutes as well as of all other instruments. Whatever may have been the case in times past, in modern times those rules have become perfectly well settled. They have become much more limited as regards the power of the Courts, and at the same time so well recognized as to be binding on this Court and all other Courts."—*Ex parte Walton* (1881), 17 Ch. D. 746, at p. 750; 50 L. J. Ch. 657, at pp. 658, 659, Jessel, M. R.

"I am disposed as much as any one to venerate the old canons for interpretation of statutes, sanctioned by the acquiescence of ages, as aids to us in the solving of ambiguities, and relieving us from doubts."—*Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, at p. 384; 52 L. J. Q. B. 505, at p. 521, Lord Fitzgerald.

"The rules of construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, viz., that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat*."—*Curtis* v. *Stovin* (Feb. 1, 1889), 22 Q. B. D. 513, at p. 517; 58 L. J. Q. B. 174, at p. 175, Bowen, L. J.

"The Master of the Rolls [Lord Esher] has relied on a general canon of construction with regard to Acts of Parliament. I must say for myself that I have always thought it difficult to lay down beforehand canons of construction by reference to which the objects of future statutes are to be defined. It has always seemed to me that it is safer to abstain from imposing with regard to Acts of Parliament any further canons of construction than those applicable to all documents."—*Lamplugh* v. *Norton* (Feb. 21, 1889), 22 Q. B. D. 452, at p. 459; 58 L. J. Q. B. 279, at p. 282, Bowen, L. J.

Regard must be had to the rules of law applicable to the subject-matter.

"In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must

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prevail, except in so far as the statute shows that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition." —*Att.-Gen.* v. *Beech*, [1898] 2 Q. B. 147, at p. 155; 67 L. J. Q. B. 585, at p. 590, Chitty, L. J.

Statutes are primâ facie Territorial.

All English legislation is primâ facie *territorial.*

English statutes primâ facie *apply to and bind all English subjects of the realm within the English dominions.*

English statutes primâ facie *apply to and bind all foreigners within English jurisdiction.*

English statutes, where their language is general and may include foreigners or not, are assumed not to be so enacted as to violate the rights of other nations.

English statutes are not intended to do what is against the comity of nations.

The area within which an English statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute.

If any interpretation otherwise be possible, an English statute will not be interpreted as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting.

"If the meaning of an act is doubtful, it is a reason for not putting a particular interpretation upon it that would violate the comity of nations."—*Leroux* v. *Brown* (1852), 22 L. J. C. P. 1, at p. 3, Maule, J.

"Every Act of Parliament must be understood to have the words 'within the dominions' inserted in it. An attempt was once made to make dealing in slaves a felony in every part of the world; but the opinion of all the legal authorities was, that an English Act of Parliament was binding within the realm of England only. If, indeed, the Act of Parliament had stated that all British subjects were to be bound, as is the case in some of the slave-dealing Acts, or as is the case in the Royal Marriage Act with respect to the descendants of George the Second, there the case is different; but where the enactment is general, as the

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present case, it does not extend beyond the English dominions."—*Rosseter* v. *Cahlmann* (1853), 22 L. J. Ex. 128, at p. 129, Pollock, C.B.

"It is clear that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them; and when legislating for the benefit of persons must *primâ facie* be construed to mean the benefit of those who owe obedience to our laws, and whose interests the legislature is under a correlative obligation to protect."—*Jefferys* v. *Boosey* (1854), 4 H. L. Cas. 815, at p. 926; 24 L. J. Ex. 81, at p. 93, Parke, B. (cited by Lord Halsbury, L. C., delivering the judgment of the Judicial Committee in *Macleod* v. *Att.-Gen. for New South Wales*, [1891] A. C. 455, at p. 458; 60 L. J. P. C. 55, at p. 57).

"Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the legislature to protect. Natural-born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom, and are within the benefits conferred by the legislature; but no duty can be imposed upon aliens resident abroad, and with them the legislature of this country has no concern, either to protect their interests or to control their rights."—*Jefferys* v. *Boosey*, *ibid.*, at p. 946; L. J., at p. 95, Jervis, C. J.

"*Primâ facie*, the legislature of this country must be taken to make laws for its own subjects exclusively. . . . But when I say that the legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance."—*Ibid.*, at p. 955; L. J., at p. 99, Lord Cranworth, L. C.

"Generally, we must assume that the legislature confines its enactments to its own subjects, over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments."—*Ibid.*, at p. 970; L. J., at pp. 103, 104,

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Lord Brougham. (Cited by Kennedy, J., in *Davidsson* v. *Hill*, [1901] 2 K. B. 606, at p. 612; 70 L. J. K. B. 788, at p. 791.)

"It being the plain and obvious rule in construing the Acts of any legislature that the legislature of each independent country must be supposed to deal with those subject-matters which are within its own control and jurisdiction. As Dr. Lushington expresses it in the case of *The Zollverein* [(1856), 2 Jur. N. S. 429; 1 Sw. 96, at p. 98]: 'In looking to an Act of Parliament with reference to such a question as I am now discussing, viz., as to whether it is intended to apply to foreigners or not, I should, in endeavouring to ascertain the construction of the Act, always bear in mind the power of the British legislature; for it is never to be presumed, unless the words are so clear that there can, by no possibility, be a mistake, that the British legislature exceeded that power which, according to the law of the whole world, properly belonged to it. The power of this country is to legislate for its own subjects all over the world, and as to foreigners within its jurisdiction, but no further."—*Cope* v. *Doherty* (1858), 4 K. & J. 367, at p. 375; 2 L. J. Ch. 600, at p. 601, Sir W. Page Wood, V.-C.

"I have always recognized the full force of this objection, that the British Parliament has no proper authority to legislate for foreigners out of its jurisdiction; and I especially did so in the case of *The Zollverein* [(1856), 2 Jur. N. S. 429; 1 Sw. 96, at p. 98]. No statute ought, therefore, to be held to apply to foreigners with respect to transactions out of British jurisdiction, unless the words of the statute are perfectly clear; but I never said that, if it pleased the British Parliament to make such laws as to foreigners out of the jurisdiction, courts of justice must not execute them; indeed, I said the direct contrary."—*The Amalia* (1863), 32 L. J. Ad. 191, at p. 193, Dr. Lushington.

"Where the language of a statute is general, and may include foreigners or not, the true canon of construction is to assume that the legislature has not so enacted as to violate the rights of other nations."—*The Queen* v. *Keyn* (1876), 2 Ex. D. 63, at p. 210; 46 L. J. M. C. 17, at p. 88, Cockburn, C. J.

"It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied, as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects, or to foreigners

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who, by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction. Every foreigner who comes into this country, for however limited a time, is, during his residence here within the allegiance of the sovereign, entitled to the protection of the sovereign and subject to all the laws of the sovereign. But, if a foreigner remains abroad, if he has never come into this country at all, it seems to me impossible to imagine that the English legislature could have ever intended to make such a man subject to particular English legislation."—*Ex parte Blain* (1879), 12 Ch. D. 522, at p. 526, James, L. J.

"The governing principle is, that all legislation is *primâ facie* territorial, that is to say, that the legislation of any country binds its own subjects and the subjects of other countries who, for the time, bring themselves within the allegiance of the legislating power. The English legislature has a right to make a bankruptcy statute which shall bind all its own subjects, and any foreigner who for the time is in England, and does something there which the statute forbids. As long as he is in England he is under the allegiance of the Queen of England, and in the power of the English legislature. Therefore, it has been held, that if a foreigner, though not domiciled or permanently resident in this country, comes into England, and does, or omits to do, some act in England which the English legislature has declared to be an act of bankruptcy, then, by reason of that act of bankruptcy, done or suffered in England, he may be made a bankrupt in England. But, upon the ground of the limited power of the legislature of England to legislate, all the authorities have held that it is necessary that the act of bankruptcy should have been committed in England, if the person against whom the statute is invoked is a foreigner who is not domiciled in England."—*Ibid.*, at p. 528, Brett, L. J.

"All we have to do is to interpret an Act of Parliament which uses a general word ['debtor'], and we have to say how that word is limited, when of necessity there must be some limitation. I take it the limitation is this, that all laws of the English Parliament must be territorial—territorial in this sense, that they apply to, and bind, all subjects of the Crown who come within the fair interpretation of them, and also all aliens who come to this country, and who, during the time they are here, do any act which, on a fair interpretation of the statute as regards them, comes within its provisions. Of course it is not necessary that a person to be sub-

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ject to an English Act should be domiciled here. If he is resident here temporarily, and does an act which comes within the intent and purview of a statute, he, as regards that statute, as does every alien who comes here in regard to all the laws of this realm, submits himself to the law, and must be dealt with accordingly. As regards an Englishman, a subject of the British Crown, it is not necessary that he should be here, if he has done that which the Act of Parliament says shall give jurisdiction, because he is bound by the Act, by reason of his being a British subject, though, of course, in the case of a British subject not resident here, it may be a question on the construction of the Act of Parliament whether that which, if he had been resident here, would have brought him within the Act, has that effect when he is not resident here. As regards a British subject, whether he is here or not, he can be made bankrupt, if the Act of Parliament has declared that, in the events which have happened, he can be made bankrupt. But, as regards foreigners, there is, *primâ facie*, no right to bind them if they are not here."—*Ex parte Blain* (1879), 12 Ch. D. 522, at pp. 531, 532, Cotton, L. J. (See also *In re Pearson*, [1892] 2 Q. B. 263; 61 L. J. Q. B. 585, where several of the above quotations in *Ex parte Blain* were cited.)

"The English Parliament cannot be supposed, merely by reason of its having used general words, to be intending to do that which is against the comity of nations. It is true that if we come to the conclusion that this has been intentionally done, we must carry out the law and leave to the government of the country the task of answering objections, but unless that is perfectly clear we ought to limit the words so as to make them reasonable and proper."—*Colquhoun* v. *Brooks* (1888), 21 Q. B. D. 52, at pp. 57, 58, Lord Esher, M. R.

"It seems to me that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction."—

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Colquhoun v. *Heddon* (1890, 25 Q. B. D. 129, at pp. 134, 135; 59 L. J. Q. B. 465, at p. 467, Lord Esher, M. R.

"First, I should like to make some observations with regard to the rules of construction applicable to statutes such as this [The Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90)]. It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. But there may be suggested some general rules—for instance, if there be nothing which points to a contrary intention, the statute will be taken to apply only to the United Kingdom. But whether it be confined in its operation to the United Kingdom, or whether, as is the case here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all the persons in the United Kingdom or in the Queen's dominions, as the case may be, including foreigners who during their residence there owe temporary allegiance to her Majesty. And according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this—That if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."—*The Queen* v. *Jameson*, [1896] 2 Q. B. 425, at p. 430; 65 L. J. M. C. 218, at p. 224, Lord Russell, C. J.

"It is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refer to them."—*Adam* v. *British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, at p. 432; 67 L. J. Q. B. 844, at p. 845, Darling, J. (dissented from by Kennedy, J., in *Davidsson* v. *Hill*, [1901] 2 K. B. 606, at p. 611; 70 L. J. K. B. 788, at p. 790).

"It appears to me, under all the circumstances and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation (The Fatal Accidents Acts, 1846 and 1864) upon foreigners as well as upon subjects, and certainly that as against an English wrong-doer the foreigner has a right to maintain his action under the statutes in

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question."—*Davidsson* v. *Hill*, [1901] 2 K. B. 606, at p. 614; 70 L. J. K. B. 788, at p. 792, Kennedy, J.

"Now, *primâ facie* the legislation of a country is territorial. Its acts are intended to apply to matters occurring within the realm and not beyond it, and this principle applies more especially to acts that are penal in their character. It is true that the language of an enactment or the nature of the subject-matter may indicate an intention to the contrary, but otherwise the *primâ facie* presumption holds and the statute applies only to acts within the realm."—*Moulis* v. *Owen*, [1907] 1 K. B. 746, at p. 764; 76 L. . . K. B. 396, at p. 406, Fletcher Moulton, L. J.

Statutes affecting Colonies or India.

The Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 1: "An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament."

(See the above Act set out *in extenso* in the Appendix.)

A confirmed statute of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament.

Colonial and Indian legislatures have powers expressly limited by the Act of the Imperial Parliament which created them, and they can do nothing beyond the limits which circumscribe those powers. But, when acting within those limits, they are not in any sense agents or delegates of or acting under any mandate from the Imperial Parliament, but have plenary powers of legislation, as large, and of the same nature, as those of the Imperial Parliament itself.

"There is even greater reason for holding sacred the prerogative of the Crown to constitute a local legislature in the case of a settled colony, where the inhabitants are entitled to be governed by English law, than in that of a conquered colony, where it is only by grace of the Crown that the privilege of self-government is allowed,

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though where once allowed it cannot be recalled. In colonies distant from the mother-country to which writs to return members to Imperial Parliament do not run, it is essential, both for the due government of the country in dealing with matters best understood upon the spot, and with emergencies which do not admit of delay, and also for giving subjects there resident the benefit of a voice, by their representatives, in the councils by which they are taxed and governed, that the Crown should have the power of creating a local Parliament. . . . . We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."—*Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1, at pp. 18—20; 40 L. J. Q. B. 28, at p. 35, Willes, J., delivering the judgment of the Exchequer Chamber.

"The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions."—*The Queen* v. *Burah* (1878), 3 App. Cas. 889, at pp. 904, 905, Lord Selborne, delivering the judgment of the Judicial Committee.

"Two cases have come before this Board in which the powers of Colonial legislatures have been a good deal considered, but these cases are of too late a date to have been known to the Supreme Court [of New South Wales] when their judgment was delivered.

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The first was the case of *The Queen* v. *Burah* [(1878), 3 App. Cas. 889], in which the question was whether a section of an Indian Act conferring upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, should be applied to a certain district, was or was not *ultra vires*. In the judgment of this Board, given by the Lord Chancellor [*query*, by Lord Selborne, delivering the judgment of the Judicial Committee—and not by the Lord Chancellor, Lord Cairns], the legislation is declared to be *intra vires*, and the Lord Chancellor lays down the general law in these terms:—'The Indian legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.'

"The same doctrine has been laid down in a later case of *Hodge* v. *The Queen* [(1883), 9 App. Cas. 117; 53 L. J. P. C. 1], where the question arose whether the legislature of Ontario had or had not the power of intrusting to a local authority—a board of commissioners—the power of enacting regulations with respect to their Liquor Licence Act of 1877, of creating offences for the breach of those regulations, and annexing penalties thereto. Their Lordships held that they had that power. It was argued then, as it has been argued to-day, that the local legislature is in the nature of an agent or delegate, and, on the principle, *delegatus non potest delegare*, the local legislature must exercise all its functions itself, and can delegate or intrust none of them to other persons or parties. But the judgment, after reciting that such had been the contention, goes on to say [p. 132, L. J. at p. 7]: 'It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers, not in any sense to be exercised by delegation from or as the agents of the Imperial Parliament, but authority as plenary and as ample, within the

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limits prescribed by sect. 92, as the Imperial Parliament, in the plenitude of its power, possessed or could bestow. Within these limits of subjects and areas the local legislature is supreme, and has the same authority as the Imperial Parliament.'"—*Powell* v. *Apollo Candle Co.* (1885), 10 App. Cas. 282, at pp. 288, 289, 290; 54 L. J. P. C. 7, at pp. 9, 10, Sir Robert P. Collier, delivering the judgment of the Judicial Committee.

Imperial statutes affecting a colony.

"If a consideration of the scope and object of a statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed."—*Callender, Sykes & Co* v. *Colonial Secretary of Lagos and Davies*, [1891] A. C. 460, at pp. 466, 467; 60 L. J. P. C. 33, at p. 37, Lord Hobhouse, delivering the judgment of the Judicial Committee.

An English statute cannot be applied to colonial or foreign property.

"It seems to me that an inquiry of a much more important kind, and one which bears very closely upon the present question, is whether there is any general rule as to the extent to which English Acts of Parliament dealing with property in general are to be treated as applying to foreign property. I use the word 'foreign' as including colonial property, and I mean by it property which, whether situate in England or elsewhere, is not at the time to which the discussion relates English property, as distinguished from foreign and colonial property. It seems to me that there is such authority, and that it runs in a well-defined current. 'It is quite clear,' says Lord Westbury, 'that you cannot apply an English Act of Parliament to foreign property whilst it remains foreign property.' [*Att.-Gen.* v. *Campbell* (1872), L. R. 5 H. L. 524, at p. 530; 41 L. J. Ch. 611, at pp. 613, 614.]"—*Colquhoun* v. *Brooks* (1887), 19 Q. B. D. 400, at pp. 406, 407, Wills, J.

In all parts of the Empire where English law prevails legal interpretation should be as nearly as possible the same.

"I conceive (though I know of no direct authority for the position) that the Acts of Colonial legislatures, where the English

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law prevails, must be governed by the same rules of construction as prevail in England, and that English authorities upon Acts *in pari materiâ* are authorities for the interpretation of the Colonial Act, I think this is true as a general principle."—*Catterall* v. *Sweetman* (1845), 1 Rob. Ecc. Rep. 304, at p. 318, Dr. Lushington.

"Their lordships think the Court in the colony might well have taken this decision [*Diggle* v. *Higgs* (1877), 2 Ex. D. 422; 46 L. J. Ex. 721] as an authoritative construction of the statute. It is the judgment of the Court of Appeal, by which all the Courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their lordships think that in colonies where a like enactment has been passed by the legislature, the colonial Courts should also govern themselves by it. . . . It is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same."—*Trimble* v. *Hill* (1879), 5 App. Cas. 342, at pp. 344, 345; 49 L. J. P. C. 49, at p. 51, Sir Montague E. Smith, delivering the judgment of the Judicial Committee (cited and applied by Byrne, J., in *Hunt* v. *Fripp*, [1898] 1 Ch. 675, at p. 679; 67 L. J. Ch. 377, at p. 378).

"Those Acts (the English Factors Acts) were embodied in the Canadian law, or rather were transferred to Canada almost in their terms, and quite in their meaning. The Canadian lawyers who gave evidence in this case tell us, and I should have expected that it would be so even if I had not been told so by them, that in construing the effect of the Canadian law when taken from the English, they look to English decisions, and say the English law is to be understood, and is meant by these Acts to be carried over bodily to Canada, and consequently *Cole* v. *North Western Bank* (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 223, is a good authority in Canada upon the construction of the Canadian Acts. I should certainly have expected it to be so, and they say it is so."—*City Bank* v. *Barrow* (1880), 5 App. Cas. 664, at p. 679, Lord Blackburn.

Colonial Boundaries Act, 1895 (58 & 59 Vict. c. 34) [6th July, 1895]. Sect. 1. "(1) Where the boundaries of a colony have, either before or after the passing of this Act, been altered by Her Majesty the Queen by Order in Council or letters patent the boundaries as so altered shall be, and be deemed to have been from the date of the alteration, the boundaries of the Colony.

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"(2) Provided that the consent of a self-governing colony shall be required for the alteration of the boundaries thereof.

"(3) In this Act 'self-governing colony' means any of the colonies specified in the Schedule to this Act.

"Sect. 2. This Act may be cited as the Colonial Boundaries Act, 1895."

SCHEDULE.

Self-Governing Colonies.

Canada.
Newfoundland.
New South Wales.
Victoria.
South Australia.
Queensland.
Western Australia.
Tasmania.
New Zealand.
Cape of Good Hope.
Natal.

Section II.

CONCERNING THE PARTS OF A STATUTE.

Citation of Statutes.

It was formerly sufficient to cite the year of the reign in which a statute was made, and, if more than one, the session, chapter, and section, according to the copy of the statute printed by the Queen's Printer, or to the copy contained in the reports of the Commissioners of Public Records.

Reference may now be made either to the short title, if any, or to the regnal year, &c.

Groups of statutes may be cited by statutory collective titles.

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References in statutes passed after 1st January, 1890, are to the revised edition, if any: otherwise, if passed before George I., to the edition prepared under the direction of the Record Commission, in other cases to the Queen's Printer's or Stationery Office Copy.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21), commenced and took effect from and immediately after the 4th of February, 1851 (repealed, 52 & 53 Vict. c. 63, s. 41).

Sect. 3.—"Be it enacted, that in any Act, when any former Act is referred to, it shall be sufficient, if such Act was made before the seventh year of Henry the Seventh [22nd August, 1492],

"To cite the year of the King's reign in which it was made, and where there are more statutes than one in the same year the statute, and where there are more chapters than one the chapter:

"And if such Act referred to was made after the fourth year of Henry the Seventh [22nd August, 1489],

"To cite the year of the reign, and where there are more statutes or sessions than one in the same year the statute or session (as the case may require), and where there are more chapters or sections than one the chapter or section or chapter and section (as the case may require),

"Without reciting the title of such Act, or the provision of such section, so referred to;

"And the reference in all cases shall be made according to the copies of statutes printed by the Queen's Printer, or to the copies thereof contained in the reports of the Commissioners of Public Records:

"Provided that where it is only intended to amend or repeal any portion only of such section it shall be necessary still either to recite such portion or to set forth the matter or thing intended to be amended or repealed."

Interpretation Act, 1889 (52 & 53 Vict. c. 63) [30th August, 1889].

Sect. 35.—(1.) "In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require, and where there are more chapters than one, by reference to the chapter,

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and any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained.

(2.) "Where any Act passed after the commencement of this Act [1st January, 1890] contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendence or authority of Her Majesty's Stationery Office.

(3.) "In any Act passed after the commencement of this Act [1st January, 1890], a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word, section, or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation."

Short Titles Act, 1892 (55 Vict. c. 10) [20th May, 1892] (repealed by Short Titles Act, 1896 (59 & 60 Vict. c. 14), s. 4).

Sect. 1.—(1.) "Each of the Acts mentioned in the First Schedule to this Act may, without prejudice to any other mode of citation, be cited by the short title therein mentioned in that behalf.

(2.) "Each of the groups of Acts mentioned in the Second Schedule to this Act may, without prejudice to any other mode of citation, be cited by the collective title therein mentioned in that behalf.

(3.) "If any Act passed after this Act is directed, as to the whole or any part thereof, to be read with any of the groups of Acts mentioned in the Second Schedule to this Act, that group shall be construed as including that Act or part, and, if the collective title of the group states the first and last years of the group, the year in which that Act is passed shall be substituted for the last year of the group, and so on as often as a subsequent Act or part is added to the group.

Sect. 2. "This Act may be cited as the Short Titles Act, 1892."

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Short Titles Act, 1896 (59 & 60 Vict. c. 14) [20th July, 1896].

Citation by Short Title.

Sect. 1. Each of the Acts mentioned in the First Schedule to this Act may, without prejudice to any other mode of citation, be cited by the short title therein mentioned in that behalf.

Citation by Collective Title.

2.—(1) Each of the groups of Acts mentioned in the Second Schedule to this Act may, without prejudice to any other mode of citation, be cited by the collective title therein mentioned in that behalf.

(2) If it is provided that any Act passed after this Act may, as to the whole or any part thereof, be cited with any of the groups of Acts mentioned in the Second Schedule to this Act, or with any group of Acts to which a collective title has been given by any Act passed before this Act, that group shall be construed as including that Act or part, and if the collective title of the group states the first and last years of the group, the year in which that Act is passed shall be substituted for the last year of the group, and so on as often as a subsequent Act or part is added to the group.

Effect of Repeal of Enactment giving a Short Title.

3. Notwithstanding the repeal of an enactment giving a short title to an Act the Act may, without prejudice to any other mode of citation, continue to be cited by that short title.

4. The Short Title Act, 1892, is hereby repealed.

5. This Act may be cited as the Short Titles Act, 1896.

Title of a Statute.

The title of a statute was not prior to 1854, *but is now, a part of the statute.*

The title of a statute may be looked at in order to remove ambiguity in the words of the statute, and to ascertain its scope and object.

"The title of an Act of Parliament is no part of the law or enacting part, no more than the title of a book is part of the book;

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for the title is not the law, but the name or description given to it by the makers."—*Mills* v. *Wilkins* (1704), 6 Mod. 62, Holt, C. J.

"The conciseness of the title shall not control the body of the Act. The title is no part of the law itself. One reading is often sufficient for it."—*The King* v. *Williams* (1758), 1 W. Bl. 93, at p. 95, Mansfield, C. J., *et tot. cur.*

"The title of the Act has also been mentioned; but although it has occasionally been referred to as aiding in the construction of an Act, particularly by Sir John Nicol in *Brett* v. *Brett* [(1826), 3 Addams, 210, at p. 216], it is certainly no part of the law, and, in strictness, ought not to be taken into consideration at all: Lord Coke, *Poulter's case* (1611), Coke, Part XI. 33; Lord Holt, *Mills* v. *Wilkins* (1704), 6 Mod. 62; Lord Mansfield, *Rex* v. *Williams* (1758), 1 Wm. Bl. 93; and Lord Hardwicke, *The Att.-Gen.* v. *Weymouth* (1743), Ambler, 22."—*Salkeld* v. *Johnson* (1848), 2 Ex. 256, at pp. 282, 283; 18 L. J. Ex. 89, at p. 97, Pollock, C. B.

"The title cannot be resorted to in construing the enactments."—*Hunter* v. *Nockolds* (1850), 1 Mac. & G. 640, at p. 651; 19 L. J. Ch. 177, at p. 178, Lord Cottenham, L. C.

"The title of an Act of Parliament is no part of the law, but it may tend to show the object of the legislature."—*Johnson* v. *Upham* (1859), 2 E. & E. 250, at p. 263; 28 L. J. Q. B. 252, at p. 257, Wightman, J.

"The title of the Act is always on the roll."—*Sutton* v. *Sutton* (1882), 22 Ch. D. 511, at p. 513, Jessel, M. R.

"In Maxwell on the Interpretation of Statutes, the author (at p. 54) states that the title of an Act of Parliament is not regarded by the Court as forming part of the Act. In Sedgwick's Interpretation of Statutory and Constitutional Law, at p. 50, it is said that the title may be resorted to in order to remove ambiguities. In *Chance* v. *Adams* [(1697), 1 Ld. Raym. 77], Treby, C. J., said that 'the title of the Act was but a new usage, and began about the 11th of Hen. VII.' In *Mills* v. *Wilkins* [(1704), 6 Mod. 62], Holt, C. J., thought that the title was no part of the law or enacting part of the statute. But there is considerable authority in favour of reading the title to get at the object of the Act. In *Stradling* v. *Morgan* [(1560), Plow. 199], the title of the Act was relied on in deciding whether the word 'receivers' in 7 Edw. VI. c. 1, applied to receivers generally, or was confined to the king's receivers only. So in *The King* v. *Cartwright* [(1791), 4 T. R. 490], Buller, J., in deciding that assaults upon revenue officers, which

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could be prosecuted in any Court under sect. 26 of 9 Geo. II. c. 35, only extended to assaults upon them *qua* government officers, said that the intention of the legislature might be gathered from other parts of the Act, which was made for the sake of the revenue, 'as its title imported.' In *The King* v. *Marks* [(1802), 3 East, 157], the Court looked at the title to determine the scope of the Act under consideration. I think, therefore, there is ample authority for saying that the title of an Act may be looked at in order to remove any ambiguity in the words of the Act."—*Coomber* v. *Justices of Berks* (1882), 9 Q. B. D. 17, at pp. 32, 33; 51 L. J. Q. B. 297, at p. 304, Huddleston, B.

"The title of the Act, which may be referred to for the purpose of ascertaining generally the scope of the Act, is . . . ."—*East and West India Dock Co.* v. *Shaw, Savill and Albion Co.* (1888), 39 Ch. D. 524, at p. 531; 57 L. J. Ch. 1038, at p. 1040, Chitty, J. (cited by Lord Macnaghten in *Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 443, at p. 447; 72 L. J. K. B. 787, at p. 789).

"The title of a statute does not go for much in construing it; but I do not know that it is absolutely to be disregarded."—*Kenrick* v. *Lawrence* (1890), 25 Q. B. D. 99, at p. 104, Wills, J.

"The title, it is true, is no part of the Act, but, as was said by Jessel, M. R., in *Sutton* v. *Sutton* [(1882), 22 Ch. D. 511, at p. 513], it is always on the roll, and may be looked at in order to remove any ambiguity in the words of the Act. It cannot be used to control the express provisions of an Act; yet, if there be in these provisions anything admitting of a doubt, the title of the Act is a matter proper to be considered in order to assist in the interpretation of the Act, and thereby to give to the doubtful language in the body of the Act a meaning consistent, rather than at variance, with the clear title of the Act."—*Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, at p. 265; 66 L. J. Q. B. 601, at pp. 613, 614, Lopes, L. J.

"The title may be dealt with shortly. With reference to Acts passed as this was before 1854, when the practice of the House of Commons was altered by Standing Order 34, which for the first time authorized the House in Committee to amend the title, there is a great preponderance of authority in favour of the proposition that the title forms no part of the Act, and cannot even be looked at for the purpose of construing the Act. (See Maxwell on Statutes, 2nd ed., pp. 50, 51, and cases there cited.)"—*Ibid.*, at p. 289; L. J., at p. 626, Rigby, L. J.

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"I read the title [to the Act of 56 & 57 Vict. c. 61 (Public Authorities Protection Act, 1893)] advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament."—*Fielding* v. *Morley Corporation*, [1899] 1 Ch. 1, at pp. 3, 4; 67 L. J. Ch. 611, at p. 612. Lindley, M. R. (delivering the judgment of the Court, Lindley, M. R., Chitty and Collins, L. JJ.) (cited by Kekewich, J., in *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour*, [1900] 1 Ch. 749, at p. 754; 69 L. J. Ch. 334, at p. 335).

Date and Commencement.

Prior to the 8th of April, 1793, *every statute in which the commencement thereof was not directed to be from a specific time commenced for the first day of the session of Parliament in which such statute was passed.*

The indorsement, immediately after the title, of the day, month, and year when the statute passed and received the royal assent was (after 8th April, 1793) *part of the statute, and the date of its commencement when no other commencement was therein provided.*

After . . uary, 1890, "*commencement*" *means the time at which the statute comes into operation.*

A statute passed after 1st January, 1890, *expressed to come into operation on a particular day, comes into operation immediately on the expiration of the previous day.*

"These arguments were urged at the bar of the House of Lords in the case of *The Att.-Gen. and Panter* [(1772), 6 Bro. P. C. 553]; but the House, by the unanimous opinion of the judges, determined that the rule of law that, where no specific day is mentioned in an Act of Parliament from which it is to take effect, it commences by legal relation from the first day of the sessions, had been so long settled that it could not be shaken."—*Lutless* v. *Holmes* (1792), 4 T. R. 660, at p. 661, *per cur.*

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An Act to prevent Acts of Parliament from taking Effect from a Time prior to the passing thereof. 33 Geo. III. c. 13 (The Acts of Parliament (Commencement) Act, 1793).

"*Whereas* every Act of Parliament in which the commencement thereof is not directed to be from a specific time doth commence from the first day of the session of Parliament in which such Act is passed: And whereas the same is liable to produce great and manifest injustice: For remedy whereof be it enacted, and it is hereby enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present Parliament assembled, and by the authority of the same, that the Clerk of the Parliaments shall indorse (in English) on every Act of Parliament which shall pass after the 8th day of April, 1793, immediately after the title of such Act, the day, month, and year when the same shall have passed and shall have received the royal assent; and such indorsement shall be taken to be a part of such Act, and to be the date of the commencement where no other commencement shall be therein provided."

"At the time when that resolution was come to [viz., in the case of *Att.-Gen.* v. *The Chelsea Water Works Co.* (1731), Fitzgibbon, 195], if two Acts of Parliament, passed in the same session, were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement on the roll of the day on which bills received the royal assent, and all Acts passed in the same session were considered as having received the royal assent on the same day, and were referred to the first day of the session. Now, however, it is known on what day each bill receives the royal assent, it being provided by the 33 Geo. III. c. 13 (The Acts of Parliament (Commencement) Act, 1793), that a certain parliamentary officer [the Clerk of the Parliaments] shall indorse [in English] on every Act of Parliament [which shall pass after the 8th day of April, 1793, immediately after the title of such Act] 'the day, month, and year when the same shall have passed and shall have received the royal assent; and such indorsement shall be taken to be a part of such Act, and to be the date of its commencement where no other commencement shall be therein provided.'"—*The King* v. *The Justices of Middlesex* (1831), 2 B. & Ad. 818, at

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p. 821, Lord Tenterden, C. J., delivering the judgment of the Court.

"The last section of the Act (30 & 31 Vict. c. 142, the County Courts Act, 1867), which is in the usual form, prevents the Act having any operation till after the 1st of January, 1868. The sections are all framed as if it would come into operation at once, because the last thing settled is when it shall come into operation, but they are all to be considered as speaking from the date so fixed, and are all governed by the last section."—*Wood* v. *Riley* (1867), L. R. 3 C. P. 26, at p. 27, Bovill, C. J.

"At common law all statutes passed in a session of Parliament had relation back to the first day of the session, unless some other day was appointed for the Act coming into operation. This relation was productive of most serious consequences, many instances of which are found in the books; and in the thirty-third year of the reign of George III. an Act was passed which required the Clerks of the Parliaments to indorse on every Act the day, month, and year when the same received the royal assent, and enacted that such indorsement should be taken as part of the Act, and should be the date of its commencement where no other commencement was provided . . . . an Act which comes into operation on a given day becomes law as soon as the day commences."—*Tomlinson* v. *Bullock* (1879), 4 Q. B. D. 230, at p. 232; 48 L. J. M. C. 95, at p. 96, Lush, J.

Interpretation Act, 1889 (52 & 53 Vict. c. 63) [30th August, 1889].

"*Commencement.*"

Sect. 36.—"(1) In this Act, and in every Act passed either before or after the commencement of this Act [1st January, 1890], the expression 'commencement,' when used with reference to an Act, shall mean the time at which the Act comes into operation.

"(2) Where an Act passed after the commencement of this Act [1st January, 1890], or any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day."

The coming into operation of instruments made under a power conferred by a statute which is not to come into operation immediately on the passing thereof.

Interpretation Act, 1889 (52 & 53 Vict. c. 63) [30th August, 1889].

Sect. 37. "Where an Act passed after the commencement of this Act [1st January, 1890], is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or bye-laws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation."

Time.

Greenwich or Dublin Mean Time.

Statutes (Definition of Time) Act, 1880 (43 & 44 Vict. c. 9) [2nd August, 1880].

Sect. 1. "Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred [*sic*] shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time, and in the case of Ireland, Dublin mean time."

Meaning of Expression "Month."

"In all Acts of Parliament where 'months' are spoken of, without the word 'calendar,' and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean 'lunar months.'"—*Lacon* v. *Hooper* (1795), 6 T. R. 224, at p. 226; 1 Esp. 246, at p. 249, Kenyon, C. J.

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Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Sect. 3. "In every Act passed after the year 1850, whether before or after the commencement of the Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely, the expression 'month' shall mean calendar month."

Preamble.

Defined.

A preamble of a statute is a recital of some inconveniences for which a remedy is given.

"There was a time when statutes were made without preambles; and the preamble of a statute is no more than a recital of some inconveniences, which does not exclude any other, for which a remedy is given by the enacting part of the statute."—7 *Bac. Abr. Statute* (*I.*) 2.

Enacting Part and Preamble.

The preamble may sometimes be usefully looked at as a guide to ascertain the subject-matter, scope and object of the statute.

Where the enacting part is clear and unambiguous, the preamble cannot be resorted to to control, cut down or restrict it.

Where the enacting part is ambiguous, the preamble can be resorted to to explain it.

"The rehearsal or preamble of the statute is a good meane to find out the meaning of the statute, and as it were a key to open the understanding thereof."—*Co. Litt.* 79a, 4 Inst. 330.

"The preamble of a statute is to be considered, which Dyer termed 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'"—*Stowel* v. *Lord Zouch* (1562-3), 1 Plowd. 353, at p. 369.

"The preamble of the Act has been always thought material in the construction of it; and by the Lord Coke it is called the key of the Act of Parliament, to open and explain the meaning thereof."—*Copeman* v. *Gallant* (1716), 1 P. Wms. 314, at p. 317, Lord Cowper, L. C.

"It is laid down [1 Jo. 163; Palmer, 485], on the construction of the statute of the 13 Eliz., that the preamble shall not restrain the enacting clause. But I take it to be agreed that, if not

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restraining the generality of the enacting clause will be attended with an inconvenience, the preamble shall restrain it."—*Ryall* v. *Rolle* (1749), 1 Atk. 164, at p. 174, Lord Hardwicke, L. C.

"The *preamble* is certainly *special* and *particular*. Therefore, without express words in the enacting part, the operation of it must be confined to the preamble. But there are a variety of cases where it has been determined that strong words in the *enacting part* of a statute may extend it beyond the preamble."—*Pattison* v. *Bankes* (1777), Cowp. 540, at p. 543, Lord Mansfield, C. J.

"I agree that the preamble cannot control the enacting part of a statute, which is expressed in clear and unambiguous terms. But if any doubt arise on the words of the enacting part, the preamble may be resorted to to explain it."—*Crespigny* v. *Wittenoom* (1792), 4 T. R. 790, at p. 793, Buller, J.

"The law is, that if the enacting part will bear only one interpretation, the preamble shall not confine it. If that is doubtful, then the preamble may be applied to throw light upon it."—*Mason* v. *Armitage* (1806), 13 Ves. 25, at p. 36, Lord Erskine, L. C.

"The preamble, though it may assist the construction of ambiguous words, cannot control a clear and express enactment."—*Lees* v. *Summersgill* (1811), 17 Ves. 508, at p. 511, Sir William Grant, M. R.

"I agree that the preamble of a statute cannot control a clear and express enactment; but the plain intent of the legislature is expressed in the preamble, and the nature of the mischief, which is sought to be remedied, may serve to give a definite and qualified meaning to indefinite and general terms."—*Emanuel* v. *Constable* (1827), 3 Russ. 436, at p. 438, Sir John Leach, M. R.

"In construing Acts of Parliament, we are to look not only at the language of the preamble, or of any particular clause, but at the language of the whole Act. And if we find in the preamble, or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect, from the large and extensive expressions used in other parts, the real intention of the legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble, or in any particular clause."—*Doe* d. *Bywater* v. *Brandling* (1828), 7 B. & C. 643, at p. 660, Lord Tenterden, C. J.

"On a sound construction of every Act of Parliament, I take it the words in the enacting part must be confined to that which is

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the plain object and general intention of the legislature in passing the Act, and the preamble affords a good clue to discover what that object was."—*Hal'on* v. *Cove* (1830), 1 B. & Ad. 538, at p. 558, Lord Tenterden, C. J.

"I use the preamble only for the purpose of ascertaining what the cases are to which the Act was intended to apply. This is a strictly legitimate process for interpreting an Act of Parliament: *Emanuel* v. *Constable* [(1827), 3 Russ. 436]; *Foster* v. *Banbury* [(1829), 3 Sim. 40]."—*Salkeld* v. *Johnston* (1841), 1 Ha. 196, at p. 207; 11 L. J. Ch. 201, at p. 206, Sir J. Wigram, V.-C.

"It is admitted that the preamble of an Act may be legitimately used to ascertain and fix the subject-matter to which the enacting part is to be applied, and even in some cases to control and cut down the enacting part."—*Fellowes* v. *Clay* (1843), 4 Q. B. 313, at p. 339; 12 L. J. Q. B. 202, at pp. 211, 212, Patteson, J.

"The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble, which, according to Chief Justice Dyer [*Stowel* v. *Lord Zouch* (1562—3), Plowd. 353, at p. 369], is a 'key to open the minds of the makers of the Act, and the mischiefs which they intended to redress.'"—*The Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, at p. 143, Tindal, C. J. [cited in *Cargo ex Argos* (1873), L. R. 5 P. C. 134, at p. 153, by Sir M. E. Smith, delivering the judgment of the Judicial Committee, and by Lord Halsbury, L. C., in *Commissioners of Income Tax* v. *Pemsel*, [1891] A. C. 531, at p. 543; 61 L. J. Q. B. 265, at p. 269].

"The preamble is undoubtedly a part of the Act, and may be used to explain it; and is, as Lord Coke says, 4 Inst. 330, 'a key to open the meaning of the makers of the Act, and mischiefs it was intended to remedy; but, on the other hand, although it may explain, it cannot control the enacting part, which may, and often does, go beyond the preamble.'"—*Salkeld* v.

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Johnson (1848), 2 Ex. 256, at p. 283; 18 L. J. Ex. 89, at p. 97, Pollock, C. B.

"The question is, whether the 137th section [of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106)] may not be construed differently, by reference to the mode recently introduced in statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute. The question then is, whether the introductory preamble to that set of clauses, beginning with the 133rd section, and terminating with the 138th, is to be read as incorporated with each of those sections. In my opinion it must, in order to ascertain what the meaning of the legislature was, and so reading the statute, there is no difficulty in construing it."—*Bryan* v. *Child* (1850), 5 Ex. 368, at p. 374; 19 L. J. Ex. 264, at p. 265, Pollock, C. B.

"From the common uncertainty of language we may frequently be driven to ascertain the intention by a consideration of the preamble where it recites the object."—*Pocock* v. *Pickering* (1852), 18 Q. B. 789, at p. 797; 21 L. J. Q. B. 365, at p. 368, Coleridge, J.

"The general rule must prevail which I find laid down by Dampier, J., in the case of *Trueman* v. *Lambert* [(1815), 4 M. & S. 238]. 'I have always,' says that learned judge, 'understood it is a standing rule in the construction of Acts of Parliament, that the enacting clause shall not be restrained by the preamble if the enacting words are large enough to comprehend the case.' The language of Lord Abinger, C. B., in *Walker* v. *Richardson* [(1837), 2 M. & W. 882, at p. 889], is to the same effect:—'The general rule is, that the preamble may extend, but cannot restrain, the effect of a particular clause.'"—*Kearns* v. *The Cordwainers' Co.* (1859), 6 C. B. N. S. 388, at p. 408; 28 L. J. C. P. 285, at p. 290, Crowder, J.

"It is, however, a well-established rule that effect is to be given to the clear words of an enacting clause, though they may go far beyond the language of the preamble, that is, that where the words of an enacting clause are clear and explicit, then their natural and obvious meaning shall not be restricted or cut down by the use of language of less extensive import in the preamble [*Crespigny* v. *Wittenoom* (1792), 4 T. R. 790, at p. 793; *Lees* v. *Summersgill* (1811), 17 Ves. 508, at p. 511, per Sir William Grant, M. R.]. If, then, the words of the enacting clauses, taken together, are words

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admitting, according to their natural import, but of one meaning, they must prevail, notwithstanding an argument to the contrary otherwise derivable from the preamble. If, on the other hand, the words are not so clear and explicit as to admit of but one clear and distinct meaning, but reasonable effect may be given to the words used in the enacting clauses by applying to them another meaning, then I apprehend that the preamble may be looked to, to throw light upon the subject [*Mason* v. *Armitage* (1806), 13 Ves. 25, at p. 36; see also the authorities collected in Davidson on Statutes, pp. 655—658]."—*Hughes* v. *The Chester and Holyhead Rail. Co.* (1861), 1 Drew. & Sm. 524, at p. 536; 31 L. J. Ch. 97, at p. 100, Channell, B.

"I assent to the proposition that if there be in an Act of Parliament a clear, explicit, positive enactment, its operation and effect are not to be cut down and restricted by the more limited tenor and scope of the preamble. But if the terms in which the enactment is expressed are such as to raise serious doubt as to its true intent and meaning, it is quite legitimate and proper to resort to the preamble for the resolution of that doubt, and to put such construction upon the enactment as will accord with the preamble." —*Ibid.*, at p. 544; L. J. at p. 103, Kindersley, V.-C.

"You cannot resort to the preamble to ascertain the intention of an Act, unless there is an ambiguity in the enacting part."—*Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395, at p. 404, Jessel, M. R.

"I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of Parliament where the intention of the legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the legislature are intending; and if the words of enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble, or which would go beyond them. To that extent only is the preamble material."—*Overseers of West Ham* v. *Iles* (1883), 8 App. Cas. 386, at pp. 388, 389; 52 L. J. Q. B. 650, Lord Blackburn.

"The preamble may be usefully called in where the enacting words are ambiguous, but where they are clear they cannot be cut down by reference to the preamble."—*In re Watts* (1885), 29 Ch. D. 947, at p. 950; 55 L. J. Ch. 332, at p. 333, Cotton, L. J.

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"The preamble: 'whereas, &c.,' may be referred to for the same purpose [of ascertaining generally the scope of the Act]."—*East and West India Dock Co.* v. *Shaw, Savill and Albion Co.* (1888), 39 Ch. D. 524, at p. 531, Chitty, J. (cited by Lord Macnaghten in *Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C. 443, at p. 447; 72 L. J. K. B. 787, at p. 789).

"Now, what effect has the preamble of an Act of Parliament when the Act has to be construed? I do not doubt that, if the words of the enacting part of an Act of Parliament are clear and unambiguous, they must be construed according to their ordinary meaning, even although by so doing the Act is extended beyond what is shown to be its object by its preamble. But the preamble must always play an important part in the construction of a statute. Dyer, C. J., calls the preamble of a statute 'a key to open the minds of the makers of the Act and the mischiefs which they intended to redress': *Stowel* v. *Lord Zouch* (1562, 1563), Plowd. 353, at p. 369. Lord Coke said: 'The rehearsal or preamble of the statute is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof': Co. Litt. 79 a, 4 Instit. 330; and Lord Tenterden, when delivering the considered judgment of the Court of King's Bench in *Hatton* v. *Core* (1830), 1 B. & Ad. 538, at p. 558, in the year 1830, thus sums up the matter. He says: 'It is very true, as was argued for the plaintiff, that the enacting words of an Act of Parliament are not always to be limited by the words of the preamble, but must in many instances go beyond it.'"—*Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, at pp. 272, 273; 66 L. J. Q. B. 601, at p. 617, A. L. Smith, L. J.

"The preamble no doubt stands on a different footing [to the title] since it does form part of the Act. But there are numerous instances in which the enacting clauses have gone, upon their true construction, beyond the scope of the preamble, and yet have not been controlled by it, and the true rule seems to be that the preamble cannot be resorted to for the purpose of controlling the enacting clauses, either by restricting the scope of them, or by enlarging it, and cannot be relied upon, unless it be in itself clear and precise in meaning, and there is some ambiguity in the enacting clauses themselves which may be cleared up by it."—*Ibid.*, at pp. 289, 290; L. J., at p. 626, Rigby, L. J.

"Undoubtedly it is a settled rule that the preamble cannot be

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made use of to control the enactments themselves where they are expressed in clear and unambiguous terms. But it has been well said that the preamble is a key to the statute, and that it affords a clue to the scope of the Act; these statements, however, are subordinate to the settled rule above referred to."—*Ibid.*, at p. 299; L. J., at p. 631, Chitty, L. J.

"It does not follow that because large words are used in a preamble everything to which they can be referred is within the scope of the Act. They may be useful to a limited extent in helping to interpret doubtful passages or phrases in the Act, but they do not extend its provisions or its scope beyond what the enacting parts of the Act contain, and it is necessary, therefore, to see what the Act does provide for."—*Kennaird* v. *Cory & Son*, [1898] 2 Q. B. 578, at p. 584; 67 L. J. Q. B. 809, at p. 811, Wills, J.

"Two propositions are quite clear—one that a preamble may afford useful light as to what a statute intends to reach, and another that, if an enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment."—*Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143, at p. 157; 68 L. J. Q. B. 392, at p. 396, Earl of Halsbury, L. C.

"'Undoubtedly,'—I quote from Chitty, L. J.'s judgment, words with which I cordially agree—'it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms.' But the preamble is a key to the statute, and affords a clue to the scope of the statute when the words, construed by themselves without the aid of the preamble, are fairly capable of more than one meaning. There is, however, another rule or warning which cannot be too often repeated, that you must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital. To do so would in many cases frustrate the enactment and defeat the general intention of the legislature."—*Ibid.*, at p. 185; L. J., at pp. 410, 411, Lord Davey.

"Doubtless the contents of a preamble of an Act of Parliament cannot for any purpose control the actual clear provision of the statute; but if the wording of the statute gives rise to doubts as to its proper construction, the preamble can be and ought to be referred to in order to arrive at the proper construction to be put upon the enacting portion of the statute. Upon this subject I fully accept the *dictum* of Lord Tenterden in *Halton* v. *Cove*

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(1830), 1 B. & A. 538, at p. 558 [see *supra*]."—*Ibid.*, at pp. 192, 193; L. J., at p. 414, Lord James of Hereford.

"But it appears to me that, although it may be true that a preamble may be a guide to the general objects of the statute, Copyright Act, 1842 (5 & 6 Vict. c. 45), it undoubtedly is unquestioned law that it can neither restrict nor limit express enactment."—*Walter* v. *Lane*, [1900] A. C. 539, at p. 548; 69 L. J. Ch. 699, at p. 704, Earl of Halsbury, L. C.

"Of course the preamble may be looked at, and ought to be looked at, as a guide to any construction which is doubtful, or to decide between two constructions which may be put upon the words."—*Hill* v. *Pannifer*, [1904] 1 K. B. 811, at pp. 815, 816; 73 L. J. K. B. 556, at p. 558, Lord Alverstone, C. J.

Recitals.

Mere recitals, either of law or fact, in a statute are not conclusive.

Where the enacting part is clear and unambiguous, it is not controlled by the recitals.

Where the enacting part is ambiguous, it may be explained by the recitals.

"A mere recital in an Act of Parliament, either of fact or law, is not conclusive; and we are at liberty to consider the fact or the law to be different from the statement of the recital."—*Reg.* v. *Haughton* (1853), 1 El. & Bl. 501, at p. 516; 22 L. J. M. C. 89, at p. 94, Lord Campbell, C. J., delivering the judgment of the Court.

"A recital in an Act will not bind those who are not within its enacting part."—*Edinburgh and Glasgow Rail. Co.* v. *Linlithgow* (1859), 3 Macq. H. L. Cas. 691, at p. 704, Lord Truro, L. C.

"The legislature has itself here [the Charitable Uses Act, 1735 (9 Geo. 2, c. 36)] declared the object of the legislation, and what the mischief was which was intended to be remedied. This recital is, therefore, of much importance in construing the rest of the statute, though it will not justify the rejection of any enactment, though going beyond the object disclosed in the recital, if we find an intention to enact it expressed, nor the insertion of any enactment which we cannot find expressed in the enacting part, though we may think such an enactment required."—*Jeffries* v. *Alexander*

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(1860), 8 H. L. Cas. 594, at p. 624; 31 L. J. Ch. 9, at p. 14, Blackburn, J.

"Now no doubt it is well established, as a rule in the construction of statutes, that where the enacting part is clear and unambiguous, you are not to control it by a reference to the recitals; but where the enacting part is ambiguous, you may explain it by reference to the recitals."—*Beatley* v. *Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588, at p. 592; 46 L. J. Ch. 284, at p. 285, Jessel, M. R.

"The object of the Act [the Administration of Estates Act, 1869—Hinde Palmer's Act (32 & 33 Vict. c. 46)] is to abolish the distinction between specialty and simple contract debts, and the recital of the Act is that that alone is the object. I must, therefore, read the enactment as corresponding with the express recital of its object; and if I find words that may be carried further, I must read them with reference to the mischief intended to be remedied, and to the express recital of the Act."—*Crowder* v. *Stewart* (1880), 16 Ch. D. 368, at p. 370; 50 L. J. Ch. 136, at p. 138, Malins, V.-C.

Headings.

Headings may sometimes be usefully referred to to determine the sense of any doubtful expression in a section ranged under a particular heading.

"In different parts of the Act [Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18)] there are to be found classes of enactments applicable to some special object. Such enactments are in many instances preceded by a heading, *special* no doubt in one sense, as addressed to the object or purpose, but, where not otherwise provided for, *general* in its application to the enactments passed to accomplish the object. These *various* headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself. They may be read, I think, not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me, a better key to the constructions of the sections which follow than might be afforded by a mere preamble."—*Eastern Counties and the London*

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and Blackwall Railway Companies v. *Marriage* (1860), 9 H. L. Cas. 32, at p. 41; 31 L. J. Ex. 73, at p. 77, Channell, B.

"The sections of the Railways Clauses Act are, as your Lordships know, arranged in order under different heads, which indicate the general object of the provisions immediately following; and these may be usefully referred to, to determine the sense of any doubtful expression in a section ranged under a particular heading."—*Hammersmith, &c. Rail. Co.* v. *Brand* (1869), L. R. 4 H. L. 171, at p. 203; 38 L. J. Q. B. 265, at p. 277, Lord Chelmsford.

"The frame of the Lands Clauses Act shows that it is even dangerous to trust to the headings which occur at the commencement of these *fasciculi* of clauses for the purpose of restraining or confining the natural operation of the words which you find in the various clauses under those headings. . . . . I think that the headings of these clauses are not to be relied upon—and many other instances might be given of the same kind inside the clauses themselves—showing, just in the same way that an Act of Parliament often goes beyond the preamble, that provisions have been introduced in the progress of the clauses going somewhat beyond the short and summary definition in the heading of the clauses. In fact, one of these Acts of Parliament shows that these short headings were introduced merely to ear-mark a set of clauses, and to afford a short and summary way by which they might be introduced, by reference, as enactments into other Acts of Parliament."—*Ibid.*, at pp. 216, 217; L. J., at pp. 283, 284, Lord Cairns.

"I cannot come to the conclusion that the heading of a series of sections introduced into an Act of Parliament is not to be considered as part of the Act: I think that that word 'appeal' at the head of the section may properly be considered as part, and used for the purpose of construing any doubtful matter in the sections under that heading."—*The Queen* v. *Local Government Board* (1882), 10 Q. B. D. 309, at p. 321; 52 L. J. M. C. 4, at p. 10, Brett, L. J.

"The heading 'offices' is [illegible] such a heading as could be grammatically read into any of the sections which follow. It seems to their Lordships to have been inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow. It may be, indeed, that the fact of a clause being found in a certain group may in some cases possibly throw some light upon its meaning."—*Union Steamship Company of New*

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Zealand v. *Melbourne Harbour Trust Commissioners* (1884), 9 App. Cas. 365, at p. 369; 53 L. J. P. C. 59, at p. 61, Sir Robert P. Collier, delivering the judgment of the Judicial Committee.

(See also *Inglis* v. *Robertson*, [1898] A. C. 616, at p. 630; 67 L. J. P. C. 108, at p. 114, Lord Herschell.)

"This clause is the last of a *fasciculus*, of which the heading is 'Truck, &c., and Railways,' and, as was held in *Hammersmith Rail. Co.* v. *Brand* [(1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265], such a heading is to be regarded as giving the key to the interpretation of the clauses ranged under it, unless the wording is inconsistent with such interpretation."—*Toronto Corporation* v. *Toronto Railway*, [1907] A. C. 315, at p. 324; 76 L. J. P. C. 57, at p. 60, Lord Collins (delivering the judgment of the Judicial Committee of the Privy Council, Lord Macnaghten, Lord Atkinson, Lord Collins and Sir Arthur Wilson).

Marginal Notes.

Marginal notes ought not to be relied on in interpreting a statute.

"A marginal note is no part of the statute."—*Bryan* v. *Child* (1850), 19 L. J. Ex. 264, at p. 265, Pollock, C. B.

"At the time when that Act [the Alehouse Act, 1828 (9 Geo. IV. c. 61)] passed, the Parliament Roll had no marginal notes, or punctuation, nor were the statutes separated into sections. We cannot, therefore, look at the marginal note for an exposition of the meaning of the section. Indeed, it is difficult to see how the marginal notes could ever be used in the construction of Acts of Parliament, seeing they are not put there by the legislature or assented to by them."—*Claydon* v. *Green* (1868), L. R. 3 C. P. 511, at p. 519; 37 L. J. C. P. 226, at p. 230, Bovill, C. J.

"Something has been said about the marginal note to sect. 4 of the 9 Geo. IV. c. 61. I wish to say a word upon that subject. It appears from Blackstone's Commentaries, Vol. I. p. 183, that, formerly, at one stage of the Bill in Parliament it was ordered to be ingrossed upon one or more Rolls of Parliament. That practice seems to have continued down to the session of 1849, when it was discontinued, without, however, any statute being passed to warrant it. [See May's Parliamentary Practice, 3rd ed. 382.] Since that time, the only record of the proceedings of Parliament,—the important proceedings of the highest tribunal of the Kingdom,—is to be found in the copy printed by the Queen's printer. But

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I desire to record my conviction that this change in the mode of recording them cannot affect the rule which treated the title of the Act, the marginal notes, and the punctuation, not as forming part of the Act, but merely as *contemporanea expositio*. The Act, when passed, must be looked at just as it were still entered upon a Roll, which it may be again if Parliament should be pleased so to order; in which case it would be without these appendages, which, though useful as a guide to a hasty inquirer, ought not to be relied upon in construing an Act of Parliament."—*Ibid.*, at pp. 521, 522; L. J., at p. 232, Willes, J.

"This view is borne out by the marginal notes; and I may mention that the marginal notes of Acts of Parliament now appear on the Rolls of Parliament, and consequently form part of the Acts; and in fact are so clearly so, that I have known them to be the subject of motion and amendment in Parliament."—*In re Venour's Settled Estates* (1876), 2 Ch. D. 522, at p. 525; 45 L. J. Ch. 409, at p. 411, Jessel, M. R. (This *dictum* was questioned in *Att.-Gen.* v. *Great Eastern Rail. Co.* (1879), 11 Ch. D. 449, at pp. 460, 461, 465.)

"The *dictum* in that case [*In re Venour's Settled Estates* (1876), 2 Ch. D. 522, at p. 525; 45 L. J. Ch. 409] is not strictly correct. I have since ascertained that the practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the Roll."—*Sutton* v. *Sutton* (1882), 22 Ch. D. 511, at p. 513; 52 L. J. Ch. 333, at p. 334, Jessel, M. R.

Punctuation and Brackets.

Punctuation and brackets form no part of a statute, and those in the printed copies ought not to be relied on.

"By putting stops, or using the parenthesis, as pointed out by the plaintiff's counsel, it becomes perfectly clear; and we know that no stops are ever inserted in Acts of Parliament, or in deeds; but the courts of law, in construing them, must read them with such stops as will give effect to the whole."—*Doe* d. *Willis* v. *Martin* (1790), 4 T. R. 39, at p. 65, Lord Kenyon, C. J.

"It seems that in the Rolls of Parliament the words are never punctuated."—*Barrow* v. *Wadkin* (No. 2) (1857), 24 Beav. 327, at p. 330; 27 L. J. Ch. 129, at p. 139, Sir John Romilly, M. R.

"On the Parliament Roll there is no punctuation, and we there-

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fore are not bound by that in the printed copies."—*Stephenson* v. *Taylor* (1861), 1 B. & S. 101, at p. 106; 30 L. J. M. C. 145, at p. 147, Cockburn, C. J.

"To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."—*Duke of Devonshire* v. *O'Connor* (1890), 24 Q. B. D. 468, at p. 478; 59 L. J. Q. B. 206, at p. 213, Lord Esher, M. R.

Sections.

A section of a statute shall have effect as a substantive enactment without introductory words.

A section of a statute is to be construed literally unless some other section cuts down its meaning, or the section itself is repugnant to the purview of the statute.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21) [10th June, 1850].

Sect. 2. "All Acts shall be divided into sections, if there be more enactments than one, which sections shall be deemed to be substantive enactments, without any introductory words." (Repealed 52 & 53 Vict. c. 63, s. 41.)

"Every clause in an enactment is an Act of Parliament."—*Att.-Gen.* v. *Lamplough* (1878), 3 Ex. D. 214, at p. 220, Cleasby, B.

Interpretation Act, 1889 (52 & 53 Vict. c. 63) [30th August, 1889].

Sect. 8. "Every section of an Act shall have effect [*on and after 1st January*, 1890], as a substantive enactment without introductory words."

"Now anyone who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things, either that there is some other section which cuts down its meaning, or else that the section itself is repugnant to the general purview of the Act."—*Nath* v. *Tamplin* (1881), 8 Q. B. D. 247, at p. 253; 51 L. J. Q. B. 177, at p. 180, Jessel, M. R.

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Proviso to Section.

A proviso must be construed with reference to the preceding parts of the clause to which it is appended as subordinate to the main clause.

Where the proviso of a statute is directly repugnant to the purview of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers.

If a substantive enactment in a former statute is repealed, that which comes by way of proviso upon it is impliedly repealed.

"Our decision is conformable with the doctrine laid down in *Attorney-General* v. *The Chelsea Waterworks Co.* [(1731), Fitzgibbon, 195]; there it was resolved that where the proviso of an Act of Parliament is directly repugnant to the purview of it, the proviso shall stand and be held a repeal of the purview, *as it speaks the last intention of the makers.*"—*The King* v. *The Justices of Middlesex* (1831), 2 B. & Ad. 818, at p. 821, Lord Tenterden, C. J., delivering the judgment of the Court.

A proviso "must be construed with reference to the preceding parts of the clause to which it is appended."—*Ex parte Partington* (1844), 6 Q. B. 649, at p. 653; 14 L. J. Q. B. 57, at p. 60, Lord Denman, C. J.

"It is a well-known rule in the construction of statutes that, if a substantive enactment in a former Act is repealed, that which comes by way of proviso upon it is impliedly repealed also."—*Horsnail* v. *Bruce* (1873), L. R. 8 C. P. 378, at p. 385; 42 L. J. C. P. 140, at p. 143, Bovill, C. J.

"When one finds a proviso to the section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso."—*Mullins* v. *Treasurer of Surrey* (1880), 5 Q. B. D. 170, at p. 173; 49 L. J. Q. B. 257, at p. 259, Lush, J.

When the previous part of a section is doubtful as to its scope, a proviso may be used as a guide to its interpretation: but when not so, a proviso cannot imply by law the existence of words of which there is no trace in the previous part.

"Now, no doubt, a proviso may assist in determining which of two reasonable constructions of the clause upon which it is a proviso ought to be adopted; but it can hardly give to that clause

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an entirely different meaning from that which, standing alone, it would bear. At any rate, such a controlling force can only be attributed to a proviso when it can be demonstrated to be entirely meaningless on any other supposition."—*Guardians of West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] 1 Ch. 335, at p. 358; 66 L. J. Ch. 199, at p. 208, Rigby, L. J.

"That a proviso could be so read as to suggest that the previous part of the section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the previous words of the section itself. My Lords, that certainly would be a very serious invasion upon any rule of construction by which any document, whether an Act of Parliament or anything else, has ever been construed, and I should be very much averse indeed to lend any countenance to such a mode of construing a proviso."—*West Derby Union* v. *Metropolitan Life Assurance Society*, [1897] A. C. 647, at pp. 651, 652; 66 L. J. Ch. 726, at p. 728, Lord Halsbury, L. C.

"Of course a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, which is the proper view to take of it; but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless, would, as I have said, be in the highest degree dangerous. And for this reason: one knows perfectly well that it not infrequently happens that persons are unreasonably apprehensive as to the effect of an enactment when there is really no question of its application to their case; they nevertheless think that some Court may possibly hold that it will apply to their case, and they suggest if it is not intended to be applicable no harm would be done by inserting a proviso to protect them; and, accordingly, a proviso is inserted to guard against the particular case of which a particular person was apprehensive, although the enactment was never intended to apply to his case or to any other similar cases at all. If the construction contended for were adopted the result would be this:—Having put in a proviso which was thought to be needless in order to satisfy certain persons, or a particular class of persons, and allay their fears, you would have the enactment so construed against the intention of the legislature

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as to impose a liability upon a number of people who were not so apprehensive, or perhaps were not present, and therefore either did not think it necessary or were not in a position to protect their own interests by a proviso. My Lords, I am satisfied that many instances might be given where provisoes could be found in legislation that are meaningless because they have been put in to allay fears when those fears were absolutely unfounded, and when no proviso at all was necessary to protect the persons at whose instance they were inserted."—*Ibid.*, at pp. 655, 656; L. J., at p. 730, Lord Herschel.

Saving Clause.

"A saving in an Act of Parliament which is repugnant to the body of the Act is void."—1 *Coke*, p. 118, Part I. 47 a.

"I should have thought it impossible successfully to contend that a saving would give any further right than the party already had."—*Arnold* v. *Mayor of Gravesend* (1856), 2 K. & J. 574, at p. 591; 25 L. J. Ch. 776, at p. 591, Sir W. Page Wood, V.-C.

"The insertion of a saving clause is never a safe ground for determining the construction of an Act of Parliament, whether local or general. We all know the anxiety which there is on the part of every one who imagines that his rights may be infringed by the passing of an Act, whether general or local, to procure the insertion of a saving clause to protect them, even where the ordinary rules of construction supersede the necessity of any such protection."—*Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31, at p. 59; 30 L. J. Ch. 777, at p. 783, Sir W. Page Wood, V.-C.

Schedules.

A schedule in a statute is as much a part of the statute and as much an enactment as any other part.

If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.

"We have also to consider the language of the section itself to which the schedule is appended; and if there be any contradiction between the two, which upon fair construction there perhaps will not be found to be, upon ordinary principles, the form, which is made to suit rather the generality of cases than all cases, must give

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way."—*The Queen* v. *Baines* (1840), 12 Ad. & E. 210, at p. 227, Lord Denman, C. J.

"We come to the remaining part of the schedule. With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part."—*Att.-Gen.* v. *Lamplough* (1878), 3 Ex. D. 214, at p. 229; 47 L. J. Ex. 555, at p. 562, Brett, L. J.

"It would be quite contrary to the recognized principles upon which courts of law construe Acts of Parliament to enlarge the conditions of the enactment, and thereby restrain its operation, by any reference to the words of a mere form, given for convenience' sake in a schedule, and still more so, when that restricted operation is not favourable to the liberty of the subject, but the reverse. It is needless to cite authorities for these principles of construction but it so happens that there is in existence a most apposite one by a judge of high repute [Lord Cottenham] in relation to the schedules of this very statute. In *Re Baines* [(1840), 1 Cr. & Ph. 31, at p. 46] he said, speaking of this very schedule, 'if the enacting part and the schedule cannot be made to correspond, the latter must yield to the former.'"—*Dean* v. *Green* (1882), 8 P. D. 79, at pp. 89, 90, Lord Penzance.

Title of a Schedule.

"Very little weight is in my opinion attachable, in any case, to the mere title of a schedule, as qualifying the enacting words of a statute."—*Trustees of Clyde Navigation* v. *Laird* (1883), 8 App. Cas. 658, at pp. 672, 673, Lord Watson.

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Section III.

DIFFICULTIES OF INTERPRETATION OF STATUTES.

A department should be instituted by which bills, after they pass committee, might be supervised and put into intelligible and working order, and then submitted for final revision to Parliament before they pass into laws.

The great difficulty in all cases is in applying rules of interpretation to the particular case.

The Court must, in each case, apply the admitted rules of interpretation to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them where to do so would obviously defeat the intention which may be collected from the whole statute.

"The difficulty arises from the form of the short clause we are required to interpret. Your Lordships, exercising your appellate jurisdiction, act as a court of construction. You do not legislate but ascertain the purpose of the legislature; and if you can discover what that purpose was, you are bound to enforce it, although you may not approve the motives from which it springs, or the objects which it aims to accomplish. Our daily experience demonstrates that the task of construction, so understood, is not an easy one. It sometimes involves the necessity of harmonising apparently inconsistent clauses, and making homogeneous provisions cast together, haphazard, by various minds, differently constituted and looking to different and special objects, without due regard to the harmony of the whole. I have often thought that our legislative arrangements need much revision in this regard, and that, if it were possible, a department should be instituted by which bills, after they pass committee, might be supervised and put into intelligible and working order, and then submitted for final revision to Parliament before they pass into laws. But, in the meantime, we must deal with things as we find them, and reach, if we can, the true meaning of the confused words with which we often have to deal."—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 756; 47 L. J. Q. B. 193, at p. 198, Lord O'Hagan.

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"In *Allgood* v. *Blake* [(1873), L. R. 8 Ex. 160, at pp. 163, 164; 42 L. J. Ex. 101, at p. 104], in the judgment of the Exchequer Chamber (which I had the honour to deliver) as to the construction of a will, it is said: 'The great difficulty in all cases is in applying these rules to the particular case; for to one mind it may appear that an effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great, as to justify the Court in putting on them another signification, which to that mind seems not an improper signification of the words; whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one; and the proposed signification may appear a violent construction. We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them when to do so would obviously defeat the intention which may be collected from the whole will.' My Lords, *mutatis mutandis*, I think this is applicable to the construction of statutes as much as of wills. And I think it is correct."—*Ibid.*, at p. 765; L. J. at p. 203, Lord Blackburn.

Section IV.

THINGS TO BE CONSIDERED IN INTERPRETATION.

All Parts together.

"The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only

by itself: *nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum perlegerit.*"—2 *Coke*, p. 161, Part III. 59 b ((1595) *Lincoln College's Case*).

"In endeavouring to discover the true construction of the seventh clause of the statute [The Foreign Enlistment Act, 1819 (59 Geo. III. c. 69)], the first matter to be attended to is, no doubt, the actual language of the clause itself, as introduced by the preamble; secondly, the words or expressions which obviously are by design omitted; and, thirdly, the connection of the seventh clause with other clauses in the same statute, and the conclusions which, on comparison with other clauses, may reasonably and obviously be drawn. . . . If a comparison of the seventh section with other sections in the Act makes a certain proposition clear and undoubted, the Act must be construed accordingly, and ought to be so construed as to make it a consistent and harmonious whole. If, after all, it turns out that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail."—*Att.-Gen.* v. *Sillem and Others* (1864), 2 H. & C. 431, at pp. 515, 516, 517; 33 L. J. Ex. 92, at pp. 111, 112, Pollock, C. B.

"A settled canon of construction, namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. (Bac. Abr. tit. Statute I., sub-s. 2.)"—*The Queen* v. *Bishop of Oxford* (1879), 4 Q. B. D. 245, at p. 261; 48 L. J. Q. B. 609, at p. 620, Cockburn, C. J., delivering the judgment of the Court (Cockburn, C. J., Field and Manisty, JJ.).

"In construing this Act [The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52)], of course like every other Act, we must take the whole of the Act together, and as this is a very long Act, containing, I think, about sixty pages of very closely printed matter, it requires, in order that we may be certain that we omit nothing, that we should look carefully at it altogether and consider all the clauses."—*Turquand* v. *Board of Trade* (1886), 11 App. Cas. 286, at p. 291; 55 L. J. Q. B. 417, at p. 419, Lord Blackburn.

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Common Law.

Mischief and Remedy.

General statutes should be interpreted according to the common law.

The office of the judges is not to legislate, but to declare the expressed intention of the legislature.

The purpose of the enactment, the mischief or defect to be prevented, and the reason of the remedy which the legislature intended to apply should be looked for.

"It is a maxim in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law."—2 Inst. 200.

"If any case be doubtful upon a statute, it is good to construe it according to the common law, as it is said in *Delamer's Case* in Plow. Com. 351."—1 *Coke*, p. 330, Part I. 134 a ((1589-95) *Chudleigh's Case*).

"Judges and sages of the law have always expounded general staintes according to the rule of the common law, which is built upon the perfection of reason, and not according to any private and sudden conceit or opinion."—2 *Coke*, p. 41, Part. III. 13 b ((1584) *Harbert's Case*).

"When the provision of a statute is general, it is subject to the controul and order of the common law, for statutes are not presumed to make any alteration in the common law further or otherwise than the Act expressly declares: therefore, in all general matters the law presumes the Act did not intend to make any alteration; for if the Parliament had had that design, they would have expressed it in the Act: *Rex* v. *The Bishop of London* (1693), 1 Show. 455."—*Ibid.*, note (*n*).

"When once it becomes necessary to seek the meaning of a term occurring in a statute, the true rule of construction appears to us to be, not to limit the latitude of departure so as to adhere to the nearest possible approximation to the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the legislature intended to apply."—*The Queen* v. *Allen* (1872), L. R. 1 C. C. R. 367, at p. 374; 41

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L. J. M. C. 99, at p. 100, Cockburn, C. J., delivering the judgment of the Court (Cockburn, C. J., Bovill, C. J., Kelly, C. B.; Martin, Bramwell, Channell, Pigott and Cleasby, BB.; Willes, Byles, Blackburn, Mellor, Lush, Hannen, Grove and Quain, JJ.).

"As long ago as *Heydon's Case* [(1584), 2 Coke Rep. p. 18, Part III. 7b], Lord Coke says, that it was resolved 'that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:—

"'1st. What was the common law before the making of the Act?

"'2nd. What was the mischief and defect for which the common law did not provide?

"'3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth? and

"'4th. The true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy' (cited by Blackburn, J., in *Peek* v. *North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473, at p. 492; 32 L. J. Q. B. 241, at p. 245, and also in *The Queen* v. *Castro* (1874), L. R. 9 Q. B. 350, at pp. 360, 361; 43 L. J. Q. B. 105, at p. 110).

But it is to be borne in mind that the office of the judges is not to legislate, but to declare the expressed intention of the legislature, even if that intention appears to the Court injudicious; and I believe that it is not disputed, that what Lord Wensleydale used to call the golden rule is right."—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 764; 47 L. J. Q. B. 193, at p. 203, Lord Blackburn. (See *post*, p. 302.)

"Among the things which have passed into canons of construction recorded in *Heydon's Case* (1584), 3 Rep. 18, Part III. 7 b, we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy."—*Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade Marks*, [1898] A. C. 571, at p. 573; 67 L. J. Ch. 628, at p. 630, Earl of Halsbury, L. C.

"As it was put in *Heydon's Case* (1584), 3 Rep. 7 a, which Lord Halsbury cited in *Eastman Photographic Materials Co.* v. *Comp-*

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troller-General of Patents, [1898] A. C. 571, at p. 573; 67 L. J. 628, at p. 630, 'We are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.' That is a general way of stating it; but no doubt one is entitled to put one's self in the position of the legislature at the time the Act was passed in order to see what was the state of knowledge, what were the circumstances brought before the legislature, and what it was the legislature was aiming at."—*Attorney-General* v. *Metropolitan Electric Supply Co., Ltd.*, [1905] 1 Ch. 24, at p. 31; 74 L. J. Ch. 145, at p. 150, Farwell, J.

(See also, *post*, p. 336, "Effect on Common Law.")

Intention.

The expressed intention of the makers of the statute is to be observed.

The intention is to be gathered from the words used in their ordinary sense, as applied to the subject-matter, if the words used are not clear, then according to the objects, collected from the cause and necessity and from the circumstances, of the statute.

It is customary to consider what was the exact state of the law and other matters of the kind at the time the statute was passed.

The policy of a statute is not a safe guide in interpreting it.

Where the words are doubtful historical investigation may be resorted to.

The reports of commissioners are not to control the interpretation of statutes.

Debates in Parliament are not to be regarded.

"In Acts of Parliament which are to be construed according to the intent and meaning of the makers of them, the original intent and meaning is to be observed."—6 *Coke*, p. 138, Part XI. 73 b.

"The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."—*Churchill* v. *Crease* (1828), 5 Bing. 177, at p. 180, Best, C. J.

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"The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."—*The Sussex Peerage Case* (1844), 11 Cl. & Fin. 85, at p. 143, Tindal, C. J. (cited by Sir Montague E. Smith in delivering the judgment of the Judicial Committee in *Cargo ex "Argos"* (1872), L. R. 5 P. C. 134, at p. 153).

"I need not say, that I can know nothing of the intention of the Act, except from the words in which it is expressed, applied to the facts existing at the time."—*Logan* v. *Courtown* (*Earl*) (1851), 13 Beav. 22, at p. 29; 20 L. J. Ch. 347, at p. 355, Lord Langdale, M. R.

"Regard must also be had to the intent and meaning of the legislature. The rule upon this subject is well expressed in the case of *Stradling* v. *Morgan* (1560), Plowd. 199, at p. 204, in which case it is said, 'That the judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular, where the intent was particular. . . . . From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.'" —*Hawkins* v. *Gathercole* (1855), 6 D. M. & G. 1, at p. 21; 24 L. J. Ch. 332, at p. 338, Turner, L. J. (cited with approval by Lord Hatherley in *Garnett* v. *Bradley* (1878), 3 App Cas. 944, at

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pp. 950, 951, and by Lord Blackburn in *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 352, at p. 372; 52 L. J. Q. B. 505, at p. 515).

"I take that case [*In re Lord of Berkeley's Will* (1874), L. R. 10 Ch. 56] to decide that there is such a thing as construing an Act according to its intent, though not according to its words."—*In re Bethlem Hospital* (1875), L. R. 19 Eq. 457, at p. 459; 44 L. J. Ch. 406, at p. 407, Jessel, M. R.

"I understand him [Lord Abinger in the case of *Ex parte Trafford* (1837), 2 Y. & C. Ex. 522] to draw a distinction between the spirit of an Act, or that which a judge conceives to be the spirit of an Act, and the intention, which, though not expressed in precise words, may be gathered from considering the terms of the enactment, and which amounts in fact to a species of construction; he thinks that unless he can find the latter he cannot make the order."—*In re Bethlem Hospital* (1875), L. R. 19 Eq. 457, at pp. 460, 461, Jessel, M. R. (cited by Buckley, J., in *In re Gaselee*, [1901] 1 Ch 923, at p. 929; 70 L. J. Ch. 441, at p. 443).

"I think, in modern times, much more weight has been given to the natural meaning of the words than was done in the time of Elizabeth; and in some cases in which the old judges have given effect to the general intention as overruling the particular words, a modern Court would have given effect to the particular words as showing that the intention really went further than what was supposed. The Civil Code of Canada, Article 12, well expresses what I think is the principle, and also the qualification which I think must now be put on the older authorities. 'When a law is *doubtful* or *ambiguous*, it is to be interpreted so as to fulfil the intention of the legislature, and to attain the object for which it was passed. The preamble, which forms part of the Act, assists in explaining it.' It is upon this principle that it is held, as I think it has always been held, that where a statute was passed for the purpose of repealing and in part re-enacting former statutes, all the statutes *in pari materiâ* are to be considered; in order to see what it was that the legislature intended to enact in lieu of the repealed enactments. It may appear from the language used that the legislature intended to enact something quite different from the previous law, and where that is the case effect must be given to the intention. But when the words used are such as may either mean that former enactments shall be re-enacted, or that they shall be altered, it is a question for the Court which was the inten-

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tion."—*Brathwaite* v. *Clarke* (1883), 8 App. Cas. 354, at p. 373; 52 L. J. Q. B. 505, at pp. 515, 516, Lord Blackburn.

"'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."—*Salomon* v. *Salomon & Co.*, [1897] A. C. 22, at p. 38; 66 L. J. Ch. 35, at p. 44, Lord Watson.

"Turner, L. J., in *Hawkins* v. *Gathercole* (1855), 6 D. M. & G. 1, at p. 21; 24 L. J. Ch. 332, at p. 338, and adding his own high authority to that of the judges in *Stradling* v. *Morgan* (1560), Plowd. 199, at p. 204, after enforcing the proposition that the intention of the legislature must be regarded, quotes at length the judgment in that case; that the judges have collected the intention, 'sometimes by considering the cause and necessity of making the Act . . . . sometimes by foreign circumstances' (thereby meaning extraneous circumstances), 'so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion,' and he adds: 'We have therefore to consider not merely the words of the Act of Parliament, but the intent of the legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light on the subject.' Lord Blackburn in *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 763; 47 L. J. Q. B. 193, at p. 203, says: 'In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object appearing from those circumstances, which the person using them had in view.'"—*Eastman's Photographic Materials Co.* v. *Comptroller-General of Patents, Designs and Trade-Marks*, [1898] A. C. 571, at pp. 575, 576; 67 L. J. Ch. 628, at p. 631, Earl of Halsbury, L. C.

Subject-matter.

"There is a rule for the construction of statutes which is well expressed in Maxwell on the Interpretation of the Statutes [Ch. 2, s. 1], 'In interpreting a statute it is to be borne in mind at the outset that language is always used *secundum subjectam materiam*, and that it must therefore be understood in the sense which best harmonises with the subject-matter.'"—*Bank of India* v. *Wilson* (1877), 3 Ex. D. 108, at p. 119; 47 L. J. Ex. 153, at p. 158, Pollock, B.

"Whenever you have to construe a statute or document, you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which obliges you to read them in a sense which is not their ordinary sense in the English language as so applied. That, I take it, is the cardinal rule."—*Lion Insurance Association* v. *Tucker* (1883), 12 Q. B. D. 176, at p. 186; 53 L. J. Q. B. 185, at p. 189, Brett, M. R.

"An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject-matter, unless there is some very strong ground, derived from the context, or reason why it should not be so construed."—*Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q. B. D. 1, at p. 5; 59 L. J. Q. B. 105, at p. 106, Lord Esher, M. R.

"In construing a statute regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail, except in so far as the statute shows that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition."—*Att.-Gen.* v. *Beech*, [1898] 2 Q. B. 147, at p. 155; 67 L. J. Q. B. 585, at p. 590, Chitty, L. J.

Objects.

The intention depends upon the object for which the statute was made as collected from the language employed.

The manifest intention of a statute must not be defeated by too literal an adhesion to its precise language.

"We must construe this statute by what appears to have been the intention of the legislature. But we must ascertain that

intention from the words of the statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute."—*Fordyce* v. *Bridges* (1847), 1 H. L. Cas. 1, at p. 4, Lord Brougham.

"In all cases the intention of the legislature must depend to a great extent upon the particular object of the statute that has to be construed."—*The Queen* v. *Justices of Surrey* (1869), L. R. 5 Q. B. 87, at p. 93; 39 L. J. M. C. 49, at p. 53, Hannen, J.

"In construing Acts of Parliament, we must look at what was the object of the legislature."—*Brown* v. *Great Western Rail. Co.* (1882), 9 Q. B. D. 744, at p. 751, Field, J.

"All statutes are to be construed by the Courts so as to give effect to the intention which is expressed by the words used in the statute. But that is not to be discovered by considering those words in the abstract, but by inquiring what is the intention expressed by those words used in a statute with reference to the subject-matter and for the object with which that statute was made; it being a question to be determined by the Court, and a very important one, what was the object for which it appears that the statute was made."—*Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, at p. 372; 52 L. J. Q. B. 505, at p. 515, Lord Blackburn.

"It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used."—*Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, at p. 634; 55 L. J. P. C. 69, at p. 73, Lord Hobhouse, delivering the judgment of the Judicial Committee.

"I am satisfied that we have nothing to do with the general object of the enactment if the words used are clear; they are clear here, and we ought not to enter upon a refined consideration of the question whether they carry out the object of the statute."—*Crofts* v. *Taylor* (1887), 19 Q. B. D. 524, at p. 528; 56 L. J. M. C. 137, at p. 140, Huddleston, B.

"My Lords, it seems to me that in order to determine the effect of legislation one must look at the object which it had in view."—*Baumwoll Manufactur von Carl Scheibler* v. *Furness*, [1893] A. C. 8, at p. 20, Lord Herschell, L. C.

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"This is well put in Maxwell on Statutes, especially at p. 29, 3rd edition, 1896, where it is said that, in order to arrive at the real meaning of a statute, it is always necessary to get an exact conception of the aim, scope, and object of the whole Act."—*Smelting Company of Australia* v. *Commissioners of Inland Revenue*, [1896] 2 Q. B. 179, at p. 184; 65 L. J. Q. B. 513, at p. 514, Pollock, B.

"Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed: see *Harrison* v. *Blackburn* (1864), 17 C. B. N. S. 678, at pp. 690—693; and *Campbell* v. *Prescott* (1808), 15 Ves. 500, at p. 503."—*Hooke* v. *Dunn*, [1897] 1 Q. B. 579, at p. 586; 66 L. J. Q. B. 364, at p. 369, Hawkins, J.

"In Maxwell on the Interpretation of Statutes, 3rd edition, p. 319, the principle of construction is laid down in these terms: 'Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence'; and for that proposition several authorities are cited. In *Salmon* v. *Duncombe* [(1886), 11 App. Cas. 627, at p. 634; 55 L. J. P. C. 69, at p. 73], Lord Hobhouse, delivering the judgment of the Privy Council, says: 'It is, however, a very serious matter to hold that when the main object of a statute is clear it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law.' . . . This case is a good instance of the principle that the manifest intention of a statute must not be defeated by too literal an adhesion to its precise language."—*Rex* v. *Vasey*, [1905] 2 K. B. 748, at pp. 750, 751; 75 L. J. K. B. 19, at p. 21, Lord Alverstone, C. J.

Surrounding Circumstances—State of Law—Extrinsic Evidence.

"Every Act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every Act is made, either for the purpose of making a

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change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment."—*The Dean, &c. of Ely* v. *Bliss* (1842), 5 Beav. 574, at p. 582; 11 L. J. Ch. 351, at p. 354, Lord Langdale, M. R.

"It is by no means an inconvenient mode of construing statutes, to presume that the legislature was aware of the state of the law at the time they passed."—*Jones* v. *Brown* (1848), 2 Ex. 329, at p. 332; 17 L. J. Ex. 163, at p. 165, Pollock, C. B.

"It has ever been held that, to construe aright an ancient statute, regard must be had to the general state of the law and of public sentiment at the time it passed."—*McWilliam* v. *Adams* (1852), 1 Macq. H. L. Cas. 120, at p. 137, Lord Truro.

"I apprehend that, in construing an Act of Parliament, a deed, will, or whatever other instrument may have to be construed by the Court, I have a right to look at all the circumstances which the parties to the instrument, whether a testator, a donor, or the legislature, who are executing a solemn act, had before them at the time, and were themselves contemplating, as proved, not of course by any extrinsic evidence, but by evidence afforded by the instruments themselves, and also such matters as can be proved by extrinsic evidence to have been the circumstances which surrounded them, and which may have affected the conclusion at which they have arrived. Such a mode of construing an Act of Parliament has been not unfrequently resorted to. It is customary to consider what was the exact state of the law and other matters of the kind at the time when a particular Act was passed."—*Att.-Gen.* v. *Earl of Powis* (1853), Kay, 186, at p. 207, Sir W. Page Wood, V.-C.

"In construing any act of the legislature, the verbal construction of the particular section in question, if it be plain and simple, must govern the Court in arriving at its conclusion. If there be any degree of doubt or difficulty upon the wording of the particular section in question, the Court is entitled to look, first at the circumstances attending the passing of the Act, next, at the preamble, as far as it affords any indication which may serve as a key to the interpretation of the Act, and then, I may add, to the whole purport and scope of the Act, to be collected from its various clauses, other than the particular clause the meaning of which is in dispute."—*Cope* v. *Doherty* (1858), 4 K. & J. 367, at p. 374; 27 L. J. Ch. 600, at p. 601, Sir W. Page Wood, V.-C.

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"Three canons of construction seem applicable in this case. First, that the statute is to be construed, if possible, according to the ordinary grammatical construction of the phraseology used in it. Secondly, if there be doubt as to the construction, or if a construction according to strict grammar would lead to a manifestly unreasonable or absurd conclusion, the statute must be considered with regard to the state of the law at the time when it was enacted."—*Gover's Case* (1875), 1 Ch. D. 182, at p. 198; 45 L. J. Ch. 83, at p. 93, Brett, J.

"It is a well-known rule or canon of construction that in construing an Act of Parliament one ought to take into account the state of the law and of judicial decisions at the time the Act is passed."—*Yorkshire Insurance Co.* v. *Clayton* (1881), 8 Q. B. D. 421, at p. 426; 51 L. J. Q. B. 82, at p. 85, Brett, L. J.

"We ought in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law."—*Young & Co.* v. *Mayor, &c. of Royal Leamington Spa* (1883), 8 App. Cas. 517, at p. 526; 52 L. J. Q. B. 713, at p. 718, Lord Blackburn.

"In order to construe the section we are entitled to consider the state of the law at the time it was passed."—*Phillipps* v. *Rees* (1889), 24 Q. B. D. 17, at p. 20; 59 L. J. Q. B. 1, at p. 3, Lord Esher, M. R.

"In order to construe an Act of Parliament, it was laid down long ago in *Heydon's Case* [(1584), 2 Coke, Rep. p. 18, Part III. 7 b] that one of the most material things to consider is the state of the law before the Act, and the defect in that law which the Act was intended to remedy."—*Pelton Brothers* v. *Harrison*, [1891] 2 Q. B. 422, at p. 424; 60 L. J. Q. B. 742, at p. 743, Kay, L. J., reading the judgment of the Court.

"In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported *Heydon's Case* (1584), 2 Rep. 7 b, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief."—*In re Mayfair Property Co.*, [1898] 2 Ch. 28, at p. 35; 67 L. J. Ch. 337, at p. 340, Lindley, M. R.

"No doubt one is entitled to put one's self in the position of the legislature at the time the Act was passed in order to see what was the state of knowledge, what were the circumstances brought before the legislature, and what it was the legislature was aiming at."—

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Att.-Gen. v. *Metropolitan Electric Supply Co., Ltd.*, [1905] 1 Ch. 24, at p. 31; 74 L. J. Ch. 145, at p. 150, Farwell, J.

"In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act—not only the common law, but the law as it then stood under previous statutes—in order properly to interpret the statute in question. These may be considered to form part of the surrounding circumstances under which the legislature passed it, and in the case of a statute, just as in the case of every other document, you are entitled to look at the surrounding circumstances at the date of its coming into existence, though the extent to which you are allowed to use them in the construction of the document is a wholly different question."—*Macmillan & Co.* v. *Dent*, [1907] 1 Ch. 107, at p. 120; 76 L. J. Ch. 136, at p. 145, Fletcher Moulton, L. J.

Policy.

Policy of the Law.

"I do not understand what right a Court of justice has to entertain an opinion of a positive law, upon any ground of political expediency. I have always been at a loss to conceive upon what ground a Court of justice was entitled so to act. The *legislature* is to decide upon political expediency; and if it has made a law which is not politically expedient, the proper way of disposing of that law is by an Act of the legislature, and not by the decision of a Court of justice."—*The Queensberry Leases* (1819), 1 Bligh, H. L. 339, at p. 497, Lord Redesdale.

"I think, where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right, or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it – to administer it as we find it; and I think to take a different course is to abandon the office of judge, and to assume the province of legislation."—*Miller* v. *Salomons* (19th April, 1852), 7 Ex. 475, at p. 560; 21 L. J. Ex. 161, at p. 197, Pollock, C. B.

"We must be careful that we do not abridge the rights conferred on suitors by common or statute law, while we are acting merely on views of policy and expediency, with respect to which different

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judges may form different opinions."—*Cobbett* v. *Hudson* (3rd Nov. 1852), 1 Ell. & Bl. 11, at p. 12; 22 L. J. Q. B. 11, at p. 13, Lord Campbell, C. J., delivering the judgment of the Court (Lord Campbell, C. J., Coleridge, J., Wightman, J., and Erle, J.).

"The general words of a statute are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched. . . . This principle of construction, as a general proposition, cannot be disputed."—*Minet* v. *Leman* (1855), 20 Beav. 269, at p. 278; 24 L. J. Ch. 545, at pp. 547, 548, Sir John Romilly, M. R.

"It is never (as it seems to me) very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt and controversy."—*Municipal Building Society* v. *Kent* (1884), 9 App. Cas. 260, at p. 273; 53 L. J. Q. B. 290, at p. 298, Earl of Selborne, L. C.

Public Policy.

"In treating of various branches of the law, learned persons have analysed the sources of the law, and have sometimes expressed their opinion that such and such a provision is bad because it is contrary to public policy; and I deny that any Court can invent a new head of public policy; so a contract for marriage brokerage, the creation of a perpetuity, a contract in restraint of trade, a gaming or wagering contract, or, what is relevant here, the assisting of the King's enemies, are all undoubtedly unlawful things; and you say that it is because they are contrary to public policy they are unlawful; but it is because these things have been either enacted or assumed to be by the common law unlawful, and not because a judge or Court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe—that is, a principle of public policy, recognised by the law, which the suggested contract is infringing, or is supposed to infringe."—*Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. 484, at pp. 491, 492; 71 L. J. K. B. 857, at p. 861, Earl of Halsbury, L. C.

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"The phrase most frequently used in argument was 'public policy'; but, following the example of many eminent judges, I prefer 'the policy of the law.'"—*In re Hope Johnstone*, [1904] 1 Ch. 470, at p. 474; 73 L. J. Ch. 321, at p. 322, Kekewich, J.

History.

"We have not to do with the history of the words, unless the words in the statute are doubtful, and require historical investigation to explain them. If the words are really and fairly doubtful, then, according to well-known legal principles, and principles of common sense, historical investigation may be used for the purpose of clearing away the doubt which the phraseology of the statute creates."—*The Queen* v. *Most* (1881), 7 Q. B. D. 244, at p. 251; 50 L. J. M. C. 113, at p. 116, Lord Coleridge, C. J.

"It is useless to enter into an inquiry with regard to the history of an enactment, and any supposed defect in the former legislation on the subject which it was intended to cure, in cases where the words of the enactment are clear. It is only material to enter into such an inquiry where the words of an enactment are ambiguous and capable of two meanings in order to determine which of the two meanings was intended."—*The Queen* v. *Bishop of London* (1889), 24 Q. B. D. 213, at pp. 224, 225; 59 L. J. Q. B. 169, at p. 172, Lord Esher, M. R.

"The Act [Public Libraries Act, 1892 (55 & 56 Vict. c. 53)] takes its rise, in respect of this exemption, from Sir Robert Peel's Income Tax Act, 1842 (5 & 6 Vict. c. 35). It is quite legitimate to refer to the history of that period to understand what was the subject-matter with which the legislature was then dealing."—*Mayor, &c. of Manchester* v. *McAdam*, [1896] A. C. 500, at p. 504; 65 L. J. Q. B. 672, at p. 674, Lord Halsbury, L. C.

"It has, indeed, been argued that the history of the legislation and of the facts which gave rise to the enactment [Betting Act, 1853 (16 & 17 Vict. c. 119)], may in view of the preamble affect the construction of the Act itself; but though I do not deny that such topics may usefully be employed to interpret the meaning of a statute, they do not, in my view, afford conclusive argument here."—*Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143, at p. 157; 68 L. J. Q. B. 392, at p. 396, Earl of Halsbury, L. C.

"In construing sect. 3 of the Act of 1833 [Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42)], as indeed in construing any

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other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as the cure provided."—*Thomson* v. *Clanmorris* (*Lord*), [1900] 1 Ch. 718, at p. 725; 69 L. J. Ch. 337, at p. 340, Lindley, M. R.

Report of Commissioners.

"We are not at liberty to infer the intention of the legislature from any other evidence than the construction of the Act itself; and indeed, if we were allowed to draw any inference from the comparison between the language of the report [the Report of the Real Property Commissioners (cited by Lord Denman in his judgment in *Fellowes* v. *Clay* (1843), 4 Q. B. 313, at p. 356; 12 L. J. Q. B. 202, at p. 218)] and that of the legislature, the more legal inference would be, that the marked distinction, observable between the two, could not have been the result of accident, but must have been advised and intentional."—*Salkeld* v. *Johnson* (1846), 2 C. B. 749, at p. 757, Tindal, C. J.

"We shall not, therefore, refer to the report of the Real Property Commissioners, published shortly before the passing of this Act, and to which it is supposed to have owed its origin, in order to explain its meaning; not conceiving that we can legitimately do so, however strongly we may believe that it was introduced in order to carry into effect their recommendation to establish a new Statute of Limitations for tithes."—*Salkeld* v. *Johnson* (1848), 2 Ex. 256, at p. 273; 18 L. J. Ex. 89, at p. 92, Pollock, C. B., delivering the judgment of the Court (Pollock, C. B., Parke, B., Alderson, B., and Platt, B.).

"The report of commissioners is no legitimate ground for arriving at the construction of a statute."—*Martin* v. *Hemming* (1854), 24 L. J. Ex. 3, at p. 5, Pollock, C. B.

"No doubt that is so, although in a very important case as to the construction of Lord Tenterden's Act with respect to tithes, Lord Denman, in his judgment, relied upon the Report of the Real Property Commissioners. [See *Fellowes* v. *Clay* (1843), 4 Q. B. 313, at p. 356; 12 L. J. Q. B. 202, at p. 218]."—*Ibid.*, Parke, B.

"I find nothing in the language of the Act itself, to show such an intention, and I cannot, for the purpose of construing it, look at the intention expressed by the commissioners. [*The Report of*

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the Chancery Commissioners had been referred to.]"—*Ewart* v. *Williams* (1854), 3 Drew. 21, at p. 24, Kindersley, V.-C.

"We next proceed to consider the purpose of the statute as a whole. On the purview of it, especially when looked at by the light of the report of the Ecclesiastical Courts Commissioners, which preceded it, and of the preamble."—*The Queen* v. *Bishop of Oxford* (1879), 4 Q. B. D. 245, at p. 264; 48 L. J. Q. B. 609, at p. 622, Cockburn, C. J., delivering the judgment of the Court (Cockburn, C. J., Field and Manisty, JJ.).

Debate in Parliament.

"We are not, however, concerned with what Parliament intended, but simply with what it has said in the statute. The statute is clear, and the parliamentary history of a statute is wisely inadmissible to explain it, if it is not."—*The Queen* v. *Hertford College* (1878), 3 Q. B. D. 693, at p. 707; 47 L. J. Q. B. 649, at p. 658, Lord Coleridge, C. J., delivering the judgment of the Court of Appeal.

"It has been regretted in the House of Lords that the Court of Appeal had allowed such a reference [to the Lord Chancellor's speech relating to the Church Discipline Act] to be made in *Reg.* v. *Bishop of Oxford* [(1879), 4 Q. B. D. 525, at p. 535; 48 L. J. Q. B. 609, at pp. 633, 634]."—*South Eastern Rail. Co.* v. *Railway Commissioners* (1881), 50 L. J. Q. B. 201, at p. 203, Selborne, L. C.

"We must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words used are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament."—*Richards* v. *McBride* (1881), 8 Q. B. D. 119, at p. 123; 51 L. J. M. C. 15, Grove, J.

"We cannot allow them [the speeches of members of the Government, including Lord Cairns', L. C., in introducing the Bill, and the Journals of the House of Lords and the House of Commons] to be referred to as a guide to the true construction of the Act [The Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86)], whatever their historical interest may be."—*J. Lyons & Sons* v. *Wilkins* (December 20, 1898), [1899] 1 Ch. 255, at p. 264; 68 L. J. Ch. 146, at p. 148, Lindley, M. R.

"It is well established that nothing said in Parliament can be referred to in a court of law as to the meaning of an Act, and

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that is a rule that no one can be more jealous than myself to uphold."—*Reg.* v. *Comptroller-General of Patents*, Ap. 12, [1899] 1 Q. B. 909, at p. 917, A. L. Smith, L. J.

"It was suggested that the view taken by us of the Act [the Education Act, 1902 (2 Edw. 7)] is not in accordance with the intention of the House of Commons or with public understanding of the effect of the Act; and reference was attempted to be made to the debates and to passive resisters; but we have only to deal with the construction of the Act as printed and published. That is the final word of the legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible. But they would be quite untrustworthy in any case. In the case of an Act dealing with a controversial subject ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason. The generality of public understanding is quite incapable of proof, and is beside the mark unless as an appeal to timidity: '*Securus judicat orbis terrarum.*' The principles of construction applicable to Acts of Parliament are well settled, and will be found stated in *Stradling* v. *Morgan* [(1560), 1 Plowden, 204], which has received the approval of Turner, L. J., in *Hawkins* v. *Gathercole* [(1855), 6 D. M. & G. 1, at p. 21; 24 L. J. Ch. 332, at p. 338], and of Lord Halsbury in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* [[1898] A. C. 571, at p. 575; 67 L. J. Ch. 628, at p. 631 (see *ante*, p. 278)], and do not admit of any such considerations. The Court must, of course, in construing an Act of Parliament, as in construing a deed or will, do its best to put itself in the position of the authors of the words to be interpreted at the time when such words were written or otherwise became effectual; but this will no more justify us in admitting, as evidence on the construction of an Act, speeches in either House or subsequent statements in the public papers, or elsewhere, of the effect of an Act than it would justify us in admitting on the construction of a will the advice given to the testator by his solicitor before, or the statements of himself or his expectant legatees of the effect of his will, after he had made it. The mischief sought to be cured by the Act and the aim and object of the Act must be sought in the Act itself. Although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight,

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as is pointed out by Bramwell, B., in *Attorney-General* v. *Sillem* (1864), 2 H. & C. 431, at p. 531; 33 L. J. Ex. 92, at p. 117. I think that the true rule is expressed with accuracy by Lord Langdale in giving the judgment of the Privy Council in the *Gorham Case*, in Moore, in 1852 edition, p. 462: 'We must endeavour to attain for ourselves the true meaning of the language employed [in the Articles and Liturgy], assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed.'"—*Rex* v. *West Riding of Yorkshire County Council*, [1906] 2 K. B. 676, at pp. 716, 717; 75 L. J. K. B. 933, at pp. 959, 960, Farwell, L. J.

Debate in Committee.

"All that I have to do is to construe the Act of Parliament before me [Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18)], and I cannot be assisted in the construction of that Act by knowing what took place before the committee when both parties were arguing face to face until at length the committee came to a conclusion."—*Steele* v. *Midland Rail. Co.* (1866), L. R. 1 Ch. 275, at p. 282, Wood, V.-C.

The Draftsman.

"I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which, in fact, has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done."—*Hilder* v *Dexter*, [1902] A. C. 474, at p. 477; 71 L. J. Ch. 781, at p. 783, Earl of Halsbury, L. C.

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Section V.

CONCERNING STATUTORY LANGUAGE.

The Crown.

The Crown cannot do a wrong.

The Crown is not bound by a statute unless specially named therein, or unless there is a necessary implication to be drawn from the provisions of the statute, the nature of the enactment, or from the legislation on the subject, that the Crown was intended to be bound.

Where a statute is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the Crown shall be bound by such statute, though not particularly named therein.

The words of a statute made for the Crown shall be taken most beneficially for the Crown.

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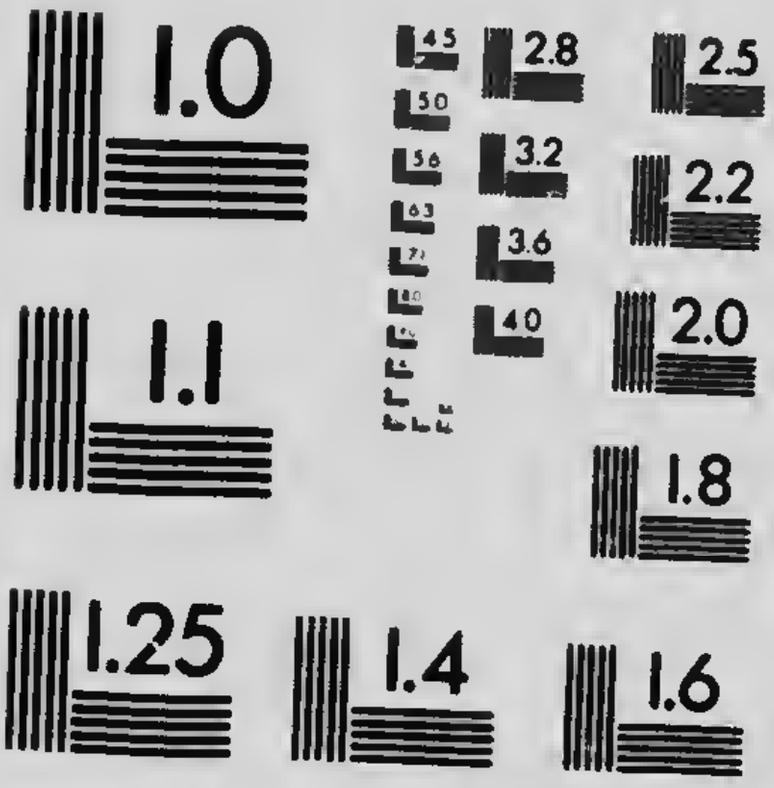

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"The King shall not be exempted by construction of law out of the general words of Acts made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong. *Solum Rex hoc non potest facere, quod non potest injuste agere.*"—6 *Coke*, p. 135, Part XI. 72 a (*Magdalen College Case*).

"It is a general rule that the Crown, if not named, is not bound by the general words of statutes."—6 *Coke*, p. 138, Part XI., note (E). [Note in *Serjt. Hill's* copy.]

"So, a statute made for the benefit of the King shall be construed most beneficially for him."—*Com. Dig.* tit. Parliament R. 21.

"Generally speaking, in the construction of Acts of Parliament, the King in his royal character is not included, unless there be words to that effect."—*Rex* v. *Cook* (1789), 3 T. R. 519, at p. 521, Lord Kenyon, C. J.

"It is a well-established rule, generally speaking, in the construction of Acts of Parliament, that the King is not included unless there be words to that effect; for it is inferred *primâ facie* that the law made by the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown: *Willion* v. *Barkley* (1561-2), Plow. 223."—*Att.-Gen.* v. *Donaldson* (1842), 10 M. & W. 117, at pp. 123, 124, Alderson, B., delivering the judgment of the Court.

"It is a maxim that the Crown is not bound by an Act of Parliament, without express words. But I think that there is express language in this statute to show that it includes all cases of appeal, and therefore those in which the Crown is interested."—*Moore* v. *Smith* (1859), 1 E. & E. 597, at p. 600; 28 L. J. M. C. 126, at p. 127, Lord Campbell, C. J. (cited by Lord Alverstone, C. J., in *Thomas* v. *Pritchard*, [1903] 1 K. B. 209, at p. 213; 72 L. J. K. B. 23, at p. 25).

"The Crown, not being named, is not bound by the Act [43 Eliz. c. 2 (The Poor Relief Act, 1601)]."—*Mersey Docks* v. *Cameron* (1865), 11 H. L. Cas. 443, at p. 508; 35 L. J. M. C. 1, at p. 25, Lord Cranworth.

"The question we have to decide appears to me to be a very simple one. The first point to be considered is, what is the general law on the subject of the prerogative of the Crown? Now on that I think there is no dispute whatever. The general rule, as expressed in Bacon's Abridgement, 7th ed., Vol. 6, p. 462, is, 'That where an

Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein; but where a statute is general, and thereby any prerogative, right, title or interest is divested or taken from the King, in such case the King shall not be bound, unless the statute is made by express terms to extend to him'; and the point came before the Court of Exchequer in *Att.-Gen.* v. *Donaldson* [(1842), 10 M. & W. 117]."—*Ex parte Postmaster-General, In re Bonham* (1879), 10 Ch. D. 595, at pp. 600, 601; 48 L. J. Bank. 84, at p. 87, Jessel, M. R.

"In the absence of express words the Crown is not to be bound, nor is the Crown to be affected except by necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I understand by 'necessary implication.'"—*Gorton Local Board* v. *Prison Commissioners* (1887), [1904] 2 K. B. p. 167 (*n*), Day, J.

"The general rule that the Crown is not bound by a statute unless named."—*Perry* v. *Eames*, [1891] 1 Ch. 658, at p. 665; 60 L. J. Ch. 345, at p. 347, Chitty, J.

"I entirely agree with the learned counsel for the appellants when he says that the Court cannot go a hair's breadth beyond the letter of the enactment in favour of the Crown, but by that I understand that, if something is not within the letter of an enactment, one must not say, in favour of the Crown, that it comes within its spirit; the enactment must not be enlarged in any way, and it must not receive a benevolent construction in favour of the Crown. But that does not disentitle the Court to have regard to every legitimate means for ascertaining what is the legal sense in which the words are used. If there be, as I think there is here, an ambiguity which is not latent but patent, according to the old distinction, that is not a matter to be solved by evidence as to the meaning of the parties in a case, that is, where there could be parties—it is to be solved by the Court as a matter of construction."—*Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, [1896] 1 Q. B. 222, at pp. 226, 227; 65 L. J. Q. B. 253, at pp. 256, 257, Wright, J.

"The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to

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be bound, is, in our opinion, still applicable. . . . No doubt the insertion in many Acts of Parliament of clauses to protect the Crown, or save Crown rights, has given rise to the impression that this rule has to some extent been trenched upon, and we are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown even though the Crown may not be specially named. But, in our opinion, the intention that the Crown shall be bound, or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments."—*Hornsey Urban District Council* v. *Hennell*, [1902] 2 K. B. 73, at p. 80; 71 L. J. K. B. 479, at p. 482, Lord Alverstone, C. J., delivering the judgment of the Court (Lord Alverstone, C. J., Darling and Channell, JJ.).

"The Crown is not bound by an Act of Parliament unless specially named, 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."—*Thomas* v. *Pritchard*, [1903] 1 K. B. 209, at pp. 212, 213; 72 L. J. K. B. 23, at p. 25, Lord Alverstone, C. J.

"Upon the general question of when statutes should or should not be held to bind the Crown, I cannot add anything to that which I said in the *Hornsey Case* (*Hornsey District Council* v. *Hennell*), [1902] 2 K. B. 73; 71 L. J. K. B. 479 [see *supra*], which was a judgment which was concurred in by my brothers Darling and Channell, and in which I tried as far as I could to consider the authorities bearing upon the matter. I do not see any reason to express myself differently to the way in which I expressed myself in that judgment."—*Cooper* v. *Hawkins*, [1904] 2 K. B. 164, at p. 170; 73 L. J. K. B. 113, at p. 117, Lord Alverstone, C. J.

(See also *Stewart* v. *Thames Conservators*, [1908] 1 K. B. 893, at p. 901; 77 L. J. K. B. 396, at pp. 399, 400, Bray, J.)

Statutory References to the Crown.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

"Sect. 30.—In this Act and in every other Act, whether passed before or after the commencement of this Act [1st January, 1890], references to the sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the contrary intention appears, be construed as references to the sovereign for the time being, and this Act shall be binding on the Crown."

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General Statutory Interpretation.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21). [10th June, 1850, which by sect. 8 commenced and took effect from and immediately after 4th February, 1851.] Repealed by Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41.

"Sect. 4. Be it enacted, that in all Acts, words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided;

"And the word 'month' to mean calendar month, unless words be added showing lunar month to be intended;

[(N.B.—Prior to this section the expression "month" meant "lunar month.") "For all purposes, and in all Acts of Parliament where 'months' are spoken of, without the word 'calendar,' and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean 'lunar months.'"—*Lacon* v. *Hooper* (1795), 6 T. R. 224, at p. 226, Kenyon, C. J.]

"And 'county' shall be held to mean also county of a town or of a city, unless such extended meaning is expressly excluded by words;

"And the word 'land' shall include messuages, tenements and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure;

"And the words 'oath,' 'swear,' and 'affidavit,' shall include affirmation, declaration, affirming and declaring, in the case of persons by law allowed to declare or affirm instead of swearing."

Words "include" and "mean."

"The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be considered as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the

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purpose of adding to th atural significance of the words or expressions defined. It m be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must inevitably be attached to these words or expressions."—*Dilworth* v. *Commissioners of Stamps*, [1899] A. C. 99, at pp. 105, 106; 68 L. J. P. C. 1, at p. 4, Lord Watson, delivering the judgment of the Judicial Committee. (See also *Dyke* v. *Elliott* (1872), L. R. 4 P. C. 184; 41 L. J. Adm. 65; *Reg.* v. *Herman* (1879), 4 Q. B. D. 284; 48 L. J. M. C. 106; *Corporation of Portsmouth* v. *Smith* (1883), 13 Q. B. D. 284; 53 L. J. Q. B. 92.)

See also "Interpretation Clauses," *post*, p. 299.

"Person."

"This Act is general, and extends to all persons of what estate or degree soever, and as well to women as to men: for the words be [if any person] and *generalia verba sunt generaliter intelligenda*."—3 *Inst.* c. 21, p. 76.

"That the word 'person' may include 'corporation' I will not deny. Though at the same time, considering the way in which statutes are now drawn, that where 'corporation' is meant it is always named,—at least there is no modern instance to the contrary,—that where the legislature made a general interpretation clause that 'person' should be male and female, plural and singular, &c., it did not include corporation, I should be reluctant to hold that in any particular statute 'person' included 'corporation' unless there was strong reason so to do."—*Pharmaceutical Society* v. *London Supply Association* (1880), 5 Q. B. D. 310, at p. 313; 49 L. J. Q. B. 338, at p. 340, Bramwell, L. J.

"I think the principle laid down by the junior counsel for the respondents [Mr. Finlay] was substantially right; that if a statute provides that no person shall do a particular act except on a particular condition, it is *primâ facie* natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the legislature as intending such persons, as, by the use of proper means, may be able to fulfil the condition; and not those who, though called 'persons' in law, have no capacity to do so at any time, by any means, or under any circumstances whatsoever."—*Pharmaceutical Society* v. *London*

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Supply Association (1880), 5 App. Cas. 857, at p. 862; 49 L. J. Q. B. 736, at p. 738, Lord Selborne, L. C.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Re-enactment of Existing Rules.

Rules as to Gender and Number.

"Sect. 1.—(1.) In this Act, and in every Act passed after the year 1850, whether before or after the commencement of this Act [1st January, 1890], unless the contrary intention appears,—

"(a) Words importing the masculine gender shall include females; and

"(b) Words in the singular shall include the plural, and words in the plural shall include the singular.

"(2.) The same rules shall be observed in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, when the enactment is contained in an Act passed in or before the year 1850.

Application of Penal Statutes to Bodies Corporate.

"Sect. 2.—(1.) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act [1st January, 1890], the expression 'person' shall, unless the contrary intention appears, include a body corporate.

"(2.) Where under any Act, whether passed before or after the commencement of this Act [1st January, 1890], any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved."

"I take it, therefore, to be clear that, in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by showing that they are a corporation. That seems to me to be common sense and good law."—*The Queen* v. *Tyler and International Commercial Co.*, [1891] 2 Q. B. 588, at p. 594; 61 L. J. M. C. 38, at p. 40, Bowen, L. J.

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Meanings of certain Words in Acts since 1850.

"Sect. 3. In every Act passed after the year 1850, whether before or after the commencement of this Act [1st January, 1890], the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely,—

"The expression 'month' shall mean calendar month;

"The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure;

"The expressions 'oath' and 'affidavit' shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression 'swear' shall, in the like case, include affirm and declare.

Meaning of "County" in past Acts.

"Sect. 4. In every Act passed after the year 1850, and before the commencement of this Act [1st January, 1890], the expression 'county' shall, unless the contrary intention appears, be construed as including a county of a city, and a county of a town.

Meaning of "Parish."

"Sect. 5. In every Act passed after the year 1866, whether before or after the commencement of this Act [1st January, 1890], the expression 'parish' shall, unless the contrary intention appears, mean, as respects England and Wales, a place for which a separate poor-rate is or can be made, or for which a separate overseer is or can be appointed."

(See 29 & 30 Vict. c. 113, s. 18, repealed by 52 & 53 Vict. c. 63, s. 41, and Sched.)

Meaning of "County Court."

"Sect. 6. In this Act, and in every Act and Order of Council passed or made after the year 1846, whether before or after the commencement of this Act [1st January, 1890], the expression 'county court' shall, unless the contrary intention appear, mean, as respects England and Wales, a Court under the County Courts Act, 1888."

(See County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 142.)

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Meaning of "Sheriff Clerk, etc.," in Scotch Acts.

"Sect. 7. In every Act relating to Scotland, whether passed before or after the commencement of this Act [1st January, 1890], unless the contrary intention appears—

"The expression 'sheriff clerk' shall include steward clerk:

"The expressions 'shire,' 'sheriffdom,' and 'county' shall include any stewartry in Scotland."

Interpretation Clauses.

An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain.

An interpretation clause should be taken as declaring what may be comprehended within the term where the subject-matter and circumstances require that it should be so comprehended.

An interpretation clause is an aid to the interpretation of the statute in which they occur, and cannot affect the construction of other statutes, prior or subsequent.

"An interpretation clause is . . . . not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should."—*Reg.* v. *Cumbridgeshire* (1838), 7 A. & E. 480, at p. 491, Lord Denman, C. J.

"With regard to all these interpretation clauses, I understand them to define the meaning, supposing there is nothing else in the Act which is opposed to the particular interpretation. When a concise term is used, which is to include many other subjects besides the actual thing designated by the word, it must always be used with due regard to the true, proper and legitimate construction of the Act."—*Midland Rail. Co.* v. *Ambergate, Nottingham and Boston and Eastern Junction Rail. Co.* (1853), 10 Hare, 359, at p. 369, Turner, V.-C.

"These interpretation clauses are often the parts of the Act most difficult to be understood."—*Evelyn* v. *Whichcord* (1858), El. Bl. & El. 126, at p. 133; 27 L. J. M. C. 211, at p. 214, Crompton, J.

"Even for the purpose of the Act of Parliament [Bills of Sale

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Act, 1854 (17 & 18 Vict. c. 36)] it appears to me that the interpretation clause does no more than say, that where you find in the Act those words 'personal chattels' they shall, unless there be something repugnant in the context, or in the sense, include fixtures. What operation upon fixtures so covered by the expression 'personal chattels' the Act may have, must depend upon its particular provisions, and that interpretation clause can have no influence whatever upon the present question, nor can anything else in that statute, if it be true, as seems admitted at the Bar, that this is not a case legislated for in any other way by that statute."—*Mews* v. *Jacobs* (1875), L. R. 7 H. L. 481, at pp. 493, 494; 44 L. J. Ch. 481, at p. 486, Lord Selborne.

"Except in mathematics, it is difficult to frame exhaustive definitions of words; they must be construed with reference to the subject-matter to which they are applied."—*Wakefield Local Board* v. *Lee* (1876), 1 Ex. D. 336, at p. 343, Grove, J.

"I think an interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain."—*The Queen* v. *Pearce* (1880), 5 Q. B. D. 386, at p. 389; 49 L. J. M. C. 81, at p. 82, Lush, J.

"Definition clauses, as they are now termed, are nothing more than interpretation clauses, which is the older and, I think, the better name for them. They are aids to the interpretation of the statute in which they occur, and cannot affect the construction of other statutes, prior or subsequent. In some modern statutes these definitions have a very wide scope, and include subjects and things which have very little in common with the word defined. According to a recent Act of Parliament, a ship is identified with a factory for the purposes of the Act, but it would not follow that other statutes relating to shipping are to be applied to factories. Indeed, the usual form of such clauses is that 'in this Act' the words quoted shall have the meanings assigned to them."—*Lord Advocate* v. *Sprot's Trustees* (1901), 3 F. 440, at pp. 444, 445, Lord M'Laren.

Meaning of Expression.

"Shall include."

"An interpretation clause of this kind ['shall apply to and include'] is not meant to prevent the word receiving its ordinary,

popular, and natural sense whenever that would be properly applicable; but to enable the word as used in the Act, when there is nothing in the context or the subject-matter to the contrary, to be applied to some things to which it would not ordinarily be applicable."—*Robinson* v. *Local Board of Barton-Eccles* (1883), 8 App. Cas. 798, at p. 801; 53 L. J. Ch. 226, at p. 227, Earl of Selborne, L. C.

"The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."—*Dilworth* v. *Commissioners of Stamps*, [1899] A. C. 99, at pp. 105, 106; 68 L. J. P. C. 1, at p. 4, Lord Watson delivering the judgment of the Judicial Committee.

"Shall be deemed."

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to."—*Ex parte Walton* (1881), 17 Ch. D. 746, at p. 756; 50 L. J. Ch. 657, at p. 662, James, L. J. (cited with approval by Earl Cairns in *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, at pp. 455, 456; 53 L. J. Ch. 842, at p. 845).

"The Court is sometimes obliged by the legislature to put an interpretation on a word which it does not ordinarily bear when it has been enacted that something 'shall be deemed' to be something else."—*Brooks* v. *Baker and Others*, [1906] 1 K. B. 11, at p. 15; 75 L. J. K. B. 41, at p. 43, Darling, J.

See also "Statutory Fictions," *post*, p. 425.

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The Golden Rule.

The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency, but no further.

"I apprehend it is a rule in the construction of statutes, that, in the first instance, the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with any expressed intent or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged, so far as to avoid such inconvenience, but no farther."—*Warburton* v. *Loveland* (1828), 1 Hudson & B. Irish Cases, 623, at p. 648, Burton, J.

"Where the language of the Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."—*Warburton* v. *Loveland* (1831), 2 D. & Cl. (H. L.) 480, at p. 489 (opinion of the judges, per Tindal, L. C. J.).

"I am not sure whether we shall fulfil the intention of the legislature; it has often happened that we have been unable to do so throughout a series of decisions. Still, the rule of construction which the Court must follow is, to intend the legislature to have meant what they have actually expressed, unless a manifest incongruity would result from doing so, or unless the context clearly shows that such a construction would not be the right."—*Rex* v. *Banbury* (1834), 1 A. & E. 136, at p. 142, Parke, J.

"It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."—*Becke* v. *Smith* (1836), 2 M. & W. 191, at p. 195; 6 L. J. Ex. 54, at p. 56, Parke, B.

"The rule by which we are to be guided in construing Acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or

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manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done." *Percy* v. *Skinner* (1837), 2 M. & W. 471, at p. 47 . Parke, B. (See also *Abbey* v. *Dale* (1851), 11 C. B. 378, at p. 391; 20 L. J. C. P. 233 at p. 235, where Jervis, C. J., refers to this rule as the golden rule.)

"The rule of law, I take it, upon the construction of all statutes, ... is, whether they be penal or remedial, to construe them according to the plain, literal, and grammati meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act, or to some palpable and evident absurdity."—*Att.-Gen.* v. *Lockwood* (1842), 9 M. & W. 378 p. 398 Alderson, B.

"It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or an uniform series of decisions had already established a particular construction."—*Doe* d. *Ellis* v. *Owens* (1842), 10 M. & W. 514, at p. 521; 12 L. J. Ex. 53, at p. 56, Parke, B.

"The view which I take of the case is this: that whatever difficulty there may be in reconciling the cases on questions of this sort, or cases on analogous subjects, the great cardinal rule is that which is pointed out by Mr. Justice Barton, viz., to adhere as closely as possible to the literal meaning of the words. When once you depart from that canon of construction, you are launched into a sea of difficulties which it is difficult to fathom."—*Goudry* v. *Pinniger* (March 4, 5, 1852), 1 De G. M. & G. 502, at p. 505; 21 L. J. Ch. 405, at p. 406, Lord Cranworth, L. J.

"It is, however, true, that words which are plain enough in their ordinary sense may, when they would involve any absurdity, or inconsistency, or repugnance to the clear intentions of the legislature, to be collected from the whole of the Act or Acts *in pari materiâ* to be construed with it, or other legitimate grounds of interpretation, be modified or altered so as to avoid that absurdity, inconsistency, or repugnance, but no further; . . . . for then we may predicate that the words never could have been used by the framers of the law in such a sense."—*Miller* v. *Salomons* (April 19, 1852), 7 Ex. 475, at p. 546; 21 L. J. Ex. 161, at p. 191, Parke, B.

"In construing an Act of Parliament, our first business, I conceive, is to examine the words themselves which are used; and, if in these there be no ambiguity, it is seldom desirable to go further;

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and although from the common uncertainty of language we may very frequently be driven to ascertain the intention by a consideration of the preamble where it recites the object, or of the previous common law where the statute clearly alters or supersedes it, in order to settle the meaning of the enactment itself, yet the object still is only to ascertain the mind of the legislature as expressed in words; and when, in either of those ways, you have arrived at the meaning, I think nothing is more dangerous that to flinch from that conclusion, because we think the enactment is less wise or efficacious than it might have been made, or even wholly fails of its object. Perhaps the most efficacious mode of procuring good laws, certainly the only one allowable to a court of justice, is to act fully up to the spirit and language of bad ones, and to let their inconvenience be fully felt, by giving them their full effect."—*Pocock* v. *Pickering* (June 18, 1852), 18 Q. B. 789, at pp. 797, 798; 21 L. J. Q. B. 365, at p. 368, Coleridge, J.

"It must, however, be conceded that, where the grammatical construction is quite clear and manifest and without doubt, that construction ought to prevail, unless there be some strong and obvious reason to the contrary. But the rule adverted to is subject to this condition that, however plain the apparent grammatical construction of a sentence may be, if it be perfectly clear from the contents of the same document (and the same rule applies in the construction not only of an Act of Parliament, but of deeds, wills, and of any subject of a like nature), that the apparent grammatical construction cannot be the true one, then that which upon the whole is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it."—*Waugh* v. *Middleton* (1853), 8 Ex. 352, at p. 357; 22 L. J. Ex. 109, at p. 111, Pollock, C. B.

"We must, therefore, in this case have recourse to what is called the golden rule of construction, as applied to Acts of Parliament, viz., to give to the words used by the legislature their plain and natural meaning, unless it is manifest, from the general scope and intention of the statute, injustice and absurdity would result from so construing them."—*Mattison* v. *Hart* (1854), 14 C. B. 357, at p. 385; 23 L. J. C. P. 108, at p. 114, Jervis, C. J.

"I subscribe to every word of that [the rule laid down by Lord Wensleydale in *Becke* v. *Smith* (1836), 2 M. & W. 191, at p. 195; 6 L. J. Ex. 54, at p. 56, see *supra*], assuming the word 'absurdity' to mean no more than 'repugnance.' With that modification, it

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seems to me that the rule thus laid down is perfectly consistent with good sense and law."—*Christopherson* v. *Lotinga* (1864), 15 C. B. N. S. 809, at p. 813; 33 L. J. C. P. 121, at p. 123, Willes, J.

"The meaning of particular words in an Act of Parliament, to use the words of Abbott, C. J., in *Rex* v. *Hall* [(1822), 1 B. & C. 123, at p. 136], 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used.'"—*The Lion* (1869), L. R. 2 P. C. 525, at p. 530; 38 L. J. Ad. 51, at p. 54, Lord Romilly, M. R., delivering the judgment of the Judicial Committee.

"There is always some presumption in favour of the more simple and literal interpretation of the words of a statute, or other written instrument.

"The more literal construction ought not to prevail if (as the Court below has thought) it is opposed to the intentions of the legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."—*Caledonian Rail. Co.* v. *North British Rail. Co.* (1881), 6 App. Cas. 114, at pp. 121, 122, Lord Selborne, L. C. (cited and followed by Jessel, M. R., in *Ex parte Walton* (1881), 17 Ch. D. 746, at pp. 750, 751; 50 L. J. Ch. 657, at p. 659; and by Chitty, J., in *Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, at pp. 148, 149).

"Now, I believe there is not much doubt about the general principle. Lord Wensleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Grey* v. *Pearson* [(1857), 6 H. L. C. 61, at p. 106; 26 L. J. Ch. 473, at p. 481] in the following terms: 'I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.' I agree in that completely, but unfortunately in the cases in which

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there is real difficulty it does not help us much, because the cases in which there is real difficulty are those in which there is a controversy as to what the grammatical and ordinary sense of the words, used with reference to the subject-matter, is. To one mind it may appear that the most that can be said is that the sense may be what is contended by the one side, and that the inconsistency and repugnancy is very great, that you should make a great stretch to avoid such absurdity, and that what is required to avoid it is a very little stretch or none at all. To another mind it may appear that the meaning of the words is perfectly clear, that they can bear no other meaning at all, and that to substitute any other meaning would be, not to interpret the words used, but to make an instrument for the parties, and that the supposed inconsistency or repugnancy is perhaps a hardship—a thing which, perhaps, it would have been wiser to have avoided, but which we have no power to deal with. This present case is about as good an illustration of that as can very well be."—*Caledonian Rail. Co.* v. *North British Rail. Co.* (1881), 6 App. Cas. 114, at p. 131, Lord Blackburn (applied by Jessel, M. R., in *Ex parte Walton* (1881), 17 Ch. D. 746, at p. 751; 50 L. J. Ch. 657, at p. 659, and by Chitty, J., in *Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, at p. 148).

"I prefer to guide my judgment by the rule of construction laid down in *Warburton* v. *Loveland* [(1828), 1 Hudson & B. Irish Cases, 623, at p. 648], and so often quoted, approved of, and followed. Mr. Justice Burton there says: 'I apprehend it is a rule in the construction of statutes that in the first instance the grammatical sense of the words is to be adhered to. If that is contrary to, or inconsistent with, any expressed intention or declared purpose of the statute, or if it would involve any absurdity, repugnance, or inconsistency, the grammatical sense must then be modified, extended, or abridged so far as to avoid such an inconvenience, but no farther.'"—*Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, at p. 384; 52 L. J. Q. B. 505, at p. 521, Lord Fitzgerald.

"I have often heard Lord Wensleydale lay down that rule, which he quoted from a judgment of Burton, J., in Ireland [*Warburton* v. *Loveland* (1828), 1 Hudson & B. Irish Cases, 623, at p. 648], and I am now content to take it as a good rule, though I heard Crompton, J., say, in reference to it, that he did not set any value upon any golden rule, that they were all calculated to

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mislead people; and I am not sure that this will not result from what is put at the end of what I have just read, namely, that you are to abide by the grammatical and ordinary sense of the words unless that would lead to some absurdity. That last sentence opens a very wide door. I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another."—*Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, at pp. 464, 465; 53 L. J. Ch. 842, at p. 848, Lord Bramwell.

"It has been stated, on the authority of the Court of Appeal in Scotland [*Baird Trustees* v. *Inland Revenue* (1888), 25 Scottish Law Reporter, 533; 15 Ct. Sess. Cas., 4th Ser. 682], that where there is an imperial statute applicable to the three Kingdoms, it must be construed according to its popular meaning, not loosely or hypothetically, but as people of ordinary education and intellect would understand it. I should not state this quite in the same way, for I should apply the rule whether the statute to be construed were an imperial statute or not, unless there is something which obliged another construction to be put upon it. But then it is said that the words used in a statute may have acquired a technical or secondary meaning which must be adopted. I think in such a case it must be shown that they have obtained that meaning not in some particular district or with some limited body of persons, but with as large a body as would have to use them in respect of the subject-matter with which they deal. In the case of a statute, if it is one that deals with the whole of the United Kingdom, we should have to see if the technical meaning which has gained reception has done so with as large a body as that to which the statute applies, that is, with the educated people of Great Britain and Ireland. So that if we find the technical meaning accepted by a limited portion only of those people, that is not a sufficient acceptance to override the commonly accepted meaning of the words."—*The Queen* v. *Commissioners of Income Tax* (1888), 22 Q. B. D. 296, at p. 306; 58 L. J. Q. B. 196, at p. 199, Lord Esher, M. R.

"An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language as applied to the subject-matter, unless there is some very strong ground, derived from the context, or reason why it should not be so construed."—*Hornsey Local Board* v. *Monarch Investment Building*

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Society (1889), 24 Q. B. D. 1, at p. 5; 59 L. J. Q. B. 105, at p. 106, Lord Esher, M. R.

"I also think the true view of the construction of an Act which is to apply to England, Ireland, and Scotland alike is, that it ought to be construed according to the canon of construction laid down by the Court of Session in the case of *Baird's Trustees* v. *Lord Advocate* (1888), 15 Ct. Sess. Cas. (4th Ser.) 682. It is a rule which has been acted on, not only in respect of Taxing Acts, but of other enactments. Indeed, it is only part of a general principle of common sense which Mr. Justice Grose laid down in a rating case [*R.* v. *Hogg* (1787), 1 T. R. 721, at p. 728]: 'An universal law [which] cannot receive different constructions in different towns.'"—*Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, at p. 548; 61 L. J. Q. B. 265, at p. 272, Lord Halsbury, L. C.

"As a matter of general principle of construction I deprecate going outside the language of the statute to find some meaning for the words other than that which the words themselves in their ordinary and natural construction suggest."—*Igoe* v. *Shann*, [1903] A. C. 320, at p. 323; 72 L. J. K. B. 693, at p. 695, Earl of Halsbury, L. C.

"There is only one safe rule, I think, to apply in construing an Act of Parliament where we have nothing except the bare words, and that is to give them their natural meaning."—*Rex* v. *Judge Whitehorne*, [1904] 1 K. B. 827, at p. 830; 73 L. J. K. B. 344, at p. 346, Wills, J.

Dictionary Meaning.

"The definition of a street is thus laid down in the Imperial Dictionary: 'a street is properly a paved way or road; but in usage, any way or road in a city having houses on one or both sides.' Now, tried by that test, this is a street: it has houses on both sides of it; and therefore, in common parlance, it is a street. It is really a street."—*Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395, at p. 408; 46 L. J. Ch. 105, at p. 109, Jessel, M. R.

"I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of Courts of law that words should be taken to be used in their ordinary sense, and we therefore sent for instruction to these books (Johnson and Webster)."—*The Queen* v. *Peters* (1886), 16 Q. B. D. 636, at p. 641; 55 L. J. M. C. 173, at p. 175, Lord Coleridge, C. J.

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"The real question here is the meaning of the word 'dilute,' and giving it its ordinary dictionary meaning of 'to thin, weaken, reduce the strength of,' I think the appellant clearly diluted Barclay's beer. There is no manifest incongruity in giving this meaning to the word, and the context clearly shows that this construction is right."—*Crofts* v. *Taylor* (1887), 19 Q. B. D. 524, at pp. 528, 529; 56 L. J. M. C. 137, at p. 140, Huddleston, B.

Context.

The plainest words may be controlled by a reference to the context.

"It is, I apprehend, in accordance with the general rule of construction in every case, that you are not only to look at the words, but you are to look at the context, the collocation, and the object of such words relating to such a matter, and interpret the meaning according to what would appear to be the meaning intended to be conveyed by the use of the words under such circumstances."—*Rein* v. *Lane* (1867), L. R. 2 Q. B. 144, at p. 151; 36 L. J. Q. B. 81, at p. 85, Blackburn, J.

"Again, there is no doubt a rule, applicable to Acts of Parliament as well as to other legal instruments, that you may control the plainest words by a reference to the context. But then, as has been said very often, you must have a context even more plain, or at least as plain—it comes to the same thing—as the words to be controlled."—*Bentley* v. *Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588, at p. 592; 46 L. J. Ch. 284, at p. 286, Jessel, M. R.

"It is beyond dispute, too, that we are entitled, and indeed bound, when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the legislature, and which may serve to show that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."—*Colquhoun* v. *Brooks* (Aug. 9, 1889), 14 App. Cas. 493, at p. 506; 59 L. J. Q. B. 53, at p. 59, Lord Herschell.

"An Act of Parliament is to be construed according to the ordinary meaning of the words in the English language, as applied to the subject-matter, unless there is some very strong ground, derived from the context or reason, why it should not be so construed."—*Hornsey Local Board* v. *Monarch Investment Building*

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Society (Nov. 1889), 24 Q. B. D. 1, at p. 5; 59 L. J. Q. B. 105, at p. 106, Lord Esher, M. R.

"I do not think that the case can be put higher than that the language of the section is equally consistent with either view; and, that being so, the Court is entitled to look to the other parts of the Act in order to arrive at the true construction of it. I should have thought that, as a matter of common sense, without any authority, this would have been clear, but we have been referred to a passage in the judgment of Lord Herschell in the case of *Colquhoun* v. *Brooks* [(1889), 14 App. Cas. 493, at p. 506; 59 L. J. Q. B. 53, at p. 59] which is exactly in point, and shows that a Court is entitled, in construing the terms of any enactment found in a statute, to consider any other sections of the Act which throw light upon the intention of the legislature, where the provision of the enacting section is not in itself absolutely clear."—*Garbutt* v. *Durham Joint Committee*, [1904] 2 K. B. 514, at pp. 521, 522; 73 L. J. K. B. 789, at p. 792, Collins, M. R.

Expressio unius est exclusio alterius. (Co. Litt. 210a.)

"The rule, *expressio unius est exclusio alterius*, is, I think, applicable here. I cannot see why the legislature should have provided for the joint occupation of a building and land, and not for that of two different buildings, if it had been intended that the latter should confer the franchise."—*Dewhurst* v. *Fielden* (1845), 8 Scott, N. R. 1013, at p. 1017; 14 L. J. C. P. 126, at p. 128, Tindal, C. J.

"A general rule of construction of Acts of Parliament is *expressio unius est exclusio alterius*."—*Blackburn* v. *Flavelle* (1881), 6 App. Cas. 628, at p. 634; 50 L. J. P. C. 58, at p. 61, Sir Barnes Peacock, delivering the judgment of the Judicial Committee. (See *ante*, pp. 78, 129, and *post*, p. 458.)

General Words and Expressions.

"Their lordships conceive that one of the safest guides to the construction of sweeping general words, which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute

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to a like limitation or qualification."—*Blackwood* v. *The Queen* (1882), 8 App. Cas. 82, at p. 94; 52 L. J. P. C. 10, at p. 14, Sir Arthur Hobhouse, delivering the judgment of the Judicial Committee.

Restriction of Language.

"It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation."—*Cox* v. *Hakes* (1890), 15 App. Cas. 506, at p. 529; 60 L. J. Q. B. 89, at p. 100, Lord Herschell.

Ejusdem Generis Doctrine—Noscitur a Sociis.

General words in a statute are primâ facie *to be taken in their usual sense.*

General words following specific words in a statute are primâ facie *to be taken in their general sense unless the reasonable interpretation of the statute requires them to be used in a sense limited to things* ejusdem generis *with those which have been specifically mentioned before.*

If the particular words exhaust the whole genus *the general word must refer to some larger* genus.

"This Act is general, and extends to all persons of what estate or degree soever, and as well to women as to men: for the words be—'if any person,' and *generalia verba sunt generaliter intelligenda*."—3 *Inst.* c. 24, p. 76.

"General words in a statute must receive a general construction, unless you can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction, and not by arbitrary addition or retrenchment."—*Beckford* v. *Wade* (1805), 17 Ves. 87, at p. 91, Sir William Grant, M. R.

"If general words follow an enumeration of particular cases, such general words are, by another rule of construction, holden to apply only to cases of the same kind as those which are expressly mentioned."—*Fletcher* v. *Lord Sondes* (1826), 3 Bing. 501, at p. 580, Best, C. J.

"Where general words follow particular ones, the rule is to

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construe them as applicable to persons *ejusdem generis*."—*Sandiman* v. *Breach* (1827), 7 B. & C. 96, at p. 100, Lord Tenterden, C. J.

"Large as these words undoubtedly are, we apply to them the ordinary rules for construing Acts of Parliament, laid down by Mr. Dwarris [Part ii. vol. ii.], and acted upon in all times, but nowhere more clearly stated than by Lord Tenterden, in *Sandiman* v. *Breach* [(1827), 7 B. & C. 96, at p. 100]."—*Kitchen* v. *Shaw* (1837), 6 Ad. & E. 729, at p. 734, Lord Denman, C. J.

"The general principle laid down in all the cases which have been cited is that, where particular words are followed by general words, the latter must be construed as *ejusdem generis* with the former."—*Reg.* v. *Edmundson* (1859), 2 El. & El. 77, at p. 83; 28 L. J. M. C. 213, at p. 215, Lord Campbell.

"According to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislature."—*Reg.* v. *Cleworth* (1864), 4 B. & S. 927, at p. 932; 33 L. J. M. C. 79, at p. 80, Sir A. J. E. Cockburn, L. C. J.

"That case [*Reg.* v. *Payne* (1866), L. R. 1 C. C. 27; 35 L. J. M. C. 170] falls within the rule that, if the particular words exhaust the whole *genus*, the general word must refer to some larger *genus*."—*Fenwick* v. *Schmalz* (1868), L. R. 3 C. P. 313, at p. 315; 37 L. J. C. P. 78, at p. 80, Willes, J.

"The maxim that general words are limited in their applications is constantly acted upon. The maxim itself is that expressed by Bacon [Max. Reg. 10]:—'For all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person.' Where they follow an enumeration of particular things, they do not introduce things of a higher and different character: see *Archbishop of Canterbury's Case* (1596), 2 Co. Rep. 46 a; *Casher* v. *Holmes* (1831), 2 B. & Ad. 592. In the judgment in *Reg.* v. *Edmundson* [(1859), 2 E. & E. 77, at p. 83; 28 L. J. M. C. 213, at p. 215], Lord Campbell lays down the rule thus: 'The general principle laid down in all the cases which have been cited is, that where particular words are followed by general words, the latter must be construed as *ejusdem generis* with the former.' And in the judgment in *Reg.* v. *Cleworth* [(1864), 4 B. & S. 927, at p. 932; 33 L. J. M. C. 79, at p. 80], the present Lord Chief Justice [Sir A. J. E. Cockburn] used the following lan-

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guage: 'Then there is a general expression, "other person whatsoever"; but according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis*.'"—*Gunnestad* v. *Price* (1875), L. R. 10 Ex. 65, at pp. 69, 70; 44 L. J. Ex. 45, at pp. 45, 46, Cleasby, B.

"When a specific enumeration concludes with a general term, that term is, by a well-known canon of construction, held to be limited to *alia similia*."—*Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694, at p. 706, Lord Watson.

"I think that, as a matter of ordinary construction, where several words are followed by a general expression, as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. For instance, 'horses, oxen, pigs, and sheep, from whatever country they may come,' the latter words would apply to horses as much as to sheep."—*Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, at p. 808; 53 L. J. Ch. 1075, at p. 1087, Lord Bramwell.

"The proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons and things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has properly jurisdiction."—*Colquhoun* v. *Heddon* (1890), 25 Q. B. D. 129, at p. 135; 59 L. J. Q. B. 465, at p. 467, Lord Esher, M.R.

"I think the proper way of construing those words is to apply to them what is known as the *ejusdem generis* doctrine, or, as it is sometimes expressed, the doctrine '*noscitur a sociis*,' which is that, where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the 'preceding words.'"—*Smelting Company of Australia* v. *Commissioners of Inland Revenue*, [1897] 1 Q. B. 175, at p. 181; 66 L. J. Q. B. 137, at p. 140, Lopes, L. J.

"The rule of construction which is called the *ejusdem generis* doctrine, or sometimes the doctrine '*noscitur a sociis*,' is one which, I think, ought to be applied with great caution; because it implies a departure from the natural meaning of words, in order

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to give them a meaning which may or may not have been the intention of the legislature"—*Ibid.*, at p. 182; L. J. at p. 140, Rigby, L. J.

"I, of course, recognize the usual rule observed in the construction of Acts of Parliament, that general, following specific, words should be limited to things *ejusdem generis* with those before enumerated; but this rule of construction must be controlled by another equally general one, that Acts of Parliament ought, like wills or other documents, to be construed so as to carry out the object sought to be accomplished by them, so far as it can be collected from the language employed: see *Harrison* v. *Blackburn* (1864), 17 C. B. N. S. 678, at pp. 690—693, and *Campbell* v. *Prescott* (1808), 15 Ves. 500, at p. 503."—*Hawke* v. *Dunn*, [1897] 1 Q. B. 579, at p. 586; 66 L. J. Q. B. 364, at p. 369, Hawkins, J.

"I can see no reason why the rule of construction as to the interpretation of general words in a statute following particular or more limited words should not be applied. That rule requires an interpretation of the general words limiting them to matters or things of the same kind, as to the mischief being dealt with, as the previous words; but an interpretation as wide as the limitation just described will admit."—*Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242, at pp. 256, 257; 66 L. J. Q. B. 601, at p. 609, Lord Esher M. R.

"Surely the doctrine of '*noscitur a sociis*' or '*ejusdem generis*' is applicable here. That doctrine may be thus expressed, namely, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."—*Ibid.*, at p. 266; L. J. at p. 614, Lopes, L. J.

"The rule that, where there are general words following particular and specific words all of one *genus*, the general words are presumed to be restricted to the same *genus* as the particular words, is a familar rule of construction. In my judgment, that familiar rule is based upon a principle which applies to the section now before us (45 & 46 Vict. c. 75. s. 3). In this section there is a specific proposition followed by the general words 'or otherwise.' Now it seems to me that, just as where there are general words following particular words, the general words are presumed to be restricted to the same *genus* as the particular words; so where there is a specific proposition followed by general words, the general words ought to be presumed, unless there are some words

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which lead to a contrary conclusion, to be restricted to the matter that is covered by the specific proposition. The fact is that general words in a section of this sort can hardly avoid being ancillary in their nature. When one looks at a clause like this it is quite plain that the words 'or otherwise' are ancillary to the specific proposition which precedes them, and it seems to me that where there are ancillary words of that sort it is a sound and wholesome rule not to give such a construction to the ancillary words as will wipe out or do away with the specific proposition with which the clause commences."—*In re Clark*, [1898] 2 Q. B. 330, at pp. 336, 337; 67 L. J. Q. B. 759, at p. 762, Vaughan Williams, L. J.

"A very familiar canon of construction that, where you have a word which may have a general meaning wider than that which was intended by the legislature, when you find it associated with other words which show the category within which it is to come, it is cut down and overridden according to the general proposition which is familiarly described as the *ejusdem generis* principle."—*Ystradyfodwig and Pontypridd Main Sewerage Board* v. *Benstead*, [1907] A. C. 264, at p. 268; 76 L. J. K. B. 876, at p. 878, Earl of Halsbury.

Relative Words.

Semper proximo antecedenti refertur: Co. Lit. 30 b.

Ad proximum antecedens fiat relatio nisi impediatur sententia. Noy. Max. 9th ed. p. 1.

Words of reference are in general referred to that to which the context appears properly to attract to it—to the last sensible antecedent.

"In those [criminal proceedings], as in all other cases, the question as to the intention of words of reference must depend upon the context."—*Thellusson* v. *Woodford* (1799), 4 Ves. 227, at p. 330, Sir R. P. Arden, M. R.

"I adopt the expression of Chief Baron Macdonald in giving the opinions of the judges to this House (House of Lords), in the case of *Thellusson* v. *Woodford* (1805), 4 B. & P. N. R. 354, at pp. 392, 393. The Chief Baron is there speaking of a will, but the observation is, I think, equally applicable to a statute. The Chief Baron says 'that construction is to be adopted which will support the general intent. The grammatical rule of referring qualifying words to the last of the several antecedents, is not even supposed by grammarians themselves to apply, when [illegible]

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intent of a writer or speaker would be defeated by such a confined application of them. Reason and common-sense revolt at the idea of overlooking the plain intent which is declared in the context, viz., that they' (that is, qualifying words) 'should be applicable to such classes as require them, and as to the others, to consider them as surplusage.'"—*Eastern Counties, &c. Companies* v. *Marriage* (1860), 9 H. L. Cas. 32, at p. 44; 31 L. J. Ex. 73, at p. 78, Channell, B.

(See also "Relative Words," *ante*, p. 66.)

Same Words in different Parts of a Statute.

Primâ facie *the same words must be interpreted in the same sense in the different parts of a statute.*

"We disclaim altogether the assumption of any right to assign different meanings to the same words in an Act of Parliament on the ground of a supposed general intention in the Act."—*The Queen* v. *Poor Law Commissioners* (1838), 6 A. & E. 56, at p. 68, Lord Denman, C. J.

"It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament or other document."—*Courtauld* v. *Legh* (1869), L. R. 4 Ex. 126, at p. 130; 38 L. J. Ex. 45, at p. 49, Cleasby, B.

"I take it also as a general rule in construing statutes that the same words must be *primâ facie* construed in the same sense in the different parts of the statute."—*Spencer* v. *Metropolitan Board of Works* (1882), 22 Ch. D. 142, at p. 149, Chitty, J.

"The first observation to be made on section 33 [of the Metropolitan Street Improvement Act, 1877 (40 & 41 Vict. c. cexxxv.)] is, that we ought to find out its meaning, if we can, from the section itself. If we can do that we need not have recourse to the use of the word 'take' in the other sections of the Act. If we cannot, then I agree with the principle which was laid down by Mr. Justice Chitty, that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and that, therefore, we may look through the other sections to see in what sense the word is there used."—*Ibid.*, at p. 162, Jessel, M. R.

"Many instances occur of a departure from the cardinal rule that the same word should always be employed to mean the same thing."—*Thames Conservators* v. *Smeed, Dean & Co.*, [1897] 2 Q. B. 334, at p. 346; 66 L. J. Q. B. 716, at p. 723, Chitty, L. J.

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Different Words in the same Statute.

Primâ facie *the use of different words must be interpreted in the same statute or in statutes dealing with the same subject-matter as indicating a change of meaning.*

"Where the legislature in the same sentence uses different words, we must presume that they were used in order to express different ideas."—*The King* v. *Great Bolton* (1828), 8 B. & C. 71, at p. 74, Lord Tenterden, C. J.

"More than a hundred years ago Acts of Parliament were very short, and were to be applied to a variety of cases; but now they are very long, and some of them are framed with all the beauties of style to be gathered from the office of the special pleader, and the office of the conveyancer also."—*Reg.* v. *Frost* (1840), 9 C. & P. 129, at p. 186, Lord Abinger, C. B.

"It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning, and it would be as well if those who are engaged in the preparation of Acts of Parliament would bear in mind that that is the real principle of construction. But in drawing Acts of Parliament, the legislature, as it would seem, to improve the graces of the style, and to avoid using the same words over and over again, constantly change them."—*Hudley* v. *Perks* (1866), L. R. 1 Q. B. 444, at p. 457; 35 L. J. M. C. 177, at p. 180, Blackburn, J.

"The employment of different language in the same Act may, in some cases, help to show that the legislature had in view different objects, but a change in language cannot be relied on as furnishing a general rule of construction, and the weight to be given to such changes must depend on a view of the entire enactments in which they occur, and the degree of ambiguity existing in the language to be construed."—*Lackess* v. *Sullivan* (1881), 6 App. Cas. 373, at pp. 382, 383; 50 L. J. P. C. 33, at p. 38, Sir Montague E. Smith, delivering the judgment of the Judicial Committee.

"It is a rule of construction that, where in the same Act of Parliament, and in relation to the same subject-matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally, and with some definite purpose; *primâ facie*, such an alteration would be considered intentional."—

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Guardians of Parish of Brighton v. *Guardians of Strand Union*, [1891] 2 Q. B. 156, at p. 167; 60 L. J. M. C. 105, at p. 112, Lord Esher, M. R.

"That form [of a bill of sale in the schedule to the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43)] provides that the witness's name, address, and 'description' shall be given. Former Acts dealing with the same subject-matter spoke of the 'description of the occupation' of the witness. In such a case the canon of construction is that, unless a strong reason to the contrary exists, such an alteration of language on the part of the legislature must be taken to have been intentional."—*Sims* v. *Trollope & Sons*, [1897] 1 Q. B. 24, at p. 26; 66 L. J. Q. B. 11, at pp. 12, 13, Lord Esher, M. R.

"So far as relates to the questions raised, the Act [Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.)] is not a specimen of good drafting. It is, on the face of it, not the production of one firm hand; probably many hands took part in the drafting before the Act assumed its final form. Many instances occur of a departure from the cardinal rule that the same word should always be employed to mean the same thing."—*Thames Conservators* v. *Smeed, Dean & Co.*, [1897] 2 Q. B. 334, at p. 346; 66 L. J. Q. B. 716, at p. 723, Chitty, L. J.

Phrases in Statutes in pari materia.

"The several Statutes of Limitations being all *in pari materiâ* ought to receive a uniform construction, notwithstanding any slight variations of phrase, the object and intention being the same."—*Murray* v. *East India Co.* (1821), 5 B. & Ald. 204, at p. 215, Abbott, C. J.

Words not relating to any Art or Science—Popular Meaning.

"The meaning of particular words in Acts of Parliament, as well as in other instruments, is to be found, not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion on which they are used, and the object which is intended to be attained."—*Rex* v. *Hall* (1822), 1 B. & C. 123, at p. 136, Abbott, C. J.

"My lords, I have always thought that, where we are to put a

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construction upon an Act of Parliament which does not relate, or profess to relate, to some particular subject of art or science, we should understand the words in the Act in the same way as they are understood in the common language of mankind."—*Rex* v. *Winstanley* (1831), 1 Cr. & J. 434, at p. 444, Lord Tenterden, C. J.

"It seems to me, first that words of popular meaning must be taken in their popular sense unless there is something in the context to alter it; and secondly, that if a word in its popular sense, and read in an ordinary way, is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act."—*Wandsworth Board of Works* v. *United Telephone Co.* (1884), 13 Q. B. D. 904, at pp. 919, 920; 53 L. J. Q. B. 449, at p. 457, Bowen, L. J.

(See also *post*, p. 351, "Statutes" *in pari materiâ*, and *post*, p. 433, "Legislative Expositions.")

Technical Language.

Primâ facie *technical words must have their technical meaning given to them, unless the contrary manifestly appears.*

"When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears. That is the rule of construction of technical expressions, even when occurring in a will."—*Burton* v. *Reevell* (1847), 16 M. & W. 307, at p. 309; 16 L. J. Ex. 85, at p. 86, Parke, B. (cited by Fry, L. J., in *The Queen* v. *Commissioners of Income Tax* (1888), 22 Q. B. D. 296, at p. 309; 58 L. J. Q. B. 196, at p. 201).

"*Primâ facie* it appears to me that the rule applies, that technical words must have their technical meaning given to them, unless you can find something in the context to overrule them."—*Laird* v. *Briggs* (1881), 19 Ch. D. 22, at p. 34, Jessel, M. R.

"It seems to me that when you have to construe a technical expression introduced into the legal vocabulary by a series of statutes forming one code, you naturally turn to the code for light and help. And the key to the true meaning of the expression will, I think, be found in the latest development of legislation rather than in its earliest effort."—*Lord Advocate* v. *Stewart*, [1902] A. C. 344, at p. 351; 71 L. J. P. C. 66, at p. 68, Lord Macnaghten.

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"It was strenuously argued by the defendants' counsel that we ought not to deal with the construction of the Finance Acts in a strict technical manner, but that, clearing our heads of the technicalities of conveyancing and the terms of art used by conveyancers, we should approach the matters involved from the point of view—I will not say of the man in the street, but of an ordinary well-educated English gentleman not a lawyer. I do not think, however, that that suggestion must be carried too far; for, after all, the Acts have been framed by draftsmen acquainted with conveyancing terms, and they must, in the nature of things, be addressed to a large extent to a section of the public familiar with those terms; and I do not think that it would be right or possible, in dealing with the provisions of the Finance Acts, to ignore altogether the technicalities of conveyancing, and to disengage one's mind entirely from all acquaintance with the technical terms which conveyancers use, and in which likewise to some extent the draftsmen of Acts of Parliament couch the provisions which they frame."—*Att.-Gen.* v. *Glossop*, [1907] 1 K. B. 163, at pp. 172, 173; 76 L. J. K. B. 199, at p. 205, Collins, M. R.

Legal Sense.

"In general, the words of an Act of Parliament are to be understood in the sense in which they are *commonly* understood, unless there be anything requiring the legal sense to be adopted."—*The King* v. *Towcrow* (1830), 1 B. & Ad. 465, at p. 479, Parke, J.

"In construing an Act of Parliament, I apprehend every word must be understood according to the legal meaning, unless it shall appear from the context that the legislature has used it in a popular or more enlarged sense: that is the general rule; but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large or popular sense must plainly appear."—*Stephenson* v. *Higginson* (1852), 3 H. L. Cas. 638, at p. 686, Lord Truro.

"It always requires the strong compulsion of other words in an Act to induce the Court to alter the ordinary meaning of a well-known legal term."—*The Queen* v. *Slator* (1881), 8 Q. B. D. 267, at p. 272; 51 L. J. Q. B. 246, at p. 248, Denman, J.

"On the whole, therefore, it appears that, at the date of the passing of the Act of 1875 [the Conspiracy and Protection of

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Property Act, 1875 (38 & 39 Vict. c. 86)], the legislature had already in an earlier statute defined what it meant by seamen, that the explanation of their exclusion from the later Act must be sought in the fact that they were already the subject of special enactments giving another remedy for some of the matters included in the later statute, and that no ground of reason or common sense can be found for excluding from the operation of the Act in question the whole class of seafaring men not actually engaged in sea service."—*Reg.* v. *Lynch*, [1898] 1 Q. B. 61, at p. 66; 67 L. J. Q. B. 59, at p. 62, Lord Russell, C. J.

Superfluous Words.

"A settled canon of construction, namely, that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. (Bac. Abr., tit. Statute I. sub-s. 2.)"—*The Queen* v. *Bishop of Oxford* (1879), 4 Q. B. D. 245, at p. 261; 48 L. J. Q. B. 609, at p. 620, Cockburn, C. J., delivering the judgment of the Court (Cockburn, C. J., Field and Manisty, JJ.).

"I adhere to an opinion expressed by myself in the House of Lords more than ten years ago in *Gites* v. *Melsom* [(1873), L. R. 6 H. L. 24, at p. 33; 42 L. J. C. P. 122, at p. 125], which, unless I am much deceived, I have also heard in substance expressed by great masters of the law, that 'nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning, only because they are superfluous.'"—*Hough* v. *Windus* (1884), 12 Q. B. D. 224, at p. 229; 53 L. J. Q. B. 165, at pp. 167, 168, Lord Coleridge, C. J., reading judgment of Lord Selborne, L. C.

Changing Words.

Where the context shows that a mistake has been made by using one word for another word, the mistake may be corrected.

"There have been frequently cases on the construction of statutes where the Courts have held 'or' to mean 'and,' taking the rest of the sentence in which the word 'or' occurred, the object and intention being prohibition, and the two things prohibited being coupled by the word 'or.'"—*Metropolitan Board of Works* v. *Steed* (1881), 8 Q. B. D. 445, at p. 448; 51 L. J. M. C. 22, at p. 24, Grove, J.

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"I know no authority for such a proceeding [turning 'or' into 'and'], unless the context makes the necessary meaning of 'or' 'and,' as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will, upon one construction, entirely alter the meaning of the sentence, unless some other part of the same statute, or the clear intention of it, requires that to be done, as in the case of *Fowler* v. *Padget* (1798), 7 T. R. 509. . . . It may, indeed, be doubted whether some of the cases of turning 'or' into 'and,' and *vice versâ*, have not gone to the extreme limit of interpretation."—*Mersey Docks and Harbour Board* v. *Henderson Brothers* (1888), 13 App. Cas. 595, at p. 603; 58 L. J. Q. B. 152, at pp. 155, 156, Lord Halsbury, L. C.

For an instance of the word "and" read as "or," see *Staniland Industrial Corn and Provision Society* v. *Staniland Urban Council*, [1906] 1 K. B. 233; 75 L. J. K. B. 190.

"The case comes within the words used by Lord Halsbury in *Mersey Docks and Harbour Board* v. *Henderson* (1888), 13 App. Cas. 595, at p. 603; 58 L. J. Q. B. 152, at p. 155, where he said that, in construing a statute, 'or' could be turned into 'and' if the context made that the necessary meaning."—*Walker* v. *York Corporation*, [1906] 1 K. B. 724, at p. 728; 75 L. J. K. B. 413, at p. 414, Darling, J.

Mistakes.

It must be assumed that the legislature makes no mistakes.

"It is our duty neither to add to nor take from a statute, unless we see good grounds for thinking that the legislature intended something which it has failed precisely to express."—*Everett* v. *Wells* (1841), 2 M. & G. 269, at p. 277; 10 L. J. C. P. 81, at p. 84, Tindal, C. J.

"We cannot assume a mistake in an Act of Parliament. If we did so, we should render many Acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of this Act [Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61, s. 3)] may have made a mistake. If so, the remedy is for the legislature to amend it. But we must construe Acts of Parliament as they are, without regard to consequences, except in those cases where the words are so ambiguous that they may be construed in two senses, and even then we must not regard what happened in Parliament, but look to what is within the four corners of the Act, and to the grievance intended to be remedied.

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or, in penal statutes, to the offence intended to be corrected."—*Richards* v. *McBride* (1881), 8 Q. B. D. 119, at pp. 122, 123; 51 L. J. M. C. 15, at p. 16, Grove, J.

"That, in fact, the language of an Act of Parliament may be founded on some mistake, and that words may be clumsily used, I do not deny. But I do not think it is competent to any Court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a Court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes. It must be assumed that it has intended what it has said, and, I think, any other view of the mode in which one must approach the interpretation of a statute, would give authority for an interpretation of the language of an Act of Parliament, which would be attended with the most serious consequences."—*Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, at p. 549; 61 L. J. Q. B. 265, at p. 272, Lord Halsbury, L. C.

Casus Omissus.

"A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws."—*Jones* v. *Smart* (1785), 1 T. R. 44, at p. 52, Buller, J.

"We cannot aid the legislature's defective phrasing of the Act; we cannot add, and mend, and, by construction, make up deficiencies which are left there."—*Crawford* v. *Spooner* (1846), 6 Moore, P. C. 1, at p. 9, Lord Brougham.

"Where the conclusion is merely that there is a *casus omissus* for which the legislature has not provided, to alter the ordinary rules of interpretation, upon the principle of a duty due to abstract justice, is simply to legislate, and not to interpret."—*Ex parte The Vicar of St. Sepulchre's* (1864), 33 L. J. Ch. 372, at p. 375, Lord Westbury, L. C.

"It seldom happens that the framer of an Act of Parliament or the legislature has in contemplation all the cases which are likely to arise, and the language therefore seldom fits every possible case. Whenever the case is clearly within the mischief, the words must be read so as to cover the case if by any reasonable construction they can be read so as to cover it, though the words may point more exactly to another case; this must be done rather than make such a case a *casus omissus* under the statute."—*Scott* v. *Legg* (1876), 2 Ex. at pp. 42, 43; 46 L. J. M. C. 117, at

p. 120, Cleasby, B., delivering the judgment of the Court (Cleasby, B., and Grove, J.).

"We ought not to create a *casus omissus* by interpretation save in some case of strong necessity."—*Mersey Docks and Harbour Board* v. *Henderson Brothers* (1888), 13 App. Cas. 595, at p. 607; 58 L. J. Q. B. 152, at p. 158, Lord Fitzgerald.

(See also *post*, p. 333, "Extension of Ordinary Meaning.")

Insensible Phrase.

"It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated."—*Stone* v. *Corporation of Yeovil* (1876), 1 C. P. D. 691, at p. 701; 45 L. J. C. P. 657, at pp. 660, 661, Brett, J.

(See also *ante*, p. 70, "Insensible Words and Phrases," and p. 148, "Supplying or Rejecting Words.")

Extraordinary Results.

"Whatever I may think of the extraordinary results which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must read them according to the ordinary rules of construction, that is, literally, unless there is something in the context or in the subject to prevent that reading."—*Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395, at p. 405, Jessel, M. R.

Statutory Language Operating Unreasonably or Absurdly.

Where the language of a statute is clear and unambiguous it must be interpreted in its ordinary sense, even though it lead to manifest absurdity, repugnance, mischief or injustice.

Where the language of a statute is susceptible of a reasonable and also of an unreasonable interpretation, the former must prevail.

Where the language of a statute is general, doubtful or obscure, it may, if susceptible of it, be modified or varied by interpretation, in order to avoid manifest absurdity, repugnance, mischief or injustice.

"If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms

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of the constitution that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule do none of them prove that where the main object of a statute is unreasonable, the judges are at liberty to reject it, for that were to set the judicial power above that of the legislature, which would be subversive of all government. But where some collateral matter arises out of the general words and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it."—1 *Bl. Com.*, p. 91.

"It is a good rule in the construction of Acts of Parliament that the judges are not to make the law what they may think reasonable, but to expound it according to the common sense of its words."—*Biffin* v. *Yorke* (1843), 6 Scott, N. R. 222, at p. 235; 12 L. J. C. P. 162, at p. 165, Cresswell, J.

"If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."—*Abley* v. *Dale* (1851), 11 C. B. 378, at p. 391; 20 L. J. C. P. 233, at p. 235, Jervis, C. J.

"Where by the use of clear and unequivocal language, capable only of one construction, anything is enacted by the legislature, we must enforce it, although, in our own opinion, it may be absurd or miscellaneous. But if the language employed admit of two constructions, and according to one of them the enactment would be absurd and mischievous, and according to the other it would be reasonable and wholesome, we surely ought to put the latter construction upon it as that which the legislature intended."—*The Queen* v. *Skeen* (1859), 28 L. J. M. C. 91, at p. 94, Lord Campbell, C. J.

"Those established rules [rules of interpretation] no doubt admit of your putting a secondary meaning upon words, where the ordinary and primary signification would lead to some absurdity or some impossibility."—*Ex parte The Vicar of St. Sepulchre's* (1864), 33 L. J. Ch. 372, at p. 375, Lord Westbury, L. C.

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"No doubt the general rule is that the language of an Act of Parliament is to be read according to its ordinary grammatical construction, unless so reading it would entail some absurdity, repugnancy, or injustice. One recognizes that rule where the repugnance arises between the words of the section to be construed and those of some other section in the same Act, or in some other act which is *in pari materiâ* with it. But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act of Parliament in order to bring it in accordance with his views as to what is right or reasonable. No such duty is imposed upon him."—*Abel* v. *Lee* (1871), L. R. 6 C. P. 365, at p. 371; 40 L. J. C. P. 154, at p. 158, Willes, J.

"I hold it to be an essential canon of construction that if the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail."—*Boon* v. *Howard* (1874), L. R. 9 C. P. 277, at p. 308; 43 L. J. C. P. 115, at p. 130, Keating, J. (See also *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at pp. 775, 776; 47 L. J. Q. B. 193, at pp. 208, 209, Lord Gordon.)

"It was said in argument for the plaintiff in error that we ought to give effect to words in a statute, though they may lead to what we may consider to be an absurdity or incongruity, and leave it to the legislature to correct the mischief which may result from the fair interpretation of the words. Undoubtedly, where Parliament has made use of words which have no application unless they are construed in a way which would lead to an absurdity, it is not for this Court to correct what has been done by Parliament. But it is a very different thing where Parliament has used language of a generic or general character applying to various things. In such a case, if one sees that by applying the language to something which is not within the mischief contemplated by the Act it will produce manifest absurdity or inconvenience, then, according to the rule of construction, which is well known, and for which it is unnecessary to refer to any authority, it is the duty of the Court so to construe the general term as not to apply it to that which will have such a result."—*Yates* v. *The Queen* (1885), 14 Q. B. D. 648, at pp. 659, 660; 54 L. J. Q. B. 258, at pp. 264, 265, Cotton, L. J.

"If the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is, in my opinion, good reason for

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believing that the construction which leads to such results cannot be the true construction of the statute."—*The Queen* v. *Clarence* (1888), 22 Q. B. D. 23, at p. 65; 58 L. J. M. C. 10, at p. 32, Lord Coleridge, C. J.

"At the same time, I am far from denying that if it can be shown that a particular interpretation of a taxing statute would operate unreasonably in the case of a foreigner sojourning in this country, it would afford a reason for adopting some other interpretation, if it were possible, consistent with the ordinary canons of construction."—*Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493, at p. 501; 59 L. J. Q. B. 53, at p. 58, Lord Herschell.

"You are not so to construe the Act of Parliament [Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85)] as to reduce it to rank absurdity. You are not to attribute to general language used by the legislature in this case, any more than any other case, a meaning that would not only not carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its objects."—*The Duke of Buccleuch* (1889), 15 P. D. 86, at p. 96, Lindley, L. J.

"It seems to me that the words are very plain and apt for the purpose for which they are designed by the legislature, and it would be, to my mind, a most perverse proceeding to construe these words in any different sense, because, by some improper use of the power thus given, it might be made mischievous in its operation. If it were mischievous in its operation, and necessarily mischievous, it would, to my mind, be no argument, if the statute has expressly authorized the thing to be done."—*Lock* v. *Queensland Investment and Land Mortgage Co.*, [1896] A. C. 461, at p. 467; 65 L. J. Ch. 798, at p. 799, Lord Halsbury, L. C.

"To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify your lordships in refusing to hold the appellant responsible for acts for which an Act of Parliament clearly declares he is to be held liable."—*Shepheard* v. *Broome*, [1904] A. C. 342, at p. 346; 73 L. J. Ch. 608, at p. 611, Lord Lindley.

(See also *post*, "Rational and Beneficial Interpretation," "Argument from Inconvenience," "Injury to Third Parties," "Interpretation producing Injustice," pp. 343—349.)

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Permissive, Directory, or Enabling Words.

"It has been so often decided as to have become an axiom, that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice."—*The Queen* v. *Tithe Commissioners for England and Wales* (1849), 14 Q. B. 459, at p. 474; 19 L. J. Q. B. 177, at p. 182, Coleridge, J., delivering the judgment of the Court (Wightman, Erle and Coleridge, JJ.).

Optional Language.

"We are of opinion that this section [46 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20)], which, in the ordinary meaning of the language used, directs one thing or the other to be done, and does not say which, clearly gives to the party who is to do the act the election to do which he pleases."—*Reg.* v. *South Eastern Rail. Co.* (1853), 4 H. L. Cas. 471, at p. 478, Parke, B. (in the name of the judges answering their lordships' questions).

Imperative or Permissive Phrases.

"It has been asked, what language will make a statute imperative if the 54 Geo. III. c. 84 (The Quarter Sessions Act, 1814), be not so? Negative words would have given it that effect, but those used are in the affirmative only [viz., 'the quarter sessions for the Michaelmas quarter shall in every year be holden']."—*The King* v. *The Justices of Leicester* (1827), 7 B. & C. 6, at pp. 12, 13, Lord Tenterden, C. J.

The words "It shall and may be lawful" import primâ facie *a discretion.*

"The meaning to be attributed to the phrase 'it shall and may be lawful' in a statute, must depend upon the subject-matter in every instance. *Primâ facie* these words import a discretion; and they must be construed as discretionary unless there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are meant to be imperative."—*Re Newport Bridge* (1859), 2 El. & El. 377, at p. 380; 29 L. J. M. C. 52, at p. 53, Crompton, J.

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When a statute authorizes the doing of a thing for the sake of justice or the public good, the word "may" or the phrase "it shall be lawful" means "shall."

"So long ago as the year 1693 it was decided in the case of *The King* v. *Barlow* (1693), Salk. 609, that when a statute authorizes the doing a thing for the sake of justice or the public good, the word 'may' means 'shall'; and that rule has been acted upon to the present time. In Bacon's Abridgment, title Statute (I.), the rule is so laid down, as also in Dwarris on Statutes, p. 264. Speaking of facultative words, it is there stated that where a statute directs the doing of a thing 'for the sake of justice' or 'for the public benefit,' the word 'may' shall be construed as 'shall' or 'must,' and, of course, the same rule will apply to the words 'it shall be lawful.'"—*The Queen* v. *Bishop of Oxford* (1879), 4 Q. B. D. 245, at pp. 258, 259; 48 L. J. Q. B. 604, at p. 619, Cockburn, C. J., delivering the judgment of the Court (Cockburn, C. J., Field and Manisty, JJ.).

"Shall," "may," and "shall and may be lawful."

"When a statute declares that something 'shall' be done, the language is considered imperative, and the thing must be done; where the word 'may' is used, the language is, as a general rule, permissive. No doubt in many cases the phrase 'shall and may be lawful' has been construed as imperative by the Courts, having regard to the object of the provision and to the context and the rule above mentioned, and it seems that they have so construed the word 'may' standing alone, as in *Reg.* v. *Barclay* [(1881), 8 Q. B. D. 306; 51 L. J. M. C. 27]."—*Davies* v. *Evans* (1882), 9 Q. B. D. 238, at pp. 242, 243; 51 L. J. M. C. 132, at p. 136, Grove, J.

The words "it shall be lawful" are naturally permissive and enabling only, unless coupled with a duty, when they are obligatory.

"The words 'it shall be lawful' are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done,

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something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide, on an application for a mandamus. And the words 'it shall be lawful' being, according to their natural meaning, permissive and enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which, according to the principles I have mentioned, creates the obligation."—*Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214, at pp. 222, 223; 49 L. J. Q. B. 577, at p. 578, Earl Cairns, L. C.

"The words 'it shall be lawful' are distinctly words of permission only—they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is not whether they mean something different, but whether, regard being had to the person so enabled—to the subject-matter, to the general objects of the statute, and to the person or class of persons for whose benefit the power may be intended to have been conferred—they do, or do not, create a duty in the person on whom it is conferred, to exercise it."—*Ibid.*, at pp. 229, 230; L. J., at p. 582, Lord Penzance.

"The language (certainly found in authorities entitled to very high respect) which speaks of the words '*it shall be lawful*,' and the like, when used in public statutes, as ambiguous and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is, in my opinion, inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential and never (in themselves) significant of any obligation."—*Ibid.*, at p. 235; L. J., at p. 585, Lord Selborne.

(The two last preceding quotations are cited by Bruce, J., in *The Queen* v. *Judge Turner*, [1897] 1 Q. B. 445, at p. 448; 66 L. J. Q. B. 417, at p. 418.)

"I do not think the words 'it shall be lawful' are in themselves

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ambiguous at all. They are apt words to express that a power is given; and as, *primâ facie*, the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that, *primâ facie*, they are equivalent to saying that the donee may do it; but if the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty, it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that because there is a duty cast on the donee of a power to exercise it, that mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee." —*Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214, at p. 241; 49 L. J. Q. B. 577, at p. 588, Lord Blackburn.

"The words are 'it shall be lawful,' &c. These words may, no doubt, under certain circumstances, impose a duty as well as confer a power, but it is for those who contend that they do both to make good their contention. Nothing can be clearer on this point than the judgment of Lord Cairns in *Julius* v. *Bishop of Oxford* (1880), 5 App. Cas. 214, at pp. 223, 224; 49 L. J. Q. B. 577, at p. 579." —*Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*, [1898] 2 Ch. 603, at p. 607; 67 L. J. Ch. 657, at p. 659, Lindley, M. R.

When the terms of a statute are permissive only, the discretion thereby conferred is intended to be exercised in strict conformity with private rights.

"Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general power committed to them shall be put into execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer licence to commit nuisance in any place which might be selected for that purpose."—*Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, at p. 213; 50 L. J. Q. B. 353, at pp. 364, 365, Lord Watson.

Obligatory or Directory Provisions.

"In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given,

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be held only directory."—*Barker* v. *Palmer* (1881), 8 Q. B. D. 9, at p. 10; 51 L. J. Q. B. 110, Grove, J.

(See also *post*, p. 434, "Directory or Imperative Statutes.")

Restriction of Language.

"When from the nature of the provision contained in an Act of Parliament it is clear that a restriction must be put upon the ordinary and literal signification of some word or expression, and it is uncertain from anything to be found in the Act itself, or in the circumstances judicially cognisable under which the provision was inserted, what the exact character and extent of that restriction is, it is the duty of the Courts to put no greater restriction than the nature of the provision and the subject-matter to which it relates necessarily impose."—*Sullivan* v. *Mitcalfe* (1880), 5 C. P. D. 455, at pp. 459, 460; 49 L. J. C. P. 815, at pp. 828, 829, Thesiger, L. J.

"In this proviso the legislature have used language of the widest kind—'in all cases'—so wide that if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the legislature, construed literally, involves such consequences, the Court has, over and over again, acted upon the view that the legislature could not have intended to produce a result which would be palpably unjust and would revolt the mind of any reasonable man, unless they have manifested that intention by express words. The Court will not infer such an intention from the use of merely general words. Some limit must, therefore, be put upon the words of the proviso, and they must be limited with reference to the subject-matter which is treated of."—*In re Brockelbank* (1889), 23 Q. B. D. 461, at pp. 462, 463; 58 L. J. Q. B. 375, at p. 376, Lord Esher, M. R.

"It seems to us that the canon of construction laid down in *Stradling* v. *Morgan* [(1560), Plowd. 199, at p. 205a], and cited by the Lord Chancellor [Halsbury] in the recent case of *Cox* v. *Hakes* [(1890), 15 App. Cas. 506, at p. 518; 60 L. J. Q. B. 89, at p. 94], may be invoked with regard to the present controversy. 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and

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those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, whose expositions have always been founded on the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion.'"—*In re Standard Manufacturing Company*, [1891] 1 Ch. 627, at pp. 646, 647; 60 L. J. Ch. 292, at pp. 300, 301. Bowen, L. J., delivering the judgment of the Court.

(See also *ante*, p. 310, "General Words and Expressions.")

Extension of Ordinary Meaning.

If there are circumstances which show that words in a statute must have been used by the legislature in a sense larger than their ordinary meaning, the Court is bound to read them in that sense.

The mere fact that it may have been better to extend a statute to other cases, or that it can apparently be gathered that such an intention was probable, is not enough to justify the putting of an interpretation upon the statute which would necessitate reading into it words extending the statute to such cases.

"It has long been settled that the language of modern Acts of Parliament cannot be extended beyond its proper and natural meaning in order to meet particular cases."—*Pinkerton* v. *Easton* (1873), L. R. 16 Eq. 490, at p. 492; 42 L. J. Ch. 878, at p. 879, Lord Selborne, L. C.

"But it is a familiar rule of construction that, although the Court are *primâ facie* bound to read the words of an Act according to their ordinary meaning in the language, if there are other circumstances which show that the words must have been used by the legislature in a sense larger than their ordinary meaning, the Court is bound to read them in that sense."—*Barton* v. *Ross* (1890),

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24 Q. B. D. 381, at p. 389; 59 L. J. Q. B. 183, at p. 186, Lord Esher, M. R.

"I think that counsel for the appellants was perhaps right in saying that sect. 14 [of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.)] was probably intended to cover such a case as the present, and probably was also intended to cover the case, not merely of the erection of new buildings, but of an extension of old buildings, although it has not been necessary to argue that question to-day. But the mere fact that it may have been better to extend the section to those cases, or that one can apparently gather that such an intention was probable, is not enough to justify us in putting a construction upon the section which would necessitate reading into it the words which the appellants' counsel has invited us to read in. It is clear to my mind that we should, as the Court of Queen's Bench said in *Underhill* v. *Langridge* ((1859), 29 L. J. M. C. 65, at p. 66), 'be taking upon ourselves the office of the legislature.' We should be doing that which the Court, in *In re Suczam, Ex parte Davis* ((1876), 3 Ch. D. 463; 45 L. J. Bank. 137), declined to do with respect to a provision which, it was suggested, ought to be read into sect. 23 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). James, L. J., said (at p. 472; L. J. at p. 138): 'That is a provision which might perhaps be very properly made by the legislature; but, to my mind, to insert it in this way by implication would not be to construe the Act of Parliament, but to alter it; it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the legislature has thought fit to make with respect to such contracts.' I am the more strongly driven to this conclusion because the proceeding here is penal, involving penal consequences, and without making the alteration in sect. 14 which we are asked to make, it could not be prosecuted at all. I have certainly always understood the rule to be that where there is an enactment which may entail penal circumstances, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."—*London County Council* v. *Aylesbury Dairy Co.*, [1898] 1 Q. B. 106, at pp. 108, 109; 67 L. J. Q. B. 24, at p. 26, Wright, J.

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Implied Words.

"Every day I see the necessity of not importing into statutes words which are not to be found there."—*King* v. *Burrell* (1840), 12 A. & E. 460, at p. 468, Patteson, J.

"It is not easy to conceive that the framer of that Act [Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21), s. 4], when he used the word 'expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily and naturally implies is expressed thereby."—*Charlton* v. *Lings* (1868), L. R. 4 C. P. 374, at p. 387; 38 L. J. C. P. 25, at p. 31, Willes, J.

"That [the implication suggested by counsel] is a provision which might perhaps be very properly made by the legislature; but, to my mind, to insert it in this way by implication would not be to construe the Act of Parliament, but to alter it, or might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the legislature has thought fit to make with respect to such contracts."—*In re Suczum, Ex parte Davis* (1876), L. R. 3 Ch. D. 463, at p. 472; 45 L. J. Bank. 137, at p. 138, Jam[illegible]

"Powers—I do not say [illegible]ame terms precisely, but to the same effect—are by implication conferred upon the Board [of Works] such as were in express terms conferred by the Act of 1877. It is a very lamentable way of legislating, that one should be driven to get at the meaning of these Acts by removing difficulties (as far as can be done) by construction, rather than that the intention of the legislature should be clearly expressed upon the face of the Act."—*Wigram* v. *Fryer* (1887), 36 Ch. D. 87, at pp. 98, 99; 56 L. J. Ch. 1098, at p. 1103, North, J.

(See also *post*, p. 471, "Repeal by Implication.")

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Section VI.

EFFECTS, CONSEQUENCES AND RESULTS OF INTERPRETATION OF STATUTES.

Effect on Common Law.

The common law gives place to a statute where they plainly differ.

"It is a maxim in the common law, that a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law."—2 *Inst.* 200.

"Statutes are not presumed to make any alteration in the common law, further or otherwise than the Act does expressly declare."—*Arthur* v. *Bokenham* (1708), 11 Mod. 150, Trevor, C. J.

"It is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law."—*The Queen* v. *Morris* (1867), L. R. 1 C. C. R. 90, at p. 95; 36 L. J. M. C. 84, at p. 87, Byles, J.

"It is right to bear in mind that, as Lord Coke says, 'It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, doth not take away the

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common law,' 2 Inst. 200. Affirmative words may no doubt be used so as to imply a negative, see Plowden, Com. 113, but I take it the general principle is that thus laid down by Cresswell, J., in *The Eastern Archipelago Co.* v. *Reg* (1853), 2 E. & B. 857, at p. 888; 23 L. J. Q. B. 82, at p. 96, 'that to make the words giving an express liberty or right have the effect of controlling or limiting that which would otherwise exist, they must be very plain.'"—*Riche* v. *Ashbury Railway Carriage Co.* (1874), L. R. 9 Ex. 224, at p. 265; 43 L. J. Ex. 177, at p. 205, Blackburn, J. (Brett and Grove, JJ., concurring) (cited and applied by Lord Hatherley in the same case on appeal (1875), L. R. 7 H. L. 653, at pp. 685, 686; 44 L. J. Ex. 185, at p. 205).

"Blackstone, the highest constitutional and legal authority with reference to the law of England, when treating of statute law, states [vol. i. p. 89], 'Where the common law and a statute differ, the common law gives place to the statute.'"—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 775; 47 L. J. Q. B. 193, at p. 208, Lord Gordon.

"The Acts in question [Merchant Shipping Acts] seem to me to be valuable ones, and the fact that they interfere with a plaintiff's common law rights is no reason why they should be construed differently from any other Acts of Parliament."—*The Warkworth* (1883), 9 P. D. 20, at p. 21; 53 L. J. P. 4, at p. 5, Butt, J.

"Where an affirmative statute is open to two constructions, that construction ought to be preferred which is consonant with the common law."—*Rex* v. *Salisbury (Bishop of)*, [1901] 1 Q. B. 573, at p. 577; 70 L. J. Q. B. 423, at p. 427, Wills, J.

"A general Act must not be read as repealing the common law relating to a special and particular matter unless there is something in the general Act to indicate an intention to deal with that special and particular matter."—*Ibid.* at p. 579; L. J. at p. 429, Channell, J.

Effect on Jurisdiction.

The jurisdiction of the Supreme Courts cannot be taken away except by express language or necessary implication.

"There can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament."—*Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, at p. 500, Lord Campbell.

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"The general rule undoubtedly is, that the jurisdiction of Superior Courts is not taken away except by express words or necessary implication."—*Albon* v. *Pyke* (1842), 4 M. & G. 421, at p. 424, Tindal, C. J.

"No rule is better understood than that the jurisdiction of a Superior Court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament."—*Oram* v. *Brearey* (1877), 2 Ex D. 346, at p. 348; 46 L. J. Ex. 481, at p. 482, Pollock, B.

Effect on Customs.

Customs, or rights of a similar description, are not to be taken away by inference or without distinct words.

"There is no doubt that, as a general rule, customs or rights of a similar description are not to be taken away by inference or without distinct words."—*Green* v. *The Queen* (1876), 1 App. Cas. 513, at p. 535, Lord Cairns, L. C.

Effect on Pre-existing Rights.

The giving of a new right does not of necessity destroy a previously existing right.

Statutes do not take away existing private rights except by express words, or by plain implication, or necessary intendment.

"I do not dispute the general proposition that an affirmative statute giving a new right does not of itself and of necessity destroy a previously existing right. But it has that effect if the apparent intention of the legislature is that the two rights should not exist together."—*O'Flaherty* v. *M'Dowell* (1857), 6 H. L. Cas. 142, at p. 157, Lord Cranworth, L. C.

"When a statute is passed creating new rights, it ought, if possible, to be so construed as not to extinguish existing rights."—*Watton* v. *Watton* (1866), L. R. 1 P. & M. 227, at p. 228; 35 L. J. Mat. Cas. 95, at p. 95, Sir J. P. Wilde.

"Now, we agree with the principle of law stated by Sir Roundell Palmer at the outset, that vested rights are not to be taken away without express words or necessary intendment or implication."—*Randolph* v. *Milman* (1868), L. R. 4 C. P. 107, at p. 113; 38 L. J. C. P. 81, at pp. 83, 84, Kelly, C. B., delivering the judgment of

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the Court (Kelly, C. B., Bramwell, Channell, and Pigott, BB., and Lush and Hannen, JJ.).

"The canon of construction applicable to such a statute [Dominion Act, 37 Viet. c. 16] is, that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words or by plain implication, that it was the intention of the legislature to do so. That principle was affirmed in *Barrington's Case* [(1611), 4 Coke, p. 416, Part VIII. 138 a], and was recognized in the recent case of *The River Wear Commissioners* v. *Adamson* [(1877), 2 App. Cas. 743; 47 L. J. Q. B. 193]. The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that, in order to take away the right, it is not sufficient to show that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right; it must also be shown that the legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights."—*Western Counties Rail. Co.* v. *Windsor and Annapolis Rail. Co.* (1882), 7 App. Cas. 178, at pp. 188, 189; 51 L. J. P. C. 13, at p. 18, Lord Watson, delivering the judgment of the Judicial Committee.

"The recognized rule that statutes should be interpreted if possible so as to respect vested rights."—*Hough* v. *Windus* (1884), 12 Q. B. D. 224, at p. 237; 53 L. J. Q. B. 165, at p. 172, Bowen, L. J.

"In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."—*In re Cano* (1889), 43 Ch. D. 12, at p. 17, Bowen, L. J. (cited by Dr. Tristram in *Lee* v. *Hartrey*, [1898] P. 63, at p. 75).

"*The North Eastern Railway* v. *Crossland* (1863), 32 L. J. Ch. 353, does not stand alone. It is one of a series of cases of which *Great Western Railway* v. *Cefn Cribbwr Brick Co.*, [1894] 2 Ch. 157; 63 L. J. Ch. 500, is another, which affirms a principle that legislation will not be construed as interfering with existing rights unless a clear intention to do so can be gathered from the language used."—*Reg.* v. *London and North Western Railway*, [1899] 1 Q. B. 921, at p. 944; 68 L. J. Q. B. 685, at p. 697, Collins, L. J.

"Their lordships are also influenced by the consideration that the effect of the appellant's construction would be to take away the respondent's property without any compensation. Such an inten-

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tion should not be imputed to the legislature unless it be expressed in unequivocal terms. This principle has frequently been recognized by the Courts of this country as a canon of construction, and was approved and acted on by Lord Watson in delivering the judgment of this Board in *Western Counties Rail. Co.* v. *Windsor and Annapolis Rail. Co.* (1882), 7 App. Cas. 178, at p. 188; 51 L. J. P. C. 43, at p. 48."—*Commissioner of Public Works (Cape Colony)* v. *Logan*, [1903] A. C. 355, at pp. 363, 364; 72 L. J. P. C. 91, at p. 95, Lord Davey, delivering the judgment of the Privy Council.

(See also *post*, "Statutes interfering with Private Rights and Interests," "New Right or Liability and its Remedy," and "Same Offence with different Punishments.")

Effect on Contracts.

"Where the question is, whether a covenant be repealed by Act of Parliament? this is the difference, viz., where H. covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant. So, if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed. [Vide Dyer, 27, pl. 278.] But if a man covenants not to do a thing which then was unlawful, and an Act comes and makes it lawful to do it, such Act of Parliament does not repeal the covenant."—*Brewster* v. *Kitchell* (1698), Salk. p. 198, *per cur.* (cited by Malins, V.-C., in *Nevington Local Board* v. *Cottingham Local Board* (1879), 12 Ch. D. 725, at p. 731; 48 L. J. Ch. 226, at p. 229).

"I think every contract, which does not *expressly* provide to the contrary, must be considered as made with reference to the existing state of the law; and if, by the intervention of the legislature, a change is made in the law, which in any degree affects the contract, such contract, made without some clear and distinct reference to the prospect or possibility of a change in the law, does not hold with reference to the state of things as altered by the new law. I am not aware there is any authority which expressly decides this, but also I am not aware that there is any authority to the contrary. And I think the intervention of the legislature, in altering the situation of the contracting parties, in principle, is analogous to a convulsion of nature, against which parties may provide; but if

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they have not provided, it would generally be considered as excepted out of the contract."—*Oswald* v. *Berwick* (1854), 3 E. & B. 353, at p. 678; 23 L. J. Q. B. 321, at p. 331, Pollock, C. B.

"I find in Maxwell on the Interpretation of Statutes [1st ed. 1875], p. 184, in a section headed, 'Construction against impairing obligations, or permitting advantage from one's own wrong,' the principle resulting from the various authorities there collected expressed as follows:—'On the general principle of avoiding injustice and absurdity, any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute, or impair an obligation of his contract by his own act, or otherwise to profit by his own wrong.' Of this the author gives many instances."—*Gowan* v. *Wright* (1886), 18 Q. B. D. 201, at p. 204; 56 L. J. Q. B. 131, at p. 132, Lord Esher, M. R.

(See also *post*, "Avoiding Statutes" and "Effect of Repeal.")

Effect on Wills.

"A testator who knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law."—*Hasluck* v. *Pedley* (1874), L. R. 19 Eq. 271, at p. 274; 44 L. J. Ch. 143, at p. 144, Sir G. Jessel, M. R.

"For purposes of construction [of a will] those rules which prevailed when the will was made and with reference to which wills may be fairly presumed to have been framed must be observed. The reasoning of the Lord Chancellor [Lord Selborne] in *Jones* v. *Ogle* (1873), L. R. 8 Ch. 192, at p. 195; 42 L. J. Ch. 334, at p. 336 upon this point appears to us unanswerable, and we do not regard the case of *Hasluck* v. *Pedley* (1874), L. R. 19 Eq. 271; 44 L. J. Ch. 143 as really inconsistent with this view. In that very case the Master of the Rolls (Sir G. Jessel) said (L. R. at p. 274; L. J. at p. 144): 'The Act does not affect the meaning of the will; it only alters its legal operation.' The construction is not altered, though the legal effect may be different, as was pointed out by Lord Justice Fry in *Constable* v. *Constable* (1879), 11 Ch. D. 681, at p. 686; 48 L. J. Ch. 621, at p. 622."—*In re March* (1884), 27 Ch. D. 166, at p. 169; 54 L. J. Ch. 143, at p. 144, Lindley, L. J.

"An extension, whether by statute or otherwise, of a testator's

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power of disposition in the interval between the making of his will and of his death does not alter the meaning of his language, although such extension will necessarily enlarge the legal effect of that language by making it apply to more objects than it previously would have applied to. This is quite consistent with *Jones* v. *Ogle* (1873), L. R. 8 Ch. 192; 41 L. J. Ch. 633, and *In re March* (1884), 27 Ch. D. 166; 54 L. J. Ch. 143."—*In re Bridger; Brompton Hospital for Consumption* v. *Lewis*, [1894] 1 Ch. 297, at p. 300; 63 L. J. Ch. 186, at p. 188, Lindley, L. J.

Equitable Interpretation.

"It is frequent in our books, that an Act made of late time shall be taken within the equity of an Act made long time before." *Vernon's Case*, 4 Rep. 4a (cited by Cozens-Hardy, L. J., in *In re Bolton Estates*, [1903] 2 Ch. 461, at p. 474; 72 L. J. Ch. 605, at p. 609).

"Where some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are in decency to conclude that this circumstance was not foreseen by the Parliament; and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it."—1 *Bl. Com.* p. 91.

"As for construing the statute by equity, equity is synonymous to the meaning of the legislator."—*The King* v. *Williams* (1758), 1 Wm. Bl. 93, at p. 95, Mansfield, C. J., *et tot. cur.*

"Lord Chief Baron Comyn says, 'A penal statute shall not be extended by equity, and the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.'"—*Fletcher* v. *Lord Sondes* (1826), 3 Bing. 501, at pp. 580, 581, Best, C. J.

"It is by no means unusual in construing a statute to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial. It is a mode of construction as familiar to every legal person, as expounding the statute by equity."—*Dean and Chapter of York* v. *Middleburgh* (1828), 2 Y. & J. 196, at p. 215, Alexander, L. C. B.

"If there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you simply adhere to the words of the statute."—*Partington* v. *Att.-Gen.* (1869), L. R. 4 H. L. 100, at p. 122; 38 L. J. Ex. 205, at p. 217, Lord Cairns.

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Rational and beneficial Interpretation.

"It is the duty of the Court to find out what the meaning of the legislature is, and to attach a rational and beneficial meaning if possible, rather than an irrational and an injurious meaning, to the statutes which have been passed by the legislature."—*Mersey Steel and Iron Co.* v. *Naylor* (1882), 9 Q. B. D. 648, at p. 660; 51 L. J. Q. B. 576, at p. 584, Jessel, M. R.

The more reasonable of two interpretations to be adopted.

"I quite agree that no Court is entitled to depart from the intention of the legislature as appearing from the words of the Act, because it is thought unreasonable. But where two constructions are open, the Court may adopt the more reasonable of the two."—*Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694, at p. 702, Lord Blackburn (cited by Farwell, J., in *City of London Electric Lighting Co., Ltd.* v. *London Corporation* (1900), 82 L. T. 530, at p. 532).

"The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, viz., that if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat*."—*Curtis* v. *Stovin* (1889), 22 Q. B. D. 513, at p. 517; 58 L. J. Q. B. 174, at p. 175, Bowen, L. J.

"When an Act is open to two constructions, that construction ought to be adopted which is the more reasonable, and the better calculated to give effect to the expressed intention."—*Llewellyn* v. *Vale of Glamorgan Railway*, [1898] 1 Q. B. 473, at p. 478; 67 L. J. Q. B. 305, at p. 308, Chitty, L. J.

"A Court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said."—*Cooke* v. *Charles A. Vogeler Co.*, [1901] A. C. 102, at p. 107; 70 L. J. Q. B. 181, at p. 183, Earl of Halsbury, L. C.

(See also *ante*, p. 324, "Statutory language operating unreasonably or absurdly.")

Argument from Inconvenience.

The argument from inconvenience is not to be lightly entertained.

"We have been strongly pressed with the inconveniences that may result from this construction of the statute. We are not insensible to them; but the only proper effect of that argument is to make the Court cautious in forming its judgment. We cannot, on that account, put a forced construction on the Act of Parliament (57 Geo. III. c. 99)."—*Hall* v. *Franklin* (1838), 3 M. & W. 259, at p. 275, Lord Abinger, C. B.

"The general rule for the construction of Acts of Parliament is that the words are to be read in their popular, natural, and ordinary sense, giving them a meaning to their full extent and capacity, unless there is reason upon their face to believe that they were not intended to bear that construction, because of some inconvenience which could not have been absent from the mind of the framers of the Act, which must arise from the giving them such large sense."—*Birks* v. *Allison* (1862), 13 C. B. N. S. 12, at p. 23; 32 L. J. C. P. 51, at p. 55, Byles, J.

"The argument from inconvenience is not to be lightly entertained, and never for the purpose of construing a statute which is clear in its terms, and indicates, unmistakeably, the purpose of the legislature. When the words are obscure, and the purpose, therefore, more or less doubtful, it may help to a right understanding of them."—*Hutton* v. *Harper* (1876), 1 App. Cas. 464, at p. 474, Lord O'Hagan.

"With regard to inconvenience, I think that that is a most dangerous doctrine. I agree if the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not in its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning."—*The Queen* v. *Overseers of Tonbridge* (1884), 13 Q. B. D. 339, at p. 342; 53 L. J. Q. B. 488, at p. 491, Brett, M. R.

"In considering what is the true construction of an Act, I am not so much affected as some judges are by the consequences which may arise from different constructions. Of course, if words are ambiguous, and one construction leads to enormous inconvenience, and another construction does not, the one which leads to least

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inconvenience is to be preferred."—*Reid* v. *Reid* (1886), 31 Ch. D. 402, at p. 407; 55 L. J. Ch. 294, at p. 297, Cotton, L. J.

"I am not fond of the argument *ab inconvenienti*; but I think it may sometimes legitimately be used when the argument on the other side leads to a result so unjust as that which has been contended for here. I do not think the legislature can have intended to bring about such a result, and one has to see whether some other view is not the true one."—*Aston Tube Works, Ltd.* v. *Dunbell*, [1904] 1 K. B. 535, at p. 541; 73 L. J. K. B. 298, at p. 213, Wills, J.

(See also *post*, p. 387, "Convenience and Inconvenience.")

Injury to Third Parties.

"On principle it is certainly desirable, in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties with whose interests the statute need not and does not profess to directly deal."—*East and West India Dock Co.* v. *Hill* (1882), 22 Ch. D. 14, at p. 23; 52 L. J. Ch. 11, at p. 17, Lord Selborne, L. C. (cited and applied by Lord Field, delivering the judgment of the Judicial Committee (Earl Selborne, Lord Watson, Lord Field and Sir Barnes Peacock) in *Railton* v. *Wood* (1900), 15 App. Cas. 363, at p. 367).

Interpretation producing Injustice.

The legislature must not be supposed to intend to do a palpable injustice.

In a matter of positive law abstract justice requires or justifies no departure from the established rules of interpretation.

Where the language of a statute is clear and unambiguous it must be interpreted in its ordinary sense even though it lead to manifest injustice.

Where the language of a statute is capable of two interpretations, one of which works manifest injustice and the other works no injustice, the latter must prevail.

Where the language of a statute is doubtful or obscure, it may, if susceptible of it, be modified or varied in order to avoid a manifest injustice.

"If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning."—*Abley* v. *Dale* (1851), 11 C. B. 378, at p. 391; 20 L. J. C. P. 233, at p. 235, Jervis, C. J.

"Where the meaning of a statute is plain and clear, we have nothing to do with its policy or impolicy, its justice or injustice, its being framed according to our views of right or the contrary. If the meaning of the language used by the legislature be plain and clear, we have nothing to do but to obey it, to administer it as we find it; and I think, to take a different course is to abandon the office of a judge, and to assume the province of legislation."—*Miller* v. *Salomons* (1852), 7 Ex. 475, at p. 560; 21 L. J. Ex. 161, at p. 197, Pollock, C. B.

"The question depends on the construction of the Act of Parliament, and I think we ought to give the Act its ordinary meaning, and carry out to its full extent that which the legislature intended. Even if the result of such a construction be attended with injustice, we must deal with the statute as we find it, instead of endeavouring to tamper with it and give it what is supposed to be a construction more consonant with justice. If an enactment be unreasonable or improper, it is the legislature who ought to interfere and set it right. In my opinion a great deal of mischief has resulted from giving a forced construction to Acts of Parliament for the purpose of carrying out the supposed justice of the case."—*Ornamental Pyrographic Woodwork Co.* v. *Brown* (1863), 2 H. & C. 63, at p. 69; 23 L. J. Ex. 190, at p. 192, Martin, B.

"The Vice-Chancellor [Kindersley] is of opinion, that what he denominates the abstract justice of the case, requires this interpretation. I cannot concur in that reasoning. I think it is impossible to take those words apart from the context; and I cannot admit the principle, that in a matter of positive law, abstract justice requires or justifies any departure from the established rules of interpretation. Those established rules, no doubt, admit of your putting a secondary meaning upon words, where the ordinary and primary signification would lead to some absurdity or some

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impossibility. But where the conclusion is merely that there is a *casus omissus*, for which the legislature has not provided, to alter the ordinary rules of interpretation, upon the principle of a duty due to abstract justice, is simply to legislate, and not to interpret." —*Ex parte The Vicar of St. Sepulchre's* (1864), 33 L. J. Ch. 372, at p. 375, Lord Westbury, L. C.

"It was once said,—I think in Hobart [in *Day* v. *Savadge*, Hob. 87, 'Even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself; for *jura naturæ sunt immutabilia*, and they are *leges legum*']—that, if an Act of Parliament was to create a man judge in his own case, the Court might disregard it. That *dictum*, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by Parliament with the consent of the Queen, Lords, and Commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."—*Lee* v. *Bude and Torrington Junction Rail. Co.* (1871), L. R. 6 C. P. 576, at p. 582; 40 L. J. C. P. 285, at p. 289, Willes, J.

"No doubt when a case of hardship is pointed out in a statute, it makes the construction which leads to it more improbable than if it led to a reasonable and just condition of things."—*Rushy* v. *Newson* (1875), L. R. 10 Ex. 322, at p. 329; 44 L. J. Ex. 143, at p. 144, Bramwell, B.

"Now I think it will be seen, as to the first point for which he [the counsel] contended, that he did not bring it within the rule which is applicable to construction when you are relying on the doctrine of injustice, which rule, I apprehend, is this: where a statute is capable of two constructions, one of which will work manifest injustice, and the other will work no injustice, you are to assume that the legislature intended that which would work no injustice. But where the injustice relied upon may be called, if it is injustice at all, injustice to one class, and the opposite construction would apply the same kind of injustice to another class, then this is no argument at all; neither is it any argument unless the injustice is manifest, so that it must have been present to the mind of those who were passing the Act of Parliament."—*The Queen* v.

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Monck (1877), 2 Q. B. D. 544, at pp. 554, 555; 46 L. J. M. C. 251, at p. 257, Brett, J. A.

"I think also that there is a general rule of construction of statutes which is applicable to this matter, namely, that unless you are obliged to do so, you must not suppose that the legislature intended to do a palpable injustice."—*Ex parte Corbett* (1880), 14 Ch. D. 122, at p. 129; 49 L. J. Bk. 74, at p. 77, Brett, L. J.

"It is the duty of judges in all cases to give fair and full effect to Acts of Parliament without regard to the particular consequence in the special case, and not to indulge in conjecture as to what the legislature would have done if a particular case had been presented to their notice. We first of all have to see what the Act of Parliament says, and then apply it to the case, and I do not think it is a fair criticism on an Act of Parliament to say that the result will be unfair, or that it will result in making people pay duty who ought not to pay duty."—*Att.-Gen.* v. *Noyes* (1881), 8 Q. B. D. 125, at p. 138, Jessel, M. R.

"Where there are two constructions, the one of which will do, as it seems to me, great and unnecessary injustice, and the other of which will avoid that injustice, and will keep exactly within the purpose for which the statute was passed, it is the bounden duty of the Court to adopt the second and not to adopt the first of those constructions."—*Hill* v. *East and West India Dock Co.* (April 3, 1884), 9 App. Cas. 448, at p. 456; 53 L. J. Ch. 842, at p. 845, Earl Cairns (cited and applied by the Judicial Committee of the Privy Council in *Railton* v. *Wood* (1890), 15 App. Cas. 363, at p. 367).

"If an enactment is such that by reading it in its ordinary sense you produce a palpable injustice, whereas by reading it in a sense which it can bear, although not exactly its ordinary sense, it will produce no injustice, then I admit one must always assume that the legislature intended that it should be so read as to produce no injustice."—*The Queen* v. *Overseers of Tonbridge* (April 4th, 1884), 13 Q. B. D. 339, at p. 342; 53 L. J. Q. B. 488, at p. 491, Brett, M. R.

"When the words of an Act of Parliament, being read in their ordinary meaning, are capable of an interpretation which will work manifest injustice, yet if it is possible within the bounds of any grammatical or reasonable construction to read the Act so that it will not commit a manifest injustice, the Court ought to construe it upon the assumption that the legislature did not intend, by the words that it has used, to enact that which will perpetrate a

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manifest injustice."—*Plumstead Board of Works* v. *Spackman* (July 12th, 1884), 13 Q. B. D. 878, at p. 887; 53 L. J. M. C. 142, at p. 145, Brett, M. R.

"Is there, then, any general rule of construction applicable to such a provision which enables us to limit the meaning of the words so as to prevent the defendant from doing what he seeks to do? I find in Maxwell on the Interpretation of Statutes, 1st ed. 1875, p. 184, in a section headed, 'Construction against impairing obligations, or permitting advantage from one's own wrong,' the principle resulting from the various authorities there collected expressed as follows:—'On the general principle of avoiding injustice and absurdity, any construction would be rejected, if escape from it were possible, which enabled a person to defeat a statute or impair the obligation of his contract by his own act, or otherwise to profit by his own wrong.' Of this the author gives many instances"—*Gowan* v. *Wright* (1886), 18 Q. B. D. 201, at p. 204; 56 L. J. Q. B. 131, at p. 132, Lord Esher, M. R.

"A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out before the Court will construe a section in a way contrary to the natural meaning of the language used."—*In re Hall* (1888), 21 Q. B. D. 137, at pp. 141, 142; 57 L. J. Q. B. 494, at p. 496, Cave, J.

"In this proviso [Bankruptcy (Discharge and Closure) Act, 1887 (50 & 51 Vict. c. 66), s. 2, sub-ss. 1, 3] the legislature have used language of the widest kind—'in all cases'—so wide that, if its full grammatical meaning be given to it, the proviso will produce injustice so enormous that the mind of any reasonable man must revolt from it. When the language of the legislature construed literally involves such consequences, the Court has over and over again acted upon the view that the legislature could not have intended to produce a result which would be palpably unjust, and would revolt the mind of any reasonable man unless they have manifested that intention by express words. The Court will not infer such an intention from the use of merely general words. Some limit must, therefore, be put upon the words of the proviso, and they must be limited with reference to the subject-matter which is treated of."—*In re Brocklebank* (1889), 23 Q. B. D. 461, at pp. 462, 463; 58 L. J. Q. B. 375, at p. 376, Lord Esher, M. R.

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Interpretation by Reference.

Several Acts to be read or Interpreted as One.

"That clause [that two Acts are to be read as one] is frequently inserted in modern Acts of Parliament; but if the two Acts be *in pari materiâ*, the construction would be the same without it."—*Waterlow* v. *Dobson* (1857), 27 L. J. Q. B. 55, Lord Campbell, C. J.

"We must assume, then, that Robert V. Mather in this nomination paper is a misnomer. Is it one which is cured by sect. 142 of the Municipal Corporations Act [5 & 6 Will. IV. c. 76]? The 13th section of the Municipal Elections Act, 1875 [38 & 39 Vict. c. 40], incorporates the former Act, but unfortunately it does so in these words: 'This Act shall, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Will. IV. c. 76, and the Acts amending the same,' &c. It does not say that the provision in sect. 142 of the former Act shall be extended to the later Act, but merely that it shall be construed as one with it. These terms do not seem to me to extend the operation of the amending section in the earlier Act to a document which had no existence then, and therefore could not have been in the contemplation of the legislature."—*Mather* v. *Brown* (1876), 1 C. P. D. 596, at p. 601; 45 L. J. C. P. 547, at p. 549, Lord Coleridge, C. J.

"It is to be observed that those two Acts (Canadian) are to be read together by the express provision of the 7th and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."—*Canada Southern Rail. Co.* v. *International Bridge Co.* (1883), 8 App. Cas. 723, at p. 727, Earl of Selborne, L. C., delivering the judgment of their lordships.

(See also *post*, p. 375, "General Incorporating Clauses.")

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Statutes in Pari Materia.

Where there are different statutes in pari materiâ, *though made at different times, or even expired or repealed, and not referring to each other, and though using different language, they shall be taken and interpreted together as one system and as explanatory of each other.*

Whatever has been determined in the interpretation of one of several statutes in pari materiâ *is a sound rule of interpretation for the others.*

"Where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and *construed together*, as one system, and as explanatory of each other. So, in the laws concerning church leases: and those concerning bankrupts. And so also I consider, all the statutes providing for the poor, as *one system* relative to that subject."—*The King* v. *Loxdale* (1758), 1 Burr. 445, at p. 447, Lord Mansfield, C. J. (cited by Farwell, L. J., in *Goldsmiths' Company* v. *Wyatt*, [1907] 1 K. B. 95, at p. 105; 76 L. J. K. B. 166, at p. 169).

"Both statutes are made *in pari materiâ*, and whatever has been determined in the construction of one of them, is a sound rule of construction for the other."—*Rex* v. *Mason* (1788), 2 T. R. 581, at p. 586, Buller, J.

"The several Statutes of Limitations being all *in pari materiâ* ought to receive a uniform construction, notwithstanding any slight variations of the phrase, the object and intention being the same."—*Murray* v. *East India Co.* (1821), 5 B. & Ald. 204, at p. 215, Abbott, C. J.

"Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act. Lord Mansfield, in the case of *The King* v. *Loxdale* [(1758), 1 Burr. 445, at p. 447], thus lays down the rule—'Where there are different statutes *in pari materiâ*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.' [And Lord Mansfield added, 'So, in the laws concerning church leases: and those concerning bankrupts. And so also I consider, all the statutes providing for the poor, as *one system*

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relative to that subject.']"—*Ex parte Copeland* (1852), 2 D. M. & G. 914, at p. 920; 22 L. J. Bank. 17, at p. 21, Knight Bruce, L. J.

"Where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the legislature in a subsequent Act *in pari materiâ* uses the same words, there is a presumption that the legislature used those words intending to express the meaning which it knew had been put upon the same words before; and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such that they might originally have been construed otherwise."—*Mersey Docks* v. *Cameron* (1865), 11 H. L. Cas. 443, at pp. 480, 481; 35 L. J. M. C. 1, at pp. 15, 16, Blackburn, J., reading the opinion of the majority of the judges.

"I think, too, that we are entitled to consider the subsequent legislation *in pari materiâ*; for where two statutes dealing with the same subject-matter use different language, it is an acknowledged rule of construction that one may be looked at as a guide to the construction of the other."—*Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1, at pp. 7, 8; 43 L. J. M. C. 25, Brett, J.

"It is a clear rule of construction that, where you find a construction has been put upon words in a former Act, which is *in pari materiâ* with the one under consideration, and when you find that the same words are used in the later Act as in the former, you must apply the same construction to the later Act."—*Hodgson* v. *Bell* (1890), 24 Q. B. D. 525, at p. 528; 59 L. J. Q. B. 231, at p. 232, Lord Esher, M. R.

"In construing the words in the present case, the Court has a right to look to the surrounding circumstances—to the facts which must have been known to the legislature when the statute was passed—above all, to the language of the class of statutes of which this is one. . . . . I think, also, that the same rule of *noscitur a sociis* applies in another form, because the previous five or six exemptions, which this exemption immediately follows, are all exemptions having relation to documents drawn by public officers when dealing with public money."—*Committee of London Clearing Bankers* v. *Commissioners of Inland Revenue*, [1896] 1 Q. B. 222, at pp. 227, 228, Wright, J.

(See also *post*, p. 362, "Decisions on Statutes.")

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Consolidation of Statutes.

It is legitimate in the interpretation of a consolidating statute to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature.

The same effect ought to be given to the provisions of a consolidating statute that does not profess to amend or alter the provisions of the statutes consolidated as was given to those of the statutes for which it was substituted.

Where there are ambiguous expressions in a consolidating statute regard may be had to the previous statutes in pari materiâ *for the purpose of interpreting those ambiguous expressions.*

"Now the circumstances under which this Act [The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104)] was passed, and the preamble of the Act in fact resolve themselves into one question. Preamble of the Act there is none beyond the recital 'that it is expedient to amend and consolidate the Acts relating to merchant shipping.' Therefore the circumstances under which it was passed are exactly narrated in the preamble. The Act was passed with the intention of consolidating and amending (which opens a little wider the question as to the law) the Acts relating to merchant shipping. With reference to the subject of consolidation and amendment, it is a question always of grave difficulty, and it has especially been felt to be so by those who have had to deal with the subject of the consolidation of the statutes in general, and who have had to consider how far the object they have in view is to be attained by a process of mere consolidation, and how far amendments should be allowed. What will be the effect of introducing the identical words of a former statute, but denuded of the preamble which has hitherto formed in some degree a key to its construction? What, again, will be the effect of combining the words introduced from a former statute with other clauses introduced by way of consolidation into the new statute, and which may have the effect of attaching to the words of the earlier Acts a construction entirely different from that which has hitherto prevailed upon these very words as they stand in their original context? In consolidating various statutes—the Statute of Uses, for instance, and many others which have been the subject of numerous judicial interpretations—one sees at once the extreme difficulties to which such processes would give rise."—*Cope* v. *Doherty* (1858), 4 K. & J. 367, at p. 376; 27 L. J. Ch. 600,

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at pp. 601, 602, Sir W. Page Wood, V.-C. (See also *Greaves* on Criminal Law Consolidation Acts (1861), pp. 3, 4, cited by Brett, J., in *The Queen* v. *Prince* (1875), L. R. 2 C. C. R. 154, at p. 161; 44 L. J. M. C. 122, at p. 131.)

"The Sheriffs Act, 1887 (50 & 51 Vict. c. 55), is a consolidating Act, and does not profess to amend or alter the provisions of the Acts consolidated. *Primâ facie*, therefore, the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted."—*Mitchell* v. *Simpson* (1890), 25 Q. B. D. 183, at p. 190; 59 L. J. Q. B. 355, at p. 359, Fry, L. J.

"I have here to deal, not with an Act of Parliament codifying the law, but with an Act [Bankruptcy Act, 1883 (46 & 47 Vict. c. 52)] to amend and consolidate the law, and therefore it is, I say, those observations (of Lord Herschell, L. C., in *Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, at p. 144; 60 L. J. Q. B. 145, at p. 164 [see *infra*]) do not apply, and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the legislature."—*In re Budgett*, [1894] 2 Ch. 557, at pp. 561, 562; 63 L. J. Ch. 847, at p. 849, Chitty, J.

"I desire to say that I protest against being taken through the Wreck and Salvage Act, 1846, and the Merchant Shipping Acts, 1854, 1861, and 1862, in order to put a construction upon a few words in the great consolidating Act of 1894, with its 748 sections and twenty-two schedules, in the last of which no less than forty-eight prior Acts have been wholly or in part repealed. If this is to be the means by which a consolidating statute, such as that of 1894, is to be construed, it would be far better that the legislature should not attempt to codify the law at all, for suitors and the Court would then be spared the trouble of having also to interpret an additional Act. In the Act of 1894 new groups of sections, with new headings, are inserted. Old sections are placed in new contexts, different phraseology is at times used, and, for myself, I decline to embark upon the inquiry as to why or wherefore the Act of 1894 differs from the prior Acts, in themselves differing with each other, and I apply myself to what the legislature has enacted to be the law when it passed the Merchant Shipping Act, 1894."—*The Fulham*, [1899] P. 251, at pp. 259, 260; 68 L. J. P. 75, at p. 80, A. L. Smith, L. J.

"The contention is, and to that extent I think it is well founded,

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that in a consolidation Act, where there are ambiguous expressions, regard may be had to the previous Act of Parliament *in pari materiâ* for the purpose of interpreting those ambiguous expressions."—*Rex* v. *Abrahams*, [1904] 2 K. B. 859, at p. 863; 73 L. J. K. B. 972, at p. 974, Lord Alverstone, C. J.

"Whenever I have to deal with consolidating legislation I am always struck with the enormous difficulties imposed upon the draftsman, and I am thankful that I have not to undertake the work myself."—*Fitch* v. *Bermondsey Guardians*, [1905] 1 K. B. 524, at p. 526; 74 L. J. K. B. 250, at p. 252, Vaughan Williams, L. J.

Amending Statute.

Larger words used in an amending Act.

"The true rule of interpretation, where larger words are used in an amending Act than were used in the principal Act, is that such larger words were used intentionally, and must have a meaning given to them accordingly."—*Hurlbatt* v. *Barnett & Co.* (1892), [1893] 1 Q. B. 77, at p. 79; 62 L. J. Q. B. 1, at pp. 2, 3, Lord Esher, M. R.

Codification.

Resort may be had to the pre-existing law in all instances where a statutory code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning; but not so where the code contains clear and unambiguous provisions.

"I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because, before the existence of that code, another law prevailed."—*Bank of England* v. *Vagliano Brothers*, [1891] A. C. 107, at p. 120; 60 L. J. Q. B. 145, at p. 151, Lord Halsbury, L. C.

"I think the proper course [in dealing with such a statute as the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which was intended to be a code of the law relating to negotiable instruments] is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming

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that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

"If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate."—*Ibid.*, at pp. 144, 145; L. J. at p. 164, Lord Herschell.

"The language used by Lord Herschell in *Bank of England* v. *Vagliano Bros.*, [1891] A. C. 107, at p. 145; 60 L. J. Q. B. 145, at p. 164, with reference to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), has equal applic'ion to the Code of Lower Canada: 'The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roamin over a vast number of authorities.' Their lordships do not doub that, as the noble and learned lord in the same case indicates, resort must be had to the pre-existing law in all instances where the code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning. But an appeal to earlier law and decisions f r the purpose of interpreting a statutory code can only be justified upon some such special ground."—*Robinson* v. *anadian Pacific Rail. Co.*, [1892] A. C. 481, at p. 487; 61 L. J. P. C. 79, Lord Watson, delivering the judgment of the Judicial Committee.

(See also *In re Budgett*, [1894] 2 Ch. 557, at p. 561; 63 L. J. Ch. 847, at p. 849, Chitty, J.)

"The Bills of Exchange Act [1882 (45 & 46 Vict. c. 61)] is now the code of law on the subject, and in cases where it differs

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from the old law it prevails over the old law. But if the words used in the Act are fairly capable of being construed as meaning the same as the words used by judges previously to the Act in stating the law, it would be right to give them that meaning in the absence of anything to indicate a clear intention of the legislature to alter the previous law. Further, by sect. 97, sub-sect. 2, the rules of the law merchant are to continue to apply to bills and notes except so far as they are inconsistent with the express provisions of the Act. It is therefore material to see what light the law on this subject before the Act throws on the case before us."—*Herdman* v. *Wheeler*, [1902] 1 K. B. 361, at p. 367; 71 L. J. K. B. 270, at p. 273, Channell, J.

"The difficulty arises which must always exist when an attempt is made to enact an exhaustive code of any branch of our law. However able the codifier may be, when the code comes to be applied to some of the innumerable cases that must arise, there is found every now and then some case which it is impossible to suppose was in fact intended to be governed by the code. At the same time the code [Sale of Goods Act, 1893] purports to be exhaustive, and, therefore, it is necessary to try to treat every case as falling within it."—*Wren* v. *Holt*, [1903] 1 K. B. 610, at pp. 613, 614; 72 L. J. K. B. 340, at p. 343, Vaughan Williams, L. J.

"This Act [The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61)] does not purport to be a scientific code dealing with the whole law relating to bills of exchange, but it is more in the nature of a digest of the law on the subject, and it contains, like many similar statutes, a general saving clause (sect. 79, sub-sect. 2) providing that 'the rules of common law, including the law merchant, save as in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes, and cheques.'"—*Embiricos* v. *Anglo-Austrian Bank*, [1904] 2 K. B. 870, at p. 876; 73 L. J. K. B. 993, at p. 997, Walton, J.

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Contemporanea Expositio—Ancient Statutes.

Usage.

Optimus legis interpres consuetudo.—2 Inst. 282; 2 Rep. 81.

Contemporanea expositio est optima et fortissima in lege.—2 Inst. 11.

Where the words of a statute are doubtful, usage may be called in to explain them, but against a plain statute no usage is of any avail.

The language of an ancient statute of doubtful import should be understood as it was at the time the statute was passed or as interpreted by the contemporaneous and long course of years.

In interpreting ancient statutes attention is always to be paid to the language of the times.

The words of a statute must be interpreted as they would have been the day before the statute was passed, unless some subsequent statute has declared that some other interpretation is to be adopted or has altered the previous statute.

If an ancient statute be susceptible of the interpretation which has been put upon it by long usage the Courts will not disturb that interpretation.

When there are ambiguous expressions in a statute passed one or two centuries ago, it may be legitimate to refer to the interpretation put upon their expressions through a long course of years by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period.

Where the words of a statute are capable of only one interpretation it is immaterial that a wrong meaning has for many years been ascribed to it.

"*Contemporanea expositio est optima et fortissima in lege.*"—2 Coke Inst. Ch. III. p. 11; Ch. XVIII. p. 136.

"Now this that hath been said doth agree with our books, and therefore it is *benedicta expositio*, when our ancient authors, and our yeare books, together with constant experience doth agree."—2 Coke Inst. Ch. XIV. p. 181.

"'Great regard,' says Lord Coke, 'ought, in construing a statute, to be paid to the construction which the sages of the law, who lived about the time or soon after it was made, put upon it; because they were best able to judge of the intention of the

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makers at the time when the law was made.'"—Dwarris on Statutes, 2nd ed. 1848, at p. 562.

"As to usage, I am clearly of opinion that it ought not to be attended to in considering an Act of Parliament, which cannot admit of different interpretations; where the words of the Act are doubtful, usage may be called in to explain them."—*Rex* v. *Hogg* (1787), 1 T. R. 728, Grose, J.

"In construing ancient statutes attention is always to be paid to the language of the times."—*Wilson* v. *Knubley* (1806), 7 East, 128, at p. 136, Lawrence, J.

"But I cannot go along with his lordship [the Lord Justice Clerk] when for this reason he denies that usage, however long and inveterate, could be binding and operative on the parties. It can be binding and operative upon the parties only as it is the interpreter of a doubtful law, as affording a contemporary interpretation; but it is quite plain that, as against a plain statutory law, no usage is of any avail. But this undeniable proposition supposes the statute to speak a language plainly and indubitably differing from the purport of the usage. Where the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; or where the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed rule, *optimus legis interpres consuetudo*, which is sometimes termed *contemporanea expositio*; and where you can carry back the usage for a century and have no proof of a contrary usage before that time, you fairly reach the period of *contemporanea expositio*."—*Magistrates of Dunbar* v. *Duchess of Roxburghe* (1835), 3 Cl. & F. 335, at pp. 353, 354, Lord Brougham.

"It is by no means an inconvenient mode of construing statutes to presume that the legislature was aware of the state of the law at the time they passed."—*Jones* v. *Brown* (1848), 2 Exch. 329, at p. 332; 17 L. J. Ex. 163, at p. 165, Pollock, C. B.

"But, my Lords, it has often been held, and not unwisely or improperly, that the construction of very ancient statutes may be elucidated by what, in the language of the Courts, is called *contemporanea expositio*: that is, seeing how they were understood at the time."—*Montrose Peerage* (1853), 1 Macq. H. L. Cas. 401, at p. 406, Lord Cranworth, L. C.

"The rule amounts to no more than this, that if the Act be susceptible of the interpretation which has been put upon it by long usage, the Courts will not disturb that construction:—*Fermoy Peerage Case* (1856), 5 H. L. Cas. 716."—*Pochin* v. *Duncombe* (1857), 1 H. & N. 842, at pp. 856, 857, Pollock, C. B.

"The 6 Anne, c. 16, however, having passed more than one hundred and fifty years ago, we must resort to contemporaneous exposition to enable us to arrive at its meaning."—*Smith* v. *Lindo* (1858), 4 C. B. N. S. 395, at p. 410; 27 L. J. C. P. 196, at p. 200, Byles, J.

"Contemporaneous and continuous usage is of the greatest efficacy in law, for determining the true construction of obscurely framed documents."—*Hebbert* v. *Purchas* (1871), L. R. 3 P. C. 605, at p. 650; 40 L. J. Ecc. 33, at p. 48, Lord Hatherley, L. C.

"If the Lord President means no more than this when he calls it '*contemporanea expositio* of the statute which is almost irresistible,' I agree with him. I do not think he means that enjoyment, at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the Court so as to prevent it from giving the true construction. If he did I should not agree with him, for I know of no authority, and am not aware of any principle for so saying."—*Trustees of Clyde Navigation* v. *Laird* (1883), 8 App. Cas. 658, at p. 670, Lord Blackburn (cited by Vaughan Williams, L. J., in *Assheton Smith* v. *Owen*, [1906] 1 Ch. 179, at pp. 207, 208; 75 L. J. Ch. 181, at p. 197).

"When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period."—*Trustees of Clyde Navigation* v. *Laird* (1883), 8 App. Cas. 658, at p. 673, Lord Watson.

"Now, what is the rule of construction to be applied? It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute."—*Sharpe* v. *Wakefield* (1888), 22 Q. B. D. 239, at p. 242; 58 L. J. M. C. 57, at p. 59, Lord Esher, M. R.

"I quite admit that from 1869 (the time at which a particular

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franchise was given) down to 1889 is too short a time to give rise to what is called *contemporanea expositio*, and to fix beyond dispute a meaning upon words which might be doubtful in themselves, yet it is not a matter altogether to be left out of sight in construing these statutes."—*Beresford-Hope* v. *Lady Sandhurst* (1889), 23 Q. B. D. 79, at p. 91; 58 L. J. Q. B. 316, at p. 324, Lord Coleridge, C. J.

"The first observation that arises is, that if our law were to exclude all such historical investigation as is pointed to by the objection, and questions of ritual and ecclesiastical practice could only be investigated by the light of the words of an Act of Parliament some centuries old, and by the testimony of living witnesses, it would disclose a very unreasonable and unsatisfactory state of the law. Who can doubt that contemporaneous usage would be of incalculable value in forming a judgment on such subjects as are indicated above? And if no historical investigation can be permitted as to what was the contemporaneous usage, one source of light upon doubtful questions would be excluded."—*Read* v. *Bishop of London*, [1892] A. C. 644, at pp. 652, 653; 62 L. J. P. C. 1, at p. 8, Lord Halsbury, L. C.

"No doubt, in the case of a very ancient statute, where the words are ambiguous, you may refer to the *contemporanea expositio* of usage as the interpreter of a doubtful law."—*Hevington* v. *Sendall*, [1903] 1 Ch. 921, at pp. 926, 927; 72 L. J. Ch. 396, at p. 399, Joyce, J.

"Before looking at the earlier legislation, as we have the right to do, we have the assistance of the County Court Rules, which, though they have not the validity of an enactment, are a contemporaneous exposition of the law by persons of authority."—*Millett* v. *Ballard*, [1904] 2 K. B. 593, at p. 598; 73 L. J. K. B. 989, at p. 991, Collins, M. R.

"Where, indeed, the Court is called upon to construe an Act of Parliament expressed in unambiguous language, it ought to put its own construction upon it regardless of the construction that has been commonly put upon it by other persons less skilled in the law. The fact that a mistaken interpretation has been generally put upon it cannot alter the law. But where the question is as to the meaning of an ambiguous term of common use, the fact that it has for a long period of years been understood in a particular sense by persons who have an interest or duty in enforcing the Act becomes very material."—*Goldsmiths' Company* v. *Wyatt*,

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[1905] 2 K. B. 586, at p. 596; 74 L. J. K. B. 822, at p. 828, Channell, J.

(See also "Contracts, *contemporanea expositio*," *ante*, p. 125. As to non-user, see *post*, pp. 454, 478.)

Decisions on Statutes.

Consistent decisions on statutes are binding on the Court; but contradictory decisions are to be considered by the Court.

If the decisions on statutes are inconsistent, the reasons given for them by those who pronounced them are to be considered.

The true interpretation of a statute is departed from where a uniform course of judicial decisions has established a different interpretation.

Where the legislature uses expressions which have been judicially interpreted in a particular sense, it is assumed that they are used in that sense.

A recent statute should generally be construed without reference to decisions on earlier statutes.

An erroneous construction of a statute remaining for some time unchallenged can be corrected by the House of Lords.

In interpreting a statute the state of the law and of judicial decisions at the time the statute was passed ought to be taken into account.

Decisions on the interpretation of other statutes generally give very little help to the Court; but if there is any principle laid down by them they ought not to be disregarded in considering a different statute.

"Where there are conflicting decisions upon the construction of a statute, the Court must refer to that which is, and ought to be, the source of all such decisions, that is, the words of the statute itself."—*The King* v. *Leck-Wootton* (1812), 16 East, 118, at p. 122, Lord Ellenborough, C. J.

"If these [authorities] are consistent we are bound by them even although our own minds do not approve the principles on which they rest. There would otherwise be no certain rule which could be known to those who are required to conform to the law.

"If the decisions are contradictory, we are to consider the reasons given for them by those who pronounced them.

"If our predecessors have given no reasons for their judgment, or the reasons given for conflicting judgments are equally unsatis-

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factory, we are to put that construction on the statutes which our own unfettered judgment induces us to think the legislature intended should be put on them."—*Norton* v. *Cowie* (1827), 4 Bing. 234, at p. 241, Best, C. J.

"Originally the Act of Parliament in question (22 & 23 Car. II. c. 9) did not receive that construction which the language of it seems to warrant; but we are bound by the weight of authority, and however we may regret that the true construction of the Act seems to have been departed from, we cannot now put that construction upon it, which, unfettered by authority, we might be inclined to do."—*Booth* v. *Ibbotson* (1827), 1 Y. & J. 354, at p. 360, Hullock, B.

"But we are bound to construe every statute according to the plain and ordinary import of its words, and to act upon that construction, unless we should find ourselves bound by an uniform course of well-considered decisions, giving a different effect to the provisions of the statute; or unless that construction would lead to such consequences, that we can safely pronounce that the legislature must have had a different intention from that which the ordinary import of the words conveys."—*The King* v. *Inhabitants of Great Driffield* (1828), 8 B. & C. 684, at p. 690, Bayley, J., delivering the judgment of the Court.

"It cannot be denied that in some cases the plain meaning of an Act of Parliament has been changed by a course of judicial decisions, each going a little and a little further, so that at length the Courts have adopted a construction widely different from that which would, but for such interpretations, have been put upon the plain intent of the words. In all such cases you are to take into consideration, not merely the words of the Act of Parliament, but the decisions on them, which may be said to have been all but imported into the words of the Act, so that the Act is to be construed with reference to such decisions. But I am not aware of any case in which a single decision, even of a Court of competent jurisdiction having before it properly and judicially the matter on which it was pronouncing a judicial decision, has been held to operate so upon the plain meaning of a statute."—*Earl of Waterford's Claim* (1832), 6 Cl. & F. 133, at p. 172, Lord Cottenham, L. C.

"It is our duty to construe the statute according to the grammatical meaning of the words, unless some absurdity would ensue from so construing it, or an uniform series of decisions had

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already established a particular construction."—*Doe* d. *Ellis* v. *Owens* (1842), 10 M. & W. 514, at p. 521; 12 L. J. Ex. 53, at p. 56, Parke, B.

"The difficulty arises from the vague manner in which the legislature has expressed its meaning; and, therefore, when once a construction has been put upon such a clause [2nd section of the Pilotage Act, 1825 (6 Geo. IV. c. 125)] by a judicial decision, that ought of itself to be a sufficient authority for our adopting the same construction."—*Williams* v. *Norton* (1845), 14 M. & W. 747, at p. 757; 15 L. J. Ex. 11, at p. 16, Rolfe, B.

"It is therefore of considerable importance to ascertain what has been deemed to be the legal import and meaning of them [the words 'beyond the seas'], because if it shall appear that they have long been used in a sense which may not improperly be called technical, and have been judicially construed to have a certain meaning, and have been adopted by the legislature in that sense long prior to the statute 21 James I. c. 16 [The Limitation Act, 1623], the rule of construction of statutes will require that the words in the statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of them."—*Ruckmaboye* v. *Lulloobhoy* (1851-2), 8 Moore, P. C. C. 4, at p. 20; 5 Moore, Ind. App. 234, at p. 250, Sir John Jervis, C. J., delivering the judgment of the Judicial Committee.

"Where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them."—*Ex parte Campbell* (1870), L. R. 5 Ch. 703, at p. 706, James, L. J.

"Assuming that a judge thinks the construction to be clear one way, but a series of authorities is produced, being decisions of judges of co-ordinate jurisdiction the other way, there must be a time at which the judge is bound by them. If one authority were produced to me, and my own opinion were the other way, I would not follow that authority; but if the authorities are numerous, I admit that I must be bound. On that point the case of *In re Newman's Settled Estates* [(1874), L. R. 9 Ch. 681; 43 L. J. Ch. 702] is an authority."—*In re Bethlem Hospital* (1875), L. R. 19 Eq. 457, at pp. 459, 460; 44 L. J. Ch. 406, at p. 407, Jessel, M. R.

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"What is the meaning of a first and true inventor? To ascertain its meaning, you must have recourse, no doubt, to various decisions given on the statute (21 Jac. 1. c. 3 (1623)), which is very nearly three hundred years old. It is not for a judge of the present day to give his meaning as to what should be attributed to the words of the statute. He must take the construction put on the statute to be of the same effect, as guiding him to a correct decision, as if that construction had been enacted as part of the statute."—*Plimpton* v. *Malcolmson* (1876), 3 Ch. D. 531, at p. 555; 45 L. J. Ch. 505, at pp. 506, 507, Jessel, M. R. (cited by Stirling, J., in *In re Avery's Patent* (1887), 36 Ch. D. 307, at p. 317; 56 L. J. Ch. 586, at p. 591).

"If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the legislature, when using well-known words upon which there have been well-known decisions, uses those words in the sense which the decisions have attached to them."—*Greaves* v. *Tofield* (1880), 14 Ch. D. 563, at p. 571; 50 L. J. Ch. 118, at p. 119, James, L. J.

"It is a well-known rule or canon of construction that in construing an Act of Parliament one ought to take into account the state of the law and of judicial decisions at the time the Act is passed."—*Yorkshire Insurance Co.* v. *Clayton* (1881), 8 Q. B. D. 421, at p. 426; 51 L. J. Q. B. 82, at p. 85, Brett, L. J.

"I have no occasion to do more than repeat the observations I have very often made, that I think it leads to great mischief, when an Act of Parliament is plain and clear, for judges to refer to decisions on older Acts, and then say they cannot distinguish sufficiently the new Act from the old, and that, therefore, the decisions are binding. Of course, you may look at them with a view of seeing what the interpretation is, but I prefer to read the modern Act, find out what its meaning is, and if it is plain, to act according to its plain construction, without troubling myself with the decisions of the Courts on earlier Acts, the provisions of which are not the same."—*Hack* v. *London Provident Building Society* (Feb. 24th, 1883), 23 Ch. D. 103, at p. 112; 52 L. J. Ch. 541, at p. 542, Jessel, M. R. (See also *Ex parte Griffith* (Feb. 15th, 1883), 23 Ch. D. 69; 52 L. J. Ch. 717.)

"The legislature have reproduced words upon which the case of *Maude* v. *Lowley* (No. 1) [(1874), L. R. 9 C. P. 165; 43 L. J.

C. P. 103] was decided, and they must be taken to have known the interpretation that had been put upon them in that case."—*Clark* v. *Wallond* (1883), 52 L. J. Q. B. 320, at p. 322, Mathew, J.

"I think the proper course is to read the section of the Act [sect. 8 of Bills of Sale Act, 1878 (41 & 42 Vict. c. 31)], and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can clearly have only one meaning we ought to give effect to it accordingly. If, instead of doing that, we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act."—*Ex parte Blaiberg* (March 8th, 1883), 23 Ch. D. 254, at p. 258; 52 L. J. Ch. 461, at p. 463, Jessel, M. R.

"Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course that requires two things—antiquity of decision, and the practice of mankind in conducting their affairs."—*Ex parte Willey, In re Wright* (March 15th, 1883), 23 Ch. D. 118, at pp. 127, 128; 52 L. J. Ch. 546, at p. 548, Jessel, M. R.

"We ought in general, in construing an Act of Parliament, to assume that the legislature knows the existing state of the law."—*Young & Co.* v. *Mayor, &c. of Royal Leamington Spa* (June 5th, 1883), 8 App. Cas. 517, at p. 526; 52 L. J. Q. B. 713, at p. 718, Lord Blackburn.

"When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the legislature at that remote period. But I feel bound to construe a recent statute according to its own terms, when these are brought into controversy, and not according to the views which interested parties may have hitherto taken; and in determining the true import of such a statute, it appears to me to be quite immaterial to

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consider whether it was passed in 1858 or in 1883."—*Trustees of Clyde Navigation* v. *Laird* (1883), 8 App. Cas. 658, at p. 673, Lord Watson (cited by Farwell, L. J., in *Goldsmiths' Co.* v. *Wyatt*, [1907] 1 K. B. 95, at p. 107; 76 L. J. K. B. 166, at p. 170).

"Where cases have been decided on particular forms of words in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts showing that the legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them."—*Barlow* v. *Teal* (1885), 15 Q. B. D. 403, at p. 405; 54 L. J. Q. B. 400, Lord Coleridge, C. J.

"The question for our consideration is, what is the true meaning of the language which the legislature has employed? Cases on the construction of other Acts or instruments generally give very little help to the Court, but if there is any principle laid down by them we ought not to disregard them in considering a different Act or instrument."—*Reid* v. *Reid* (1886), 31 Ch. D. 402, at p. 405; 55 L. J. Ch. 291, at p. 296, Cotton, L. J.

"In the first place we have been told that a series of decisions on this section has gone far to establish the rights under it; but looking at the conflict which has taken place in the Courts of first instance, it appears to me impossible to say that there is any course of decisions which can in any way bind, or which ought seriously to influence this Court, although of course we shall always look with the greatest possible respect on the reasons for which the judges of first instance have come to their conclusions."—*Ibid.*, at p. 410; L. J., at p. 299, Fry, L. J.

"We cannot use the interpretation of one statute in construing another not made with the same intent."—*The Queen* v. *Commissioners of Income Tax* (1888), 22 Q. B. D. 296, at p. 307; 58 L. J. Q. B. 196, at p. 199, Lord Esher, M. R.

"There is thus distinct authority, forty-seven years old, and so far as I know, not questioned, but acted on and treated as binding, and though it may appear a technical point, I should hesitate to do anything to disturb a rule laid down about the Statute of Frauds and acted on for so long."—*Lucas* v. *Dixon* (Jan. 17th, 1889), 22 Q. B. D. 357, at p. 362; 58 L. J. Q. B. 161, at p. 164, Bowen, L. J.

"The appellants challenge the decision in *The Mary Ann* (1865), L. R. 1 A. & E. 8; 35 L. J. Adm. 6, and the course of practice which has followed it. The respondent contends that the decision

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was right. But whether it was right or not, he says that it is too late now even for this House to interfere. I am sensible of the inconvenience of disturbing a course of practice [as to the maritime lien on a ship for disbursements] which has continued unchallenged for such a length of time [since 1863], and which has been sanctioned by such high authority [Sir Robert Phillimore, Sir James Hannen, and Butt, JJ.]. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time."—*Hamilton* v. *Baker* (May 27th, 1889), 14 App. Cas. 209, at pp. 221, 222; 58 L. J. P. 57, at p. 62, Lord Macnaghten.

"The legislature in 1842 must be taken to have used the words ['full cost'] with knowledge of the judicial interpretation which had been put on them, and to have intended to use them in the sense thus given to them."—*Avery* v. *Wood*, [1891] 3 Ch. 115, at p. 118; 61 L. J. Ch. 75, at p. 76, Fry, L. J.

"There is a well-known principle of construction sanctioned, if sanction were necessary, by the decision of the Court of Appeal in *Greaves* v. *Tofield* [(1880), 14 Ch. D. 563; 50 L. J. Ch. 118], that where the legislature uses in an Act a legal term which has received judicial interpretation, it must be assumed that the term is used in the sense in which it has been judicially interpreted."—*Jay* v. *Johnstone* (1892), [1893] 1 Q. B. 25, at p. 28; 62 L. J. Q. B. 128, at p. 130, Lord Coleridge, C. J.

"If the legislature in one Act have used language which is admittedly ambiguous, and in a subsequent Act have used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the legislature have acted as their own interpreters of the earlier Act."—*Att.-Gen.* v. *Clarkson*, [1900] 1 Q. B. 156, at p. 165; 69 L. J. Q. B. 81, at p. 86, Sir F. H. Jeune.

(See also "Long-standing Decisions," *ante*, p. 20, and *dicta* contained in "Decisions," *ante*, p. 28.)

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Interpretation by reference to Practice.

"While it is true that we have no right to construe the Act itself [Revenue Act, 1869 (32 & 33 Vict. c. 14)] by the practice which has taken place under that Act, it is equally true that we are entitled to construe that Act, not only upon the actual words used, but with reference to the practice which had grown up and was existing at the time when that Act was passed." – *Vereens* v. *Noakes* (1880), 6 Q. B. D. 530, at p. 535; 50 L. J. Q. B. 132, at p. 135, Thesiger, L. J.

"I am sensible of the inconvenience of disturbing a course of practice [as to a maritime lien on a ship for disbursements] which has continued for such a length of time [since 1863], and which has been sanctioned by such high authority [Sir Robert Phillimore, Sir James Hannen, and Butt, J.]. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your lordships from correcting the error."—*Hamilton* v. *Baker* (1889), 14 App. Cas. 209, at p. 222; 58 L. J. P. 57, at p. 62, Lord Macnaghten.

"When you find legislation following a continuous practice, and repeating the very words on which that practice was founded, it may perhaps fairly be inferred that the legislature in re-enacting the statute intended those words to be understood in their received meaning. And perhaps it might be argued that the inference grows stronger with each successive re-enactment. However, as the point was not dealt with at the Bar, I forbear to express any opinion upon it."—*Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] A. C. 531, at p. 591; 61 L. J. Q. B. 265, at p. 294, Lord Macnaghten (cited by Joyce, J., in *London County Council* v. *South Metropolitan Gas Co.*, [1903] 2 Ch. 532, at p. 538; 72 L. J. Ch. 536, at p. 538).

"Cases have been cited to show that sometimes you are not only entitled but bound, where you have Acts of Parliament passed in reference to a matter on which there has been a continuity of Acts of Parliament in succession running on the same lines, to take into consideration the previous practice. The strongest case probably of all those which were cited is that of *Vereens* v. *Noakes* (1880), 6 Q. B. D. 530; 50 L. J. Q. B. 132. . . . . That, undoubtedly, is a strong authority for saying that such a practice may, in the case that Thesiger, L. J., described, be taken into

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consideration in construing the later Act of Parliament; and I do not propose to depart from or whittle down that proposition in any degree. But what does the lord justice mean? Does he mean that you are to have regard to every practice by persons who have a statutory duty thrown upon them, and who for a long period have neglected to perform that which, according to the natural construction of the words of their Act of Parliament, would be their duty? I think not. I do not think he means to say that one is always to impute to the legislature a knowledge of that neglect of duty by those who have had a statutory obligation thrown upon them. If, then, it is not always that this imputation is to be made, when is it to be made? I think it is to be made in those cases in which it is reasonable to impute such a knowledge to the legislature. A case in which it very usually has been done is this: very often in an antecedent or earlier Act in similar frame upon the same subject-matter, the very question of the interpretation of a particular section, or of particular words, in the Act has come into Court for decision, and the Court has put a construction upon the words of that earlier Act; and then, in the later Act, the legislature uses identical words. It could not, in such a case at all events, be supposed, however doubtful the construction of those words might be, that the legislature passed the subsequent Act without knowledge of the previous decision upon the same words in the earlier and similar Act. Then take again the case which was actually before the Court—*Verrens* v. *Noakes* (1880), 6 Q. B. D. 530; 50 L. J. Q. B. 132. That was a case in which the knowledge which was sought to be imputed to the legislature was the practice of a public department in respect of inhabited house duty. One can quite understand that the practice of public departments might be supposed to be within the knowledge of the legislature, but I do not think we ought to carry that so far as to say that in the present case the legislature must have had within their knowledge and view the practice of the gas examiners as to holding no tests upon Sundays."—*London County Council* v. *South Metropolitan Gas Co.*, [1904] 1 Ch. 76, at pp. 81—83; 73 L. J. Ch. 136, at p. 140, Vaughan Williams, L. J.

Interpretation by reference to Rules.

"We are of opinion that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the

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rules which have been made by the Lord Chancellor under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction."—*Ex parte Wier* (1871), L. R. 6 Ch. 875, at p. 879, Sir G. Mellish, L. J., delivering the judgment of the Court.

"Before looking at the earlier legislation, as we have the right to do, we have the assistance of the County Court Rules, which, though they have not the validity of an enactment, are a contemporaneous exposition of the law by persons of authority."—*Millett* v. *Ballard*, [1901] 2 K. B. 593, at p. 598; 73 L. J. K. B. 989, at p. 991, Collins, M. R.

Section VII.

CONCERNING PARTICULAR CLAUSES AND PARTICULAR STATUTES.

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Judicial and other Notice of Statutes.

Judicial notice must be taken of public statutes. Every statute (including local and personal statutes and private statutes) passed after 1850 *is a public statute, and must be judicially noticed unless the contrary is expressed by the statute.*

English subjects are bound to interpret rightly the statute law of the land.

"*Note* reader, the rule of the law is, that of general statutes the judges ought to take notice, although they be not pleaded, otherwise of special or particular statutes; and for the better understanding of your books on this point, and which shall be said in judgment of law *statutum generale*, and which is *statutum speciale*, it is to be known that *generale dicitur a genere, et speciale a specie*; and there are *genus, species, et individua*."—2 *Coke*, p. 472, Part IV. 76 a ((1597), *Holland's Case*).

"Statutes are either *general* or *special*, *public* or *private*. A general or public Act is an universal rule, that regards the whole community; and of this the courts of law are bound to take notice judicially and *ex officio*; without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. *Special* or *private* Acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns: such as the Romans entitled *senatûs decreta*, in contradistinction to the *senatûs consulta*, which regarded the whole community: and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded."—1 *Bl. Comm.* 85.

"The history of the law, with regard to the proof of private Acts of Parliament, is this: originally, they were required to be proved by a copy examined with the Parliament Roll. To avoid this inconvenience, a clause was usually inserted, declaring a copy printed by the King's printer should be evidence. It was then objected, that in such cases, it was necessary to prove that the Act produced was, in fact, printed by the King's printer; and to meet this objection, the present form of clause was adopted [viz., that the Act should be deemed and taken to be a public Act, and should be taken notice of as such by all judges, &c., without being specially pleaded]."—*Woodward* v. *Cotton* (1834), 1 Cr. M. & R. 44, at pp. 47, 48, Lord Lyndhurst, C. B.

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"The judge is theoretically bound to take judicial notice of all Acts of Parliament; that is, he is bound theoretically to know the contents of them, and to be aware that there is no such Act of Parliament. I say 'theoretically,' but practically the judge requires attention to be called to the particular statute, and the clauses and sections of it that bear upon the matter in hand. But he is bound to take judicial notice of all Acts of Parliament."—*Chilton* v. *Corporation of London* (1878), 7 Ch. D. 735, at p. 740; 47 L. J. Ch. 433, at p. 437, Jessel, M. R.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21)—

Sect. 7. "Be it enacted that every Act made after the commencement of this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act." (Commenced and took effect on 11th February, 1851. Repealed by Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41. Re-enacted by 52 & 53 Vict. c. 63, ss. 9 and 39.)

Interpretation Act, 1889 (52 & 53 Vict. c. 63)—

Sect. 9. "Every Act passed after the year 1850, whether before or after the commencement of this Act [1st January, 1890], shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act."

Sect. 39. "In this Act the expression 'Act' shall include a local and personal Act and a private Act."

Ignorantia juris non excusat.—1 Co. 177.

"The subjects of this country are bound to construe rightly the statute law of the land."—*The Charlotta* (1814), 1 Dods. Adm. 387, at p. 392, Sir W. Scott.

"Everyone is bound to know the law."—*Cooper* v. *Simmons* (1862), 7 H. & N. 707, at p. 717, Pollock, C. B.

"It is said '*Ignorantia juris haud excusat*,' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application."—*Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149, at p. 170, Lord Westbury (cited by Stirling, J., in *Allcard* v. *Walker*, [1896] 2 Ch. 369, at p. 381; 65 L. J. Ch. 660, at p. 665).

Where a lawful continuous act is made unlawful by statute a reasonable time is allowed for its discontinuance.

"Before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may of itself be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued."—*Burns* v. *Norell* (1880), 5 Q. B. D. 444, at p. 454; 49 L. J. Q. B. 468, at p. 473, Baggallay, L. J., delivering the judgment of the Court (Bramwell, Baggallay and Thesiger, L. JJ.).

Notice of Clauses to Private Persons.

"I am further of opinion, and, if need was, I should be prepared to hold, that, where a company is created by Act of Parliament, having privileges and rights granted to them, and liabilities and duties imposed upon them in respect of their incorporation, parties dealing with them must be taken to be cognizant of the provisions of the Act of Parliament granting those privileges and rights and imposing those duties and liabilities, although it be a private Act."—*Cahill* v. *The London and North Western Rail. Co.* (1861), 10 C. B. N. S. 154, at p. 172; 30 L. J. C. P. 289, at p. 294, Erle, C. J.

General and Special Provisions.

General provisions in the same statute or other statutes are not to control or repeal the special provisions. The special provisions are to be read as excepted out of the general.

"The rule is, that where a general intention is expressed and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of exception."—*Churchill* v. *Crease* (1828), 5 Bing. 177, at p. 180, Best, C. J.

"It may be laid down as a rule for the construction of statutes,

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that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby, and not by the terms of the general provision."—*Dryden* v. *Overseers of Putney* (1876), 1 Ex. D. 223, at p. 232, Quain, J.

"Where you have general provisions, whether contained in the same Act or in another Act of Parliament, and where you have special provisions as to a particular property in the ownership of one individual, you must read the special provisions as excepted out of the general. That is the only way of reconciling these Acts of Parliament. It is the practice of Parliament, as those who are in the habit of going before Parliamentary Committees know, to insert in the bill the special clauses which are agreed on, and then those persons who have obtained their insertion leave the committee-room, and have nothing further to do with the bill. The Committee would not listen to them on the general clauses. They would say, 'It is no business of yours; you have been provided for, and you have had all your clauses put in.' If you once admit the doctrine that the general provisions are to override the special ones, anybody getting a clause inserted in the bill ought to be heard on every clause of that Act. It would be simply impossible to conduct private legislation at all if any such doctrine were admitted or prevailed. I consider it an established rule, that when you find general provisions of this sort, either in the same Act or other Acts, they are not to control or repeal the special provisions, which are considered to provide for the particular property."—*Taylor* v. *Corporation of Oldham* (1876), 4 Ch. D. 395, at p. 410, Jessel, M. R.

General Incorporating Clauses.

In interpreting statutes enacting general provisions, and adjusting the general provisions in the general statute to the particular provisions of the special statute, considerations of reason and justice, and the universal analogy of such provisions in similar statutes, are proper to be borne in mind, and ought to have much weight and force.

"I pause to observe that it is of the greatest importance, in any case like that with which your lordships have now to deal, to remember the principles of the scheme of legislation contained in those statutes [the Lands Clauses Consolidation Acts and the

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Railways Clauses Consolidation Acts]. They were passed because the legislature thought that a considerable number of general provisions, which had been ascertained, after sufficient experience, to be proper and necessary to be introduced into Acts authorizing undertakings of the character there referred to, had better be enacted once for all in a general form; so that when any particular undertaking afterwards came to be authorized, the special Act might be introduced in a short form, containing only such clauses as were suggested by the circumstances of the particular case. A general incorporating clause, of which your lordships have a specimen here, was to supersede the necessity of repeating in every such special Act those provisions which were universally or generally applicable."—*Metropolitan District Rail. Co.* v. *Sharpe* (1880), 5 App. Cas. 425, at p. 430; 50 L. J. Q. B. 14, at p. 15, Lord Selborne, L. C.

"In construing Acts of Parliament of this kind, and adjusting the general provisions in the general Act to the particular provisions of the special Act, considerations of reason and justice, and the universal analogy of such provisions in similar Acts of Parliament, are proper to be borne in mind, and ought to have much weight and force."—*Ibid.*, at p. 433; L. J. at pp. 16, 17.

(As to weight and effect of decisions on the construction of such Acts, see *Pugh* v. *Golden Valley Rail. Co.* (1880), 15 Ch. D. 330, at p. 334; 49 L. J. Ch. 721, at p. 723, Thesiger, L. J., delivering the judgment of the Court, cited *ante*, pp. 21—23.)

Where a single section of a statute is introduced into another statute it must be read in the sense which it bore in the original statute from which it is taken.

"Where a single section of an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act. I do not mean that if there was in the original Act a section not incorporated, which came by way of a proviso or exception on that which is incorporated, that should be referred to. But all others, including the interpretation clause, if there be one, may be referred to. It is a dangerous mode of draftsmanship to incorporate a section from a

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former Act; for unless the draftsman has a much clearer recollection of the whole of the former Act than can always be expected, there is great risk that something may be expressed which was not intended."—*Mayor, &c. of Portsmouth* v. *Smith* (1885), 10 App. Cas. 364, at p. 371; 54 L. J. Q. B. 473, at pp. 476, 477, Lord Blackburn.

Legislation by Reference.

In dealing with cases of legislation by reference, the primary consideration to be kept in view is the general scope and object of the amending legislation.

"If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the Act, you have no occasion to refer to the former Act at all."—*In re Wood's Estate* (1886), 31 Ch. D. 607, at p. 615; 55 L. J. Ch. 488, at p. 490, Lord Esher, M. R.

"Sometimes whole Acts of Parliament, sometimes groups of clauses of Acts of Parliament, entirely or partially, sometimes portions of clauses are incorporated into later Acts, so that the interpreter has to keep under his eye, or, if he can, bear in his mind, large masses of bygone and not always consistent legislation in order to gather the meaning of recent legislation. There is very often the further provision that these earlier statutes are incorporated only so far as they are not inconsistent with the statute into which they are incorporated; so that you have first to ascertain the meaning of a statute by reference to other statutes, and then to ascertain whether the earlier Acts qualify only or absolutely contradict the later ones, a task sometimes of great difficulty, always of great labour—a difficulty and labour, generally speaking, wholly unnecessary."—*Knill* v. *Towse* (1889), 24 Q. B. D. 186, at pp. 195, 196; 59 L. J. Q. B. 136, at p. 141, Mathew, J., delivering the judgment of the Court (Lord Coleridge, C. J., and Mathew, J.).

"In dealing with cases of legislation by reference, I think that, as a rule, the primary consideration to be kept in view is the general scope and object of the amending legislation, as this affords some guide as to whether a wide or narrow interpretation is to be put upon general words or expressions capable of a wider or

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narrower meaning."—*Tracey* v. *Pretty & Sons*, [1901] 1 Q. B. 444, at p. 451; 70 L. J. Q. B. 234, at p. 246, Lord Alverstone, C. J.

(See also *ante*, p. 351, "Statutes *in Pari Materiâ*.")

Public and Private Statutes.

Whether a statute is public or private does not depend upon any technical considerations (such as having a clause or declaration that the statute shall be deemed a public statute), but upon the nature and substance of the case.

When the interpretation is not clear, a private statute is construed more strictly than a public statute.

When the interpretation is clear, there is no difference between the modes of construing a private statute and a public statute.

"Where an Act of Parliament, in express terms, or by necessary implication, empowers an individual or individuals to take or interfere with the property or the rights of another, and upon a sound construction of the Act it appears to the Court that such was the intention of the legislature, in such cases it may well be the duty of the Court, whose province it is to declare and not to make the law, to give effect to the decrees of the legislature so expressed. But where an Act of Parliament merely enables an individual or individuals to deal with property of his or their own, for their own benefit, and does not in terms, or by necessary implication, empower him or them to take or interfere with the property or rights of others, questions of a very different character arise. Here the distinction between public and private Acts of Parliament becomes material. By a private Act of Parliament, I do not mean merely private estate Acts, but local and personal as distinguished from general public Acts. Public Acts, it is said in the books, bind all the Queen's subjects. But of private Acts of Parliament, it is said that they do not bind strangers, unless by express words or necessary implication the intention of the legislature to affect the rights of strangers is apparent in the Act; and whether an Act is public or private does not depend upon any technical considerations (such as having a clause or declaration that the Act shall be deemed a public Act), but upon the nature and substance of the case. For those general propositions it is not necessary I should do more than refer to *Sir Francis Barrington's Case* [(1611), 4 *Coke*, p. 116, Part VIII., 138 a], and *Lucy* v. *Levington* [(1683), 1 Ventris,

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175]."—*Dawson* v. *Parer* (1847), 5 Hare, 115, at pp. 433, 434; 16 L. J. Ch. 274, at p. 279, Sir James Wigram, V.-C.

"Now, it is quite true that there is some difference between a private Act of Parliament and a public one, but the only difference which I am aware of is as to the strictness of the construction to be given to it [the private Act] when there is any doubt as to the meaning. In the case of a public Act you construe it, keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But where the construction is perfectly clear, there is no difference between the modes of construing a private Act and a public Act, and, however difficult the construction of a private Act may be, when once the Court has arrived at the true construction, after having subjected it to the strictest criticism, the consequences are precisely the same as in the case of a public Act. The moment you have arrived at the meaning of the legislature, the effect is the same in the one case as in the other."—*Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (1885), 15 Q. B. D. 597, at pp. 602, 603, Lord Esher, M. R. (cited by Bray, J., in *Stewart* v. *Thames Conservators*, [1908] 1 K. B. 893, at pp. 901, 902; 77 L. J. K. B. 396, at p. 400).

General Statutes and Local and Personal Statutes.

A general statute, primâ facie, *is that which applies to the whole community.*

In former times public and general statutes were distinguished from private and special statutes. The more modern division is between general statutes and local and personal statutes.

A local and personal statute may be public because of its importance without losing its character of local and personal.

Whether any particular statute is commonly called 'public local and personal,' or 'local and personal' is to be determined by the Court and not by the jury.

"Statutes are either general or special, public or private. A *general or public* Act is an universal rule, that regards the whole community . . . . *Special or private* Acts are rather exceptions than

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rules, being those which only operate upon particular persons and private concerns."—1 *Bl. Com.* 85.

"On the 1st May, 1797, the House of Lords resolved that the King's printer should class the general statutes and special, the public local, and private, in separate volumes; and on the 8th May, 1801, there was a resolution of the House of Commons, agreed to by the House of Lords, that the general statutes, and the 'public local and personal,' in each session, should be classed in separate volumes."—*Richards* v. *Easto* (1846), 15 M. & W. 244, at p. 251; 15 L. J. Ex. 163, at p. 167, Parke, B., delivering the judgment of the Court.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21)—

Sect. 7: "Be it enacted that every Act made after the commencement of this Act shall be deemed and taken to be a *public Act*." (Commenced and took effect on 4th February, 1851. Repealed by Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41. Re-enacted by 52 & 53 Vict. c. 63, ss. 9 and 39.)

Interpretation Act, 1889 (52 & 53 Vict. c. 63)—

Sect. 9: "Every Act passed after the year 1850, whether before or after the commencement of this Act [1st January, 1890] shall be a *public Act*."

Sect. 39: "In this Act the expression 'Act' shall include a local and personal Act and a private Act."

"At the time of its [32 Geo. III. c. lxxiv] being passed no Acts were commonly so called (viz., public local and personal, or local and personal), but statutes were only divided into public and private and general and special.

"As the 5 & 6 Vict. c. 97 (The Limitations of Actions and Costs Act, 1842) distinguishes between statutes *commonly called* public local and personal, or local and personal, and those which *are* of a local and personal nature; and it is to be determined by the Court and not by the jury whether any particular statute is commonly so called (which, in itself, would seem to be a mere matter of fact), there seems to be no better ground on which this is to be decided than a reference to the Statute Book itself: if we find it so printed under the directions of the legislature, we have the best grounds for saying it is commonly so called, and this appears the more proper with reference to the 5 & 6 Vict. c. 97, s. 5, which, as to this part, is clearly framed with reference to the

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resolutions, and to the division of statutes in the Statute Book thereby introduced."—*Shepherd* v. *Sharp* (1856), 1 H. & N. 115, at p. 123; 25 L. J. Ex. 254, at p. 255, Coleridge, J., delivering the judgment of the Exchequer Chamber.

"I am not going through the history of this nomenclature of Acts of Parliament); but it is important to remark that it has altered very much, and that part of the obscurity which has been introduced into the subject is due to the alterations which have been made at different times. There was a time when public and general Acts were distinguished from private and special; but that is not the division which has obtained in later times, and the more modern division has been between general Acts and local and personal; for it is to be observed (and this is essential for recollecting the point of our decision in the present instance), that 'general,' and not 'public,' is opposed to 'local and personal'; and the division, therefore, lies between public and general Acts on the one side, and public local and personal Acts on the other; because, of course, a local and personal Act may be public without losing its character of local and personal. . . . Now, a general Act, *primâ facie*, is that which applies to the whole community. In the natural meaning of the term it means an Act of Parliament which is unlimited both in its area and, as regards the individual, in its effects; and as opposed to that you get statutes which may well be public because of the importance of the subjects with which they deal and their general interest to the community, but which are limited in respect of area—a limitation which makes them local—or limited in respect of individuals or persons—a limitation which makes them personal."—*The Queen* v. *London County Council*, [1893] 2 Q. B. 454, at p. 462; 63 L. J. Q. B. 4, at pp. 8, 9, Bowen, L. J.

Lord Shaftesbury's Clauses.

"My lords, in local and personal Acts there was found to be great inconvenience from the clauses being framed according to the views of the promoters' counsel, and, consequently, being very differently worded, and to remedy this a practice arose, I do not know when, but I believe about forty years ago, of obliging the promoters to submit their bills to the revision of the Chairman of Committees, who required them to make their clauses in the form he had approved of, unless some good reason was shown for deviating from it. These forms of clauses were well known, and

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from the name of the noble lord who had originated them were called Lord *Shaftesbury's* Clauses."—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 765; 47 L. J. Q. B. 193, at p. 203, Lord Blackburn.

Intention unconnected with purpose of Statute.

"If in a local and personal Act we found words that seemed to express an intention to effect something quite unconnected with the purpose of the promoters, and which the Committee would not (if it did its duty) have allowed to be introduced into such an Act, I think the judges would be justified in putting almost any construction on the words that would prevent its having that effect."—*River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, at p. 766; 47 L. J. Q. B. 193, at p. 204, Lord Blackburn.

Statutes conferring Powers on Public Bodies or Companies.

Generalia specialibus non derogant.

General powers do not override special powers.

Whenever the legislature has by a special statute vested powers of a special character in a corporate body or any body of commissioners for the express purpose of carrying out a particular object which the legislature has in view, no subsequent statute in merely general terms giving powers which by their generality apply to the special powers conferred by the former statute will override the special powers thereby delegated to the particular body of commissioners or corporation.

Where there is a special power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done.

"Whenever the legislature has, by such an Act, vested powers of a special character in a corporate body, or any body of commissioners, for the express purpose of carrying out a particular object which the legislature has in view, no subsequent statute, in merely general terms, giving powers which, by their generality, apply to the special powers conferred by the former Act, will override the special powers thereby delegated to the particular body of commissioners or

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corporation. That principle is clearly laid down in the cases referred to by Lord Justice Turner in his judgment in *The Trustees of the Birkenhead Docks* v. *Laird* [(1853), 18 Jur. 883, at p. 884; 1 D. M. & G. 732; 23 L. J. Ch. 457], and it seems to be a very ancient and settled principle of law. 'That appears to be the rule as laid down by the learned Judge Jenkyns in *Sir Foulke Greville's Case* (reported in his work called Eight Centuries of Reports, the Third Century, case 41, p. 120), where, speaking of the statute 14 Edw. III., which ordains that every merchant who ships goods to be exported over sea shall be compelled to find sureties to import two marks in bullion upon his return; and then referring to the Acts of Parliament 45 Edw. III. and 10 Ric. II., which ordain that after three years no new charge shall be imposed upon the subject, the author says: "These last general statutes did not repeal the said statute 14 Edw. III., for it is a special statute," and further on he adds, "*generalia specialibus non derogant.*" And he then proceeds to illustrate his position by reference to a statute which was passed to require that a certain tenant in tail shall only make leases for lives, followed by a general public Act, enabling tenants in tail to make leases for their lives, and says that this latter "does not repeal the said Act for the reason aforesaid." To this rule of law I entirely assent. . . .' The reason of the rule is manifest, namely: The legislature, in passing a special Act, has entirely in its consideration some special power which is to be delegated to the body applying for the Act of Parliament on public grounds, and the preamble of every statute contains a recital of its being for the public convenience that the particular powers should be granted. When a general Act is subsequently passed, it seems to be a necessary inference that the legislature does not intend thereby to regulate all cases not specially brought before it; but looking to the general advantage of the community, without reference to any particular cases, it gives large and general powers which in their generality might, except for this very wholesome rule of interpreting statutes, override the powers which, upon consideration of the particular case, the legislature had before conferred by the special Act for the benefit of the public."—*The London and Blackwall Rail. Co.* v. *The Board of Works for the Limehouse District* (1856), 3 K. & J. 123, at p. 127; 26 L. J. Ch. 164, at p. 166, Sir W. Page Wood, V.-C. (followed *City and South London Rail. Co.* v. *London County Council*, [1891] 2 Q. B. 513; 60 L. J. M. C. 149).

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"Some general propositions admit of no doubt. In the first place, I think it clear that when the legislature authorizes railway directors to take, for the purposes of their undertaking, any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands: provided only that they take them *bonâ fide* with the object of using them for the purposes authorized by the legislature, and not for any sinister or collateral purpose. This is the construction to be put on all such legislative powers, whether the language of the Act is that the company may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers."—*Stockton and Darlington Rail. Co.* v. *Brown* (1860), 9 H. L. Cas. 246, at p. 256, Lord Cranworth (cited by Vaughan Williams, L. J., in *London & North Western Railway* v. *Westminster Corporation*, [1904] 1 Ch. 759, at p. 766; 73 L. J. Ch. 386, at p. 390).

"The well-known rule that when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done."—*Ex parte Stephens* (1876), 3 Ch. D. 659, at pp. 660, 661, Jessel, M. R.

"That rule [that posterior laws repeal prior ones to the contrary] is subject to a qualification excellently, as it seems to me, expressed by Sir P. B. Maxwell in his book on the interpretation of statutes. He says, at p. 157, under the heading '*Generalia specialibus non derogant*,' 'It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general Act is to be construed as not repealing a particular one by mere implication. A general later law does not abrogate an earlier special one. It is presumed to have only general cases in view, and not particular cases, which have been already provided for by a special or local Act, or, what is the same thing, by custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless it

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manifests that intention in explicit language.'"—*Garnett* v. *Bradley* (1877), 2 Ex. D. 349, at pp. 351, 352; 46 L. J. Ex. 545, at p. 546, Bramwell, L. J.

"The passage which was cited from Maxwell on the Interpretation of Statutes [3rd ed., pp. 242, 243] correctly lays down the rule as to the repeal of special enactments by a general statute and the reasons for it. In *London and Blackwall Rail. Co.* v. *Limehouse District Board of Works* [(1856), 3 K. & J. 123, at p. 127; 26 L. J. Ch. 164, at p. 166], Page Wood, V.-C., expresses the rule as follows:—'Whenever the legislature has by such an Act vested powers of a special character in a corporate body or any body of commissioners for the express purpose of carrying out a particular object which the legislature has in view, no subsequent statute in merely general terms giving powers which by their generality apply to the special powers conferred by the former Act will override the special powers thereby delegated to the particular body of commissioners or corporation.' The rule has been laid down in similar terms in other cases—for example, by Bovill, C. J., in *Thorpe* v. *Adams* [(1871), L. R. 6 C. P. 125, at pp. 135, 136; 40 L. J. M. C. 52, at p. 56]."—*Ashton-under-Lyne Corporation* v. *Pugh* (Nov. 2nd, 1897), [1898] 1 Q. B. 45, at p. 49; 67 L. J. Q. B. 32, at p. 34, A. L. Smith, L. J.

"The general maxim is, '*Generalia specialibus non derogant.*' When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim."—*Barker* v. *Edger*, [August 3rd, 1898] A. C. 748, at p. 754; 67 L. J. P. C. 115, at p. 118, Lord Hobhouse, delivering the judgment of the Privy Council.

(See also *post*, p. 463, "Prior Special Statute and Subsequent General Statute.")

Powers conferred on a company by statute cannot be exercised for a collateral purpose.

"The case of the appellant, Mr. Galloway, rested on a principle well recognized, and founded on the soundest principles of justice.

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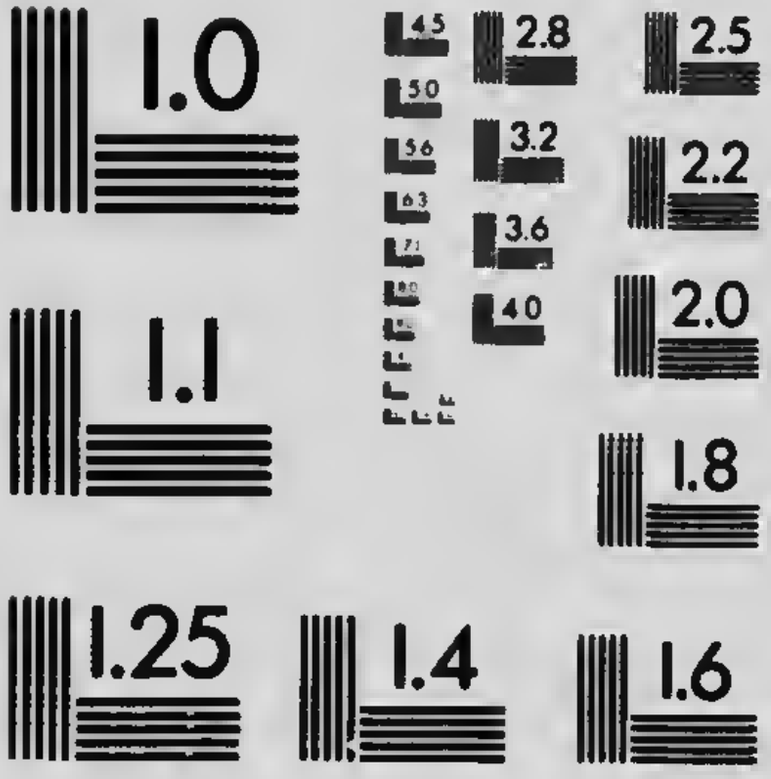

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The principle is this, that when persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers. The necessity for strictly enforcing this principle became apparent, when it became an ordinary occurrence that associations should be formed of large numbers of persons possessing enormous pecuniary resources, and to whom are given powers of interfering for certain purposes with the rights of private property. In such a state of things it was very important that means should be devised whereby the Courts, consistently with the ordinary principles on which they act, should be able to keep such associations or companies strictly within their powers, and should prevent them, when the legislature has given them power to interfere with private property for one purpose, from using that power for another. Lord Cottenham, in numerous instances, interfered in such cases; and the principle has been cordially approved of, and acted on, in all the courts of law and equity, and has been frequently recognized and confirmed in this House. It has become a well-settled head of equity, that any company authorized by the legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing."—*Galloway* v. *Mayor and Commonalty of London* (1866), L. R. 1 H. L. 34, at p. 43; 35 L. J. Ch. 477, at pp. 483, 484, Lord Cranworth, L. C. (latter part cited by Stirling, J., in *London and North Western Railway* v. *Westminster Corporation*, [1904] 1 Ch. 759, at p. 770; 73 L. J. Ch. 386, at p. 392).

Powers conferred by Reference.

In dealing with cases of giving powers by reference the primary consideration to be kept in view is the general scope and object of the amending legislation.

"The difficulty arises from the fact that the powers of the factory inspector in the matter are given by reference to the powers of the sanitary authority under the Public Health Act; and we

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have to determine to what extent the powers of the sanitary authority are transferred under the general words used. . . . In dealing with cases of legislation by reference, I think that, as a rule, the primary consideration to be kept in view is the general scope and object of the amending legislation, as this affords some guide as to whether a wide or narrow interpretation is to be put upon general words or expressions capable of a wider or narrower meaning."—*Tracy* v. *Pretty & Sons*, [1901] 1 Q. B. 444, at p. 451; 70 L. J. Q. B. 234, at p. 246, Lord Alverstone, C. J.

(See *ante*, p. 377, "Legislation by Reference.")

Convenience and Inconvenience.

Public advantage and convenience of inhabitants.

"The Act [the Gas Company's] has, therefore, two purposes, the public advantage and the convenience of the inhabitants, and an Act of Parliament passed for these purposes ought not to receive narrow construction."—*Dover Gas Light Co.* v. *Dover (Mayor, &c.)* (1855), 7 D. M. & G. 545, at p. 555, Turner, L. J.

In a doubtful question of interpretation the balance of inconvenience is to be regarded as between the public and private persons.

"This and all other railways made under Acts of Parliament are made, not only, perhaps I may say not principally, for the benefit of the shareholders, but for the public benefit as furnishing lines of traffic which, from the time when the railway is made, the public have a right to use. You must, therefore, consider that in any provisions such as those now to be construed in such Acts the public interest and the private interest are impartially and justly regarded upon the one side and upon the other: and if upon words or expressions at all ambiguous it would seem that the balance of hardship or inconvenience would be strongly against the public on the one construction, or strongly against the private person on another construction, it is, I think, consistent with all sound principles to pay regard to that balance of inconvenience in determining such a doubtful question of construction."—*Dixon* v. *Caledonian and Glasgow and South Western Rail. Cos.* (1880), 5 App. Cas. 820, at p. 827, Lord Selborne, L. C.

"If a word in its popular sense, and read in an ordinary way,

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is capable of two constructions, it is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers."—*Wandsworth Board of Works* v. *United Telephone Co.* (1884), 13 Q. B. D. 904, at p. 920; 53 L. J. Q. B. 449, at p. 457, Bowen, L. J.

(See also *ante*, p. 344, "Argument from Inconvenience.")

Rights and Interests accompanying Powers.

"The general rule on this head of law is, that where the legislature gives power to a public body to do anything of a public character, the legislature means also to give to the public body all rights, without which the power would become wholly unavailable, although such a meaning cannot be implied in relation to circumstances arising accidentally only."—*In re Corporation of Dudley* (1881), 8 Q. B. D. 86, at p. 93; 51 L. J. Q. B. 121, at p. 124, Brett, L. J.

"In the construction of a statutory enactment intended to regulate the relative rights of a body of persons purchasing an interest in land for the purpose of constructing works, and the previous owner, it is reasonable to anticipate that the purchasers would acquire such an interest in the surface as would enable the works to be constructed and maintained by the purchasers."—*Earl of Jersey* v. *Guardians of Poor of Neath Poor Law Union* (1889), 22 Q. B. D. 555, at pp. 564, 565; 58 L. J. Q. B. 573, at p. 578, Fry, L. J. (cited by Buckley, J., in *Great Western Railway* v. *Blades*, [1901] 2 Ch. 624, at pp. 636, 637; 70 L. J. Ch. 847, at p. 853).

Public Importance of Statute.

"It was said that, looking at the purview and general intent of the Act, and the fact that it was passed with the view of obviating or, at least, lessening a great public danger, the statute must be construed in a liberal spirit, and so as not unduly to place difficulties in the way of those to whom its execution is intrusted. With regard to this last argument, if it means that this statute is to receive a construction different to what would be put upon a statute authorizing the carrying out of any other public work, I see the greatest difficulty in giving effect to it, for nothing would

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be a more dangerous doctrine, or one more contrary to the true rules of construction than that which required or allowed a judge to give an effect to the same words wider or narrower in proportion, as he might think the general object of the Act in which they were found of great or small public importance. The principle is, as was said by Blackburn, J., in *The Mersey Docks Trustees* v. *Gibbs* (1866), L. R. 1 H. L. 93, at p. 112; 35 L. J. Ex. 225, at pp. 231, 232: 'That the Act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature.'" —*Hill* v. *Managers of Metropolitan Asylum District* (1879), 4 Q. B. D. 433, at pp. 441, 442; 48 L. J. Q. B. 562, at pp. 566, 567, Pollock, B.

Powers causing a Nuisance.

"And my notion of the law is, that when statutory powers are conferred, under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impossible without causing one, and so contravening the law of the land, the persons exercising them are liable to an indictment."—*The Queen* v. *The Company of Proprietors of the Bradford Navigation* (1865), 6 B. & S. 631, at p. 648; 34 L. J. Q. B. 191, at p. 199, Cockburn, C. J.

Ultra Vires.

In statutes creating corporations for public or particular purposes, powers not expressly or impliedly authorized are prohibited.

"That case [*The Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185] appears to me to decide, at all events, this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited; and consequently, that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose."—*Att.-Gen.* v. *Great Eastern Rail. Co.* (1880), 5 App. Cas. 473, at p. 481, Lord Blackburn.

"I cannot doubt that the principle by which this House, in the case of the *Ashbury Rail. Co.* v. *Riche* [(1875), L. R. 7 H. L. 653;

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44 L. J. Ex. 185], tested the power of a joint stock company registered (with limited liability) under the Companies Act of 1862, applies with equal force to the case of a railway company incorporated by Act of Parliament. That principle, in its application to the present case, appears to me to be this, that when a railway company has been created for public purposes, the legislature must be held to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication."—*Ibid.*, at p. 486, Lord Watson.

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions. That appears to be the principle recognized by this House in *Ashbury Company* v. *Riche* (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185, and in *Attorney-General* v. *Great Eastern Rail. Co.* (1880), 5 App. Cas. 473; 49 L. J. Ch. 545."—*Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354, at pp. 362, 363; 54 L. J. Q. B. 577, at p. 581, Lord Watson (cited by Cozens-Hardy, L. J., in *Corbett* v. *South Eastern and Chatham Railways Managing Committee*, [1906] 2 Ch. 12, at p. 20; 75 L. J. Ch. 489, at p. 493).

"The objects for which the respondent company, being a statute corporation, was incorporated must be collected from the statute of incorporation, and the powers of the company taken to be limited to those expressed in the statute or to be properly implied as incident to the purposes for which the corporation was created."—*Ibid.*, at p. 363; L. J., at p. 581, Lord Fitzgerald.

Effect of conferring powers which could have been exercised without any express statutory authority.

"The legislature has expressly conferred upon the company many powers which the company, as the owner of property, could have exercised without any express statutory authority. Whenever this is the case, the powers expressly given must be treated either as superfluous or as purposely inserted in order to define, that is, limit, the right conferred, and as implying a prohibition

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against the exercise of the more extensive rights which the company might have by virtue of its ownership of property. That the latter is the true mode of regarding statutory powers conferred on bodies created for public purposes and authorized to acquire land for such purposes cannot, I think, admit of any doubt."—*London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242, at p. 251; 62 L. J. Ch. 294, at p. 300, Lindley, L. J.

Statutes in reference to Trade.

Statutes relating to trade in general are public, and those relating to certain trades are private.

"So mystery or trade is a general word, trade or grocery is special, and this grocer by name is *individuum*: and, therefore, Acts of Parliament concerning mysteries, or trades, are general Acts; but an Act of Parliament concerning the trade of grocery is a special Act, as it is said 28 H. VIII.; Dyer, 27; because the trade of grocers contains under it but *individua*, or singular persons, as this or that grocer by name [*vide* 10 E. 4, 7 a]." 2 *Coke*, p. 473, Part IV. 76 b ((1597), *Holland's Case*).

"And though it be true that Acts of Parliament relating to trade in general are public Acts, yet a statute which relates only to a certain trade is a private one."—*Kirk* v. *Nowill* (1786), 1 T. R. 118, at p. 125, Buller, J.

Statutes in reference to a large trade or business should receive a reasonable and business interpretation with regard to the trade or business with which it is dealing.

"My view of an Act of Parliament which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it with regard to the trade or business with which it is dealing. It seems to me impossible reasonably to hold that those who have to regulate a large trade or business should be supposed to have made an enactment which would prevent that trade or business from being carried on, unless you are forced to come to such a conclusion by the language, and then that could only be by the most extraordinary inadvertence of those who legislate."—*The Danelm*

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(1884), 9 P. D. 164, at p. 171; 53 L. J. P. 81, at pp. 84, 85, Brett, M. R.

Statutes referring to a particular trade, business, or transaction.

"If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."—*Unwin* v. *Hanson*, [1891] 2 Q. B. 115, at p. 119; 60 L. J. Q. B. 531, at p. 532, Lord Esher, M. R.

Statutes interfering with Private Property, Rights, Titles, or Interests.

Statutes interfering with private property, rights, titles, or interests must be interpreted strictly against the parties obtaining them, but liberally, in favour of the public.

"This [an Act for making a road] is a special authority delegated by Act of Parliament to particular persons to take away a man's property and estate against his will; therefore it must be *strictly* pursued."—*Rex* v. *Croke* (1774), 1 Cowp. 26, at p. 29, Lord Mansfield, C. J.

"Those who seek to impose a burden upon the public should take care that their claim rests upon plain and unambiguous language."—*The Leeds and Liverpool Canal Co.* v. *Hustler* (1823), 1 B. & C. 424, at p. 425, Bayley, J.

"If the words of the statute on which they rely [an Act for better supplying with water the inhabitants of the parish of Stratford-le-Bow] be ambiguous, every presumption is to be made against the company and in favour of private property. If such a construction were not adopted, Acts would be framed ambiguously in order to lull parties into security."—*Scales* v. *Pickering* (1828), 4 Bing. 448, at p. 452, Best, C. J.

"It is a wise rule in the construction of private Acts of Parliament that they should be construed strictly."—*Ibid.*, at p. 453, Park, J.

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"This was clearly a bargain made between a company of adventurers and the public, and, as in many similar cases, the terms of the bargain are contained in the Act, and the plaintiffs can claim nothing which is not clearly given."—*The Kingston-upon-Hull Dock Co.* v. *La Marche* (1828), 8 B. & C. 42, at p. 52, Lord Tenterden, C. J.

"The canal having been made under the provisions of an Act of Parliament, the rights of the plaintiffs are derived entirely from that Act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute, and the rule of construction in all such cases is now fully established to be this,—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not *clearly* given to them by the Act. This rule is laid down in distinct terms by the Court in the case of *The Hull Dock Co.* v. *La Marche* [(1828), 8 B. & C. 42, at p. 52], where some previous authorities are cited; and it was also acted upon in the case of *The Leeds and Liverpool Canal Company* v. *Hustler* [(1823), 1 B. & C. 424]."—*Stourbridge Canal Co.* v. *Wheeley* (1831), 2 B. & Ad. 792, at pp. 793, 794, Lord Tenterden, C. J.

"It is to be observed, that the language of these Acts of Parliament (empowering certain parties to make a railway) is to be treated as the language of the promoters of them. They ask the legislature to confer great privileges upon them, and profess to give the public certain advantages in return. Acts passed under such circumstances should be construed strictly against the parties obtaining them, but liberally in favour of the public."—*Parker* v. *The Great Western Rail. Co.* (1844), 7 M. & Gr. 253, at p. 288; 13 L. J. C. P. 105, at p. 112, Tindal, C. J.

"We agree with my brother Alderson, who, in *Lee* v. *Milner* [(1837), 2 Y. & C. Ex. 611, at p. 618], said: 'These Acts of Parliament have been called parliamentary bargains made with each of the landowners. Perhaps more correctly they ought to be treated as conditional powers given by Parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each landowner, therefore, has the right to have the powers strictly and literally carried into effect as regards his own land, and has a right also to require that no variation shall be made to his prejudice in the carrying into effect the bargain between the undertakers and anyone else. This,' he adds, 'I

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conceive to be the real view taken of the law by Lord Eldon, in the case of *Blakemore* v. *The Glamorganshire Canal Co.* [(1824), 1 M. & K. 154; 2 L. J. Ch. 95].'"—*The York and North Midland Rail. Co.* v. *The Queen* (1853), 1 El. & B. 858, at p. 869; 22 L. J. Q. B. 225, at p. 232, Jervis, C. J., delivering the judgment of the Exchequer Chamber (adopted by Lord Chelmsford, L. C., in *Ware* v. *Regent's Canal Co.* (1859), 3 De G. & J. 212, at p. 228; 28 L. J. Ch. 153, at p. 157).

"This is an Act which interferes with private rights and private interests, and which ought, therefore, according to all the decisions upon the subject, to receive a strict construction so far as those rights and interests are concerned. This is so clearly the doctrine of the Court that it is unnecessary to refer to the cases upon the point; they might be cited almost without end."—*Hughes* v. *The Chester and Holyhead Rail. Co.* (1861), 31 L. J. Ch. 97, at p. 109, Turner, L. J.

"The rule that they (Acts of Parliament) ought to be interpreted as in no respect to interfere with or prejudice a clear private right or title, unless the private right or title is taken away *per directum*."—*Walsh* v. *Secretary of State for India* (1863), 10 H. L. Cas. 367, at p. 386; 32 L. J. Ch. 585, at pp. 594, 595, Lord Westbury, L. C.

"Now, we agree with the principle of law stated by Sir Roundell Palmer at the outset, that vested rights are not to be taken away without express words or necessary intendment or implication."—*Randall* v. *Hitman* (1868), L. R. 4 C. P. 107, at p. 113; 38 L. J. C. P. 81, at pp. 83, 84. Kelly, C. B., delivering the judgment of the Exchequer Chamber (Kelly, C. B., Bramwell, Channell and Pigott, BB., and Lush and Hannen, JJ.).

"If a public company or any individuals obtain an Act of Parliament which they say enables them to take away the common law rights of any person, they are bound to show that it does it with sufficient clearness."—*Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R. 8 Ch. 125, at p. 139; 42 L. J. Ch. 107, at p. 111, Mellish, L. J.

"It is obvious that the rights thus conferred on the miner are, as regards the landowner, of a very onerous character, and such as practically to deprive the latter of any beneficial use of so much of his land as is thus used by the miner. Such rights to be thus exercised *in alieno solo* must, in my opinion, be construed strictly, and must be carried no further than the language of the Act

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declaring the custom expressly warrants."—*Wake* v. *Bolticarn* (1880), 43 L. T. 123, at p. 126, Cockburn, C. J.

"It is clear that the burden lies on those who seek to establish that the legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears"—*Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193, at p. 208; 50 L. J. Q. B. 353, at p. 364, Lord Blackburn (cited in *Canadian Pacific Ry.* v. *Parke*, [1899] A. C. 535, at p. 545; 68 L. J. P. C. 89, at p. 93, by Lord Watson, delivering the judgment of the Judicial Committee).

"It was, however, urged, and very strongly, on the part of the plaintiff, that the result of the Paving Acts of Geo. III. was to interfere with and take away the rights of the owner of the market franchise. Now it is to be observed that if those Acts have taken away and interfered with such rights they have done so without giving any compensation, and, it seems to me, that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so."—*Att.-Gen.* v. *Horner* (1884), 14 Q. B. D. 245, at pp. 256, 257; 54 L. J. Q. B. 227, at p. 232, Brett, M. R.

"It is a sound rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it: see per Lord Esher in *Att.-Gen.* v. *Horner* (1884), 14 Q. B. D. 245, at pp. 256, 257; 54 L. J. Q. B. 227, at p. 232."—*Earl of Lonsdale* v. *Loether*, [1900] 2 Ch. 687, at p. 696; 69 L. J. Ch. 686, at p. 690, Farwell, J.

"Their lordships [in the case of the *Tunbridge Wells Corporation* v. *Baird*, [1896] A. C. 434; 65 L. J. Q. B. 451] arrived at that conclusion in accordance with the principle laid down by a line of cases beginning with *Coverdale* v. *Charlton* (1878), 4 Q. B. D. 104; 47 L. J. Q. B. 446, that in construing an Act of Parliament which confers a right upon a public authority for which they do not pay, the Court gives the best effect to the intention of the legislature by limiting the right to the area which is necessary to enable them to perform the duties imposed upon them in respect

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of the street as a street."—*Finchley Electric Light Co.* v. *Finchley Urban Council*, [1903] 1 Ch. 437, at pp. 440, 441; 72 L. J. Ch. 297, at pp. 299, 300, Collins, M. R.

"We have to construe sub-sect. (a) of sect. 1 of the Act of 1893 [Public Authorities Protection Act, 1893 (56 & 57 Vict. *c.* 61)]. That provides a statutory limitation, and must be construed strictly."—*Pelley* v. *Fordham*, [1904] 2 K. B. 345, at p. 347; 73 L. J. K. B. 687, at p. 689, Lord Alverstone, C. J.

(See also *ante*, p. 338, "Effect on Pre-existing Rights," and *post*, p. 424, "Declaratory Statutes.")

Local and personal statutes, directly imposing mutual obligations upon two persons or companies, are to be construed analogously to contracts.

"A private Act of Parliament is in the nature of an agreement between the parties; why may not an agreement be made in derogation of it, provided the agreement be not (as this is not) inconsistent with the public interest, or morality? Suppose the plaintiff had absolutely released all claim under the Act, could he afterwards have recovered?"—*Savin* v. *The Hoylake Rail. Co.* (1865), L. R. 1 Ex. 9, at p. 11, Pollock, C. B. (cited by Farwell, J., in *Corbett* v. *South Eastern & Chatham Railway*, [1905] 2 Ch. 280, at p. 288; 74 L. J. Ch. 659, at p. 663).

"In cases where the provisions of a local and personal Act directly impose mutual obligations upon two persons or companies, such provisions may, in my opinion, be fairly considered as having this analogy to contract, that they must, as between those parties, be construed in precisely the same way as if they had been matter not of enactment, but of private agreement. It was in that sense that in *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* [(1882), 7 App. Cas. 694, at p. 707], I ventured to observe that 'such statutory provisions as those of section 43 [as to compensation and damages] occurring in a local and personal Act must be regarded as a contract between the parties, whether made by their mutual agreement or forced upon them by the legislature.' For all purposes of construction, I thought that the provisions which the House had to interpret might be legitimately viewed in that light. But it did not occur to me then, nor am I now of opinion, that the analogy of contract—for it is nothing more—could, in an English case especially, be carried further."—*Davis & Sons* v. *Taff Vale Rail. Co.*, [1895] A. C. 542, at p. 552; 64 L. J. Q. B. 488, at

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p. 492, Lord Watson (approved of by Vaughan Williams, L. J., in *Joseph Crossfield & Sons, Ltd.* v. *Manchester Ship Canal Co.*, [1904] 2 Ch. 123, at pp. 139, 140; 73 L. J. Ch. [illegible], at p. 358).

Statutory Provisions of Railway Acts and Private Stipulations compared.

"The difference between the statutory provisions of a railway Act and private stipulations has been considered in a great many cases, and is put by Lord Watson in *Dacs & Sons* v. *Taff Vale Rail. Co.*, [1895] A. C. 542, at p. 552; 64 L. J. Q. B. 488, at p. 492, with his usual lucidity. He says: 'The provisions of a railway Act, even when they impose mutual obligations, differ from private stipulations in this essential respect, that they derive their existence and their force, not from the agreement of parties, but from the will of the legislature. And when provisions of that kind are not limited to the interests of the parties mutually obliged, but impose upon one or other or both of them an obligation in favour of third parties, who are sufficiently designated, I am of opinion that the obligation so imposed must operate as a direct enactment of the legislature in favour of these parties, and cannot be regarded as a mere stipulation *inter alios*, which they may have an interest but have no title to enforce. These observations are not meant to apply to any case where a private contract made between two companies is scheduled to and confirmed by the Act; because in such a case the form of the enactment might be held to indicate that it is to operate as a contract, and not otherwise.' I think it is plain from that statement that, in order to say that it is for the benefit of third persons, it is necessary to show who those persons are, and the nature and extent of the benefit intended for them."—*Corbett* v. *South Eastern & Chatham Rail. Co.*, [1905] 2 Ch. 280, at pp. 286, 287; 74 L. J. Ch. 659, at p. 662, Farwell, J.

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Statutes striking at Common Law Rights.

The surface owner has by common law the right to have proper support for his surface so as to prevent its subsidence. The right can only be displaced by express words or by necessary implication from the words used in the statute. The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support. So also is the presence of a compensation clause limited to injury arising from ordinary surface user as distinct from injury by subsidence or obviously inadequate to any greater injury; but a compensation clause providing expressly for injury to buildings or other injury resulting from subsidence is in favour of the destruction of the right. But this is a question of interpretation.

"Speaking for myself, I cannot see why a covenant providing a particular measure or mode of obtaining compensation is in any way inconsistent with the existence of an obligation not to let down the surface, even though that covenant extends beyond the surface and is applicable also, or even exclusively, to underground operations. The use of the words 'by reason of the exercise of the powers' does not seem to me to carry it any further, because it may apply to any incidental injury done—whether accidentally or wilfully makes no difference—whilst exercising the powers. It does not seem to me to give a licence to do the injury, if you say that a person shall pay compensation if he does it. A covenant to pay compensation for doing a thing which you are prohibited from doing is in no way contrary to or inconsistent with the continuance of the obligation not to do it. Indeed, one may go further and say that, if the thing done, notwithstanding the prohibition, is done, there is no other means by which you can obtain a remedy for what is past (an injunction, of course, will not extend to the past) except by provision for payment of compensation. Therefore, I do not accede to the argument that the existence of a covenant for payment of compensation for letting down the surface is, whether it applies wholly or partially to underground operations or not, in any way inconsistent with the continuance of the common law obligation."—*New Sharlston Collieries Co., Ltd.* v. *Earl of Westmorland* (1900), [1904] 2 Ch. 443, at p. 447; 73 L. J. Ch. p. 338 n. (5), Lord Davey.

"Questions on the construction of Inclosure Acts have fre-

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quently come before the Courts, and, although each case of course depends on the wording of the particular Act, there is sufficient similarity between them to warrant the deduction of some general principles applicable to all such Acts; and, indeed, these principles have been settled by numerous decisions, many of them in the House of Lords, and may be stated as follows: The surface owner has by common law the right to have proper support for his surface so as to prevent its subsidence. If the mineral owner contests this right, the burden is on him to displace it. The right can only be displaced by express words or by necessary implication from the words used in the Act. Words, however large, applicable to the right of working and privileges connected with it and compensation for the exercise of such right and privileges are not enough, at any rate, if the words used are fairly applicable to the ordinary course of working and nothing more: see Lord Selborne's judgment in *Love* v. *Bell* (1884), 9 App. Cas. 286, at pp. 290, 291; 53 L. J. Q. B. 257, at p. 258. The absence of any provision for compensation is strong evidence in favour of the continuance of the right to support. So also is the presence of a compensation clause limited to injury arising from ordinary surface user as distinct from injury by subsidence or obviously inadequate to any greater injury; but a compensation clause providing expressly for injury to buildings or other injury resulting from subsidence is in favour of the destruction of the right. But this is a question of construction, for, as stated by Lord Davey in *New Sharlston Collieries Co.* v. *Earl of Westmorland* (1900), [1904] 2 Ch. 443, at p. 447; 73 L. J. Ch. 338, n. (5), at p. 341, the existence of an express provision for compensation for letting down the surface does not necessarily authorize the mine-owner to let it down. The question is one of construction in each case, and the same principles apply whether the document be a grant, lease, or Inclosure Act. The latter is nothing more than a statutory agreement between the parties, or, as Lord Selborne puts it, 'it is a case of mutual considerations resulting in the apportionment of land to which the parties may be taken to have agreed, or have had determined for them by the authority which made the award.' It is important to ascertain whether the mineral owner's rights are merely reserved or whether they are newly created by grant. In the latter case there is more ground than in the former for the argument that the ordinary common law right of support has been displaced. (*Duke of Buccleuch* v. *Wakefield* (1870), L. R. 4 H. L. 377; 39

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L. J. Ch. 441; *Love* v. *Bell* (1884), 9 App. Cas. 286, at pp. 291, 292; 53 L. J. Q. B. 257, 260.) The reservation of the lord's rights to be enjoyed in as full and ample a manner as if the Act had not been passed is not equivalent to a reservation free from the common law liability to leave support merely because the only liability before the Act was to leave sufficient pasturage, but is to be read as subject to the ordinary maxim, '*Sic utere tuo ut alienum non laedas*'; so that, *mutatis mutandis*, it becomes subject to the substituted ownership right of support in lieu of the extinguished commoners' right of pasturage; and accordingly, if there were no such commonable rights, no substituted right of support can be maintained: *Gill* v. *Dickinson* (1880), 5 Q. B. D. 159; 49 L. J. Q. B. 262."—*Bishop Auckland Industrial Co-operative Society, Ltd.* v. *Butterknowle Colliery Co., Ltd.*, [1904] 2 Ch. 419, at pp. 424—426; 73 L. J. Ch. 335, at p. 342, Farwell, J.

Statutes striking at Privileges.

"It seems to me that a more sound and reasonable interpretation of such an Act of Parliament [Bankruptcy Act, 1861 (24 & 25 Vict. c. 134)] would be, that the privilege which had been established by common law, and recognized on many occasions by Act of Parliament, should be held to be a continuous privilege not abrogated or struck at unless by express words in the statute."—*Duke of Newcastle* v. *Morris* (1870), L. R. 4 H. L. 661, at p. 668, Lord Hatherley, L. C.

Statutes imposing Charge on an Individual.

"I desire to say that when an Act of this description is obtained by a company, incorporated for purposes of profit, to confer upon them rights and powers which they would not have at common law, the provisions of such a statute must be somewhat jealously scrutinized, and I think that they ought not to be held to possess any right unless it be given in plain terms or arises as a necessary inference from the language used."—*Scottish Drainage and Improvement Co.* v. *Campbell* (1889), 14 App. Cas. 139, at p. 142, Lord Herschell.

"I have always understood, with reference to private Acts, as contradistinguished from public Acts of Parliament, that if a charge is imposed upon the person of an individual, it must be so

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imposed in clear and express terms, and not left to implication."—*Ibid.*, at p. 149, Lord Fitzgerald.

Statutes in reference to Judicial Acts.

"When a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having the right to make the application."—*Macdougall* v. *Paterson* (1851), 11 C. B. 755, at p. 773; 21 L. J. C. P. 27, at p. 29, Jervis, C. J., delivering the judgment of the Court (Jervis, C. J., Maule, J., Williams, J., and Talfourd, J.).

The jurisdiction of Superior Courts is not taken away except by express words or necessary implication.

"The general rule undoubtedly is, that the jurisdiction of Superior Courts is not taken away, except by express words or necessary implication."—*Albon* v. *Pyke* (1842), 4 M. & G. 421, at p. 424, Tindal, C. J.

"There can be no doubt that the principle is, that the jurisdiction of the Supreme Courts can only be taken away by positive and clear enactments in an Act of Parliament."—*Balfour* v. *Malcolm* (1842), 8 Cl. & F. 485, at p. 500, Lord Campbell.

"No rule is better understood than that the jurisdiction of a Superior Court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament."—*Oram* v. *Brewer* (1877), 2 Ex. D. 346, at p. 348; 46 L. J. Ex. 481, at p. 482, Pollock, B.

Interpretation of statutory rules, regulations, by-laws and provision as to exercise of powers and duties.

"I am of opinion that the rules and orders [made pursuant to sect. 19 of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85)] have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before Parliament for a certain time, and if not objected to they are then to be binding. Wherever that provision is introduced into an Act of Parliament it seems to me that the rules and orders, if not objected to by Parliament,

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become part of the statute. It was urged that though the rules and orders might be part of the statute, the forms were not. In my opinion the forms are part of the rules and orders, they are referred to in them, and the mere fact of their being put into a schedule, instead of being embodied in the rules, is a mere question of drafting. The forms, therefore, are part of the rules and orders which have statutory authority."—*Dale's Case* (1881), 6 Q. B. D. 376, at pp. 455, 456; 50 L. J. Q. B. 234, at pp. 263, 264, Brett, L. J.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Sect. 31. "Where any Act, whether passed before or after the commencement of this Act [1st January, 1890], confers power to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or by-laws, expressions used in the instrument, if it is made after the commencement of this Act [1st January, 1890], shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power."

Sect. 32.—"(1.) Where an Act passed after the commencement of this Act [1st January, 1890] confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

"(2.) Where an Act passed after the commencement of this Act [1st January, 1890] confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

"(3.) Where an Act passed after the commencement of this Act [1st January, 1890] confers a power to make any rules, regulations, or by-laws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations, or by-laws."

Ministerial Acts and Judicial Discretion.

"Now, it appears to me that it is a true proposition to say that when a public duty is imposed by Act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it

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cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to have been merely ministerial, then, I think, for the purposes of the question, whether they are protected from an action, it must be considered as judicial."—*Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (1890), 25 Q. B. D. 90, at p. 96; 59 L. J. Q. B. 475, at p. 478, Lord Esher, M. R.

Statutory Rules, Orders and Forms.

The effect of a statutory rule or order, if validly made under the statute, is that every person must conform himself to its provisions.

It is open to a person to canvass a statutory rule or order and determine whether or not it is within the power of those who made it. No person can canvass in that way the provisions of a statute.

Where there is any conflict between a statutory rule or order and a provision of the statute under which the rule or order is made, it should be determined which is the leading and which the subordinate provision and which must give way to the other.

For all purposes of interpretation or obligation or otherwise, statutory rules, orders and forms, if validly made under a statute, are to be treated exactly as if they were in the statute itself under which the rules, orders and forms are made.

"The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule, if validly made, is precisely the same—that every person must conform himself to its provisions, and, if in each case a penalty be imposed, any person who does not comply with the provisions, whether of the enactment or the rule, becomes equally subject to the penalty. But there is this difference between a rule and an enactment; that whereas, apart from such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore

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there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference, if it is open to consideration, whether it be so or not.

"I own I feel great difficulty in giving to this provision that they 'shall be of the same effect as if they were contained in this Act,' any other meaning than this, that you shall, for all purposes of construction or obligation or otherwise, treat them exactly as if they were in the Act. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it. Those are points which I need not dwell upon on the present occasion.

"Although it is not necessary for the determination of this case to express an opinion upon it, yet, as the matter has been so much discussed, I think it only right to express the opinion which I entertain, that the words to which I have referred are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words, I believe, to be found in legislation only in comparatively recent years, and it is difficult to understand why they have been inserted unless with the object I have indicated."—*Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347, at pp. 359, 360, 361; 63 L. J. P. C. 74, at pp. 80, 81, Lord Herschell, L. C.

"It is to be observed, that by sect. 58 of the Act of 1878 [the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74)], the Order in Council is to have the same effect as if it were enacted by the Act itself. What, then, is the effect of that provision on the question of air space? The case of the *Institute of Patent Agents* v. *Lockwood*, [1894] A. C. 347; 63 L. J. P. C. 74, to which we have been referred, suggests that in such a case the proper canon of construction is to read the original Act and the subordinate legislation together, as if they were one Act, and were to be construed together. That seems to me the right principle to

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adopt."—*Baker* v. *Williams*, [1898] 1 Q. B. 23, at pp. 25, 26; 66 L. J. Q. B. 880, at p. 882, Wright, J.

"Where I am called upon to construe a rule [of the Supreme Court] which is admittedly a modification of a previous rule, it appears to me to be not unfair or improper to inquire what principles were held to apply under the earlier rule, and to hold that the same principles ought to be applied under the new or modified rule."—*Tomalin* v. *Smart*, [1904] P. 141, at p. 144; 73 L. J. P. 37, at p. 38, Jenne, P.

By-Laws.

"'By-law,' or 'bye-law,' is the Scandinavian *bye* ('hamlet'), a law made by a hamlet or township for the regulation of its own affairs."—*Bain*, "*A Higher English Grammar*," p. 225, new edition.

"They [by-laws] may be made at courts-leet and courts-baron, by commoners or inhabitants, in vils, &c., guilds or fraternities of trade duly incorporated."—*Wharton's Law Lexicon.*

"In Scotland those laws are called laws of *birlaw*, or *burlaw*, which are made by neighbours elected by common consent in the birlaw Courts."—*Ibid.*

By 19 Hen. VII. c. 7, 1503–4, it is enacted that:—

Sect. 1. No masters, wardens and fellowships of crafts or mysteries, nor any of them, nor any rulers of guilds or fraternities, take upon them to make any acts or ordinances, nor to execute any acts or ordinances by them hereafore made, in disheritance or diminution of the prerogative of the King, nor of other, nor against the common profit of the people, but if the same acts or ordinances be examined and approved by the chancellor, treasurer of England, and chief justices of either bench, or three of them; or before both the justices of assize in their circuit or progress in that shire, whether such acts or ordinances be made, upon the pain of forfeiture of 40*l.* for every time that they do the contrary.

Sect. 2. None of the same bodies corporate take upon them to make any acts or ordinances to restrain any person or persons to sue to the King's Highness, or to any of his Courts, for due remedy to be had in their causes, nor put nor execute any penalty or punishment upon any of them for any such suit to be made, upon pain of forfeiture of 40*l.* for every time that they do the contrary.

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Every by-law must be *legi, fidei, rationi consona.* 8 Co. 126; Com. Dig. By-law B. 1.

If it be lawful and reasonable, it will be good, though it be not confirmed, or allowed according to the st. 19 H. VII. 7. R. 5 Co. 63 b; 1 Rol. 363, l. 35; Com. Dig. By-law B. 1.

A by-law, not good, shall not be allowed, because it is approved according to the st. 19 H. VII. 7. R. 11 Co. 54 b; Com. Dig. By-law C. 6.

A by-law, not reasonable in any respect, will be void. Com. Dig. By-law C. 6.

A by-law, being entire if it be unreasonable in any particular, shall be void for the whole: as if the penalty be unreasonable. Com. Dig. By-law C. 7.

"Though a by-law may be good in part, and bad in part, yet it can be so only where the two parts are entire and distinct from each other."—*Rex* v. *The Company of Fishermen of Faversham* (1799), 8 T. R. 352, at p. 356, Lord Kenyon, C. J.

Primâ facie *the same interpretation should be applied to terms used in a by-law which is applied to the same terms in the statute under which the by-law is framed.*

A by-law must be, as a general rule, consistent with the principles of the common law, and if it violates those principles it is bad.

If a by-law is capable of two interpretations, one of which would make it bad and the other good, that interpretation which will make it consonant with the principles of the common law must be adopted.

A by-law to be valid must be certain and reasonable. Where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself.

The by-laws of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public, should be jealously watched by the Courts.

The by-laws of public representative bodies ought to be supported if possible, and ought to be benevolently interpreted.

"Instruments should be so construed as that they may stand good, rather than be defeated. That this rule is applicable to by-laws, sufficiently appears from the case of *The Poulters' Co.* v.

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Phillips (1840), 6 Bing. N. C. 314; 9 L. J. C. P. 190."—*The Queen* v. *The Saddlers' Co.* (1861), 30 L. J. Q. B. (Ex. Ch.) 186, at p. 198, Martin, B.

"I do not say that there may not be words in by-laws which are so obviously used in a different sense to the same words in the Act [under which the by-laws are made] that the Court may properly, reading them with the context, put a different construction upon them; but *primâ facie* I should say that the proper mode of construction is to apply the same interpretation to terms used in a by-law which is applied to the same terms in the Act under the powers of which the by-law is framed." - *Blashill* v. *Chambers* (1884), 14 Q. B. D. 479, at p. 485, Grove, J.

"The jurisdiction of testing by-laws by their reasonableness was originally applied in such cases as those of manorial bodies, towns, or corporations, having inherent powers or general powers conferred by charter of making such laws. As new corporations or local administrative bodies have arisen, the same jurisdiction has been exercised over them. But in determining whether or no a by-law is reasonable, it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned."—*Slattery* v. *Naylor* (1888), 13 App. Cas. 446, at p. 452; 57 L. J. P. C. 73, at p. 76. Lord Hobhouse, delivering the judgment of their lordships (Lords Hobhouse, Herschell and Macnaghten and Sir Barnes Peacock and Sir Richard Couch) (cited by Sir F. H. Jeune, President of Probate, Divorce and Admiralty Division, in *Kruse* v. *Johnson*, [1898] 2 Q. B. 91, at pp. 104, 105; 67 L. J. Q. B. 782, at p. 788).

"Now, it is true that a by-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law."—*Collman* v. *Mills*, [1897] 1 Q. B. 396, at p. 399; 66 L. J. Q. B. 170, at p. 172, Wills, J.

"The great majority of the cases in which the question of by-laws has been discussed, are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public. In this class of case it is right that

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the Courts should jealously watch the exercise of these powers, and guard their unnecessary or unreasonable exercise to the public disadvantage. But when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves no new canon of construction. But further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think Courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn, C. J., said in *Bailey* v. *Williamson* (1873), L. R. 8 Q. B. 118, at p. 124; 42 L. J. M. C. 49, at p. 55, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made [the County Council of Kent], as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent, or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose those whom they think

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best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested. . . . . I have said that there are few of the prior cases dealing with this matter which lay down the principles upon which the by-laws made by representative public bodies are to be considered. There is one notable exception. I refer to the case of *Slattery* v. *Naylor* (1888), 13 App. Cas. 446; 57 L. J. P. C. 73. That was a case in the Privy Council in which the members of that Court had to consider the validity of a by-law passed by the Municipal Council of the Borough of Petersham in New South Wales, under the provisions of the Municipalities Act, 1867. The Court consisted of Lords Hobhouse, Herschell, and Macnaghten, Sir Barnes Peacock and Sir Richard Couch. That case has been so fully discussed during the course of the argument that I do not think it necessary here to refer to it in detail. It is enough to say that beyond doubt the reasoning and principles on which it proceeds fully justify the views which I have expressed in this judgment. Nor are the weight and value of the reasoning in that case, as an authority in the present case, in any way lessened by the fact that the by-law there was made under the authority of a different statute. The cases are strictly analogous, and it was necessary for the judgment of the Privy Council that that tribunal should consider the principles upon which by-laws of representative governing bodies made under statutory authority should be considered. That it has done thoroughly and clearly."—*Kruse* v. *Johnson*, [1898] 2 Q. B. 91, at pp. 99, 100, 102, 103; 67 L. J. Q. B. 782, at pp. 785—787, Lord Russell, C. J. [Mathew, J., dissented from, but the rest of the Court (Chitty, L. J., Wright, Darling, and Channell, JJ.) concurred in, the judgment delivered by Lord Russell of Killowen, C. J.]

"It was decided in very early times that the approval of the by-law by the authorities mentioned in the statute [19 Hen. VII. c. 7 (1503—4) (see *ante*, p. 405)] did not give it validity not otherwise legal. (*Ipswich Taylor's Case* (1614), 11 Co. Rep.

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53 a; *Stationers' Co.* v. *Salisbury* (1693), Comb. 221, at p. 222; 2 Kyd on Corporations, 109.) The validity of the by-laws must be determined by the judges when they are brought properly before them. This duty has been cast on the Superior Courts where any restriction is sought to be imposed on personal liberty, and is traceable to the clause in the great Charter, '*Nullus liber homo, dissesiatur de . . . . libertatibus suis . . . . aisi . . . . per legem terræ*' [25 Edw. I. (1297)]. This rule has been followed and acted upon down to the present time. The power to make by-laws is conferred upon a vast number of corporate bodies and associations created by charter or by statute, as, *e.g.*, municipal bodies, companies for trading or other purposes, literary and scientific associations, and such institutions as the University of London and the College of Surgeons. See for further instances, Lumley on By-laws, p. 164.

"From the many decisions upon the subject it would seem clear that a by-law, to be valid, must, among other conditions, have two properties: it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable. See *City of London Case* (1609), 8 Co. Rep. 121 b; Com. Dig. By-law B. 1; *Framework Knitters' Co.* v. *Greg* (1696), 1 Ld. Raym. 113; *Eagleton* v. *East India Co.* (1802), 3 B & P. 55 [cited in *Nash* v. *Finlay* (1902), 66 J. P. 182] . . . . . .

I do not propose to refer at length to the cases cited in the argument where by-laws made under local authority have in recent times been condemned as unreasonable. In none of those cases is there any indication of the principle which I understand to be now contended for, namely, that such ordinances should receive a special kind of interpretation. The powers conferred on county councils have been spoken of in the discussion as something previously unknown to the law. But from the earliest times when charters were granted to towns, municipal affairs have been managed by elected representatives of the inhabitants. The by-laws made by such bodies have been frequently declared to be invalid. Take, for instance, the by-laws which have been held to be unreasonable restraint of trade, and which are referred to in the judgment in *Mitchell* v. *Reynolds* (1711), 1 P. Wms. 181; 1 Sm. L. C. (10th ed.) p. 391. No case has been cited in which there is any trace of the principle now contended for, that such by-laws are to be interpreted with any particular indulgence because of

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their popular origin. If this view be adopted, it seems to me the judges will be placed in an anomalous position. Where they differ from bodies not popularly elected, their jurisdiction to pronounce upon the validity of a by-law would remain unimpaired; but where they differed from bodies like a county council, their position would be altogether different. They would be bound to uphold what, in other cases, they would be right in condemning. I concur in the view that deference should be shown by the Courts to the by-laws of a local authority which may appear to interfere unduly with personal liberty, but where there was reason to suppose that the regulations were called for by the requirements of the particular place. There may be peculiar circumstances in the condition of a borough or part of a county which make stringent regulations as to personal conduct necessary. In that sense, I agree, a by-law ought to receive an indulgent interpretation. But this by-law is not confined to a particular locality; it applies to the whole of rural Kent. . . . I have been unable to find any authority in our books for the suggestion that the validity of a by-law can be established in any other way than by a judgment of a Court of law as to its meaning according to ordinary rules of construction. . . . . .

I regret to be unable to concur in the view of the majority of my colleagues. Their judgment appears to me to conflict with the recent decisions referred to in the course of the discussion, and with the views expressed by Sir Henry Hawkins, the late Mr. Justice Cave, the present Master of the Rolls [Sir N. Lindley], and the late Lord Justice Kay. In the case of *Alty* v *Farrell*, [1896] 1 Q. B. 636; 65 L. J. M. C. 115, a by-law which gave a policeman an unqualified right to require a vendor of coals in small quantities to weigh the coals in the policeman's presence was held to be unreasonable and invalid, because the power might be exercised oppressively. This principle seems to me applicable to the present case. The decision of *Alty* v. *Farrell*, [1896] 1 Q. B. 636; 65 L. J. M. C. 115, has the high authority of the Lord Chief Justice and Wright, J.

"The judgments of the majority of the judges by whom this case is decided will no doubt be entitled to great respect from those who may have similar cases to deal with; but the decision will not be binding on any other Divisional Court, and in the present state of the law there seems to be no mode of finally settling the differences of judicial opinion that may arise in cases like the present.

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A change of procedure would seem to be necessary which would permit an appeal in the ordinary way."—*Kruse* v. *Johnson*, [1898] 2 Q. B. 91, at pp. 108, 110, 111, 112, 113; 67 L. J. Q. B. 782, at pp. 790, 791, 792, Mathew, J.

"I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification—the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."—*Reg.* v. *Bird, Ex parte Needes*, [1898] 2 Q. B. 340, at p. 345; 67 L. J. Q. B. 618, at p. 619, Wills, J.

"We shall not attempt to define a by-law or to lay down the limits of its operation. It is sufficient to say that by-laws of the class with which we are dealing [made under the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Viet. c. exxxiii.)] derive their authority from the statute which gives power to make them, and the provisions of different statutes in that behalf vary almost infinitely; so that it is necessary in any particular instance to look to the enactment under the authority of which the by-law affects to be made, and to see whether or not it is within the statutory power."—*Kennaird* v. *Cory & Son*, [1898] 2 Q. B. 578, at p. 582; 67 L. J. Q. B. 809, at p. 810, Wills, J.

"I also think that in *Kruse* v. *Johnson*, [1898] 2 Q. B. 91; 67 L. J. Q. B. 782, it is laid down as a principle that the Courts should not look at the by-laws of local authorities—the popularly elected governing bodies of boroughs and counties—from the same point of view as that from which they were in the habit of looking at the by-laws of railway companies and other like bodies, and that a larger discretion is to be given to those public representative bodies than is given to private bodies."—*White* v. *Morley*, [1899] 2 Q. B. 34, at p. 37; 68 L. J. Q. B. 702, Darling, J.

"By-laws must not only be reasonable, but must not be repugnant to the general law. A by-law is a local law, and may be supplementary to the general law; it is not bad because it deals with something that is not dealt with by the general law. But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful."—*Ibid.* at p. 39, Channell, J.

"As was said in *Kruse* v. *Johnson*, [1898] 2 Q. B. 91; 67 L. J. Q. B. 782, a strong case is needed to induce the Court to hold such by-laws [made under the Salmon Fishery Act of 1873] void for unreasonableness. Where clear powers are given by the

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enabling Act of Parliament, we ought not to hold that a by-law made under those powers is *ultra vires* unless it prescribes something which is clearly not within the statute, and that is certainly even more the case where the by-law is passed (as was the case here) after a public inquiry, at which all the persons interested in the question might have been heard."—*Clayton* v. *Peirse*, [1904] 1 K. B. 424, at p. 426; 73 L. J. K. B. 268, at p. 270, Lord Alverstone, C. J.

"I agree with that which Lord Russell of Killowen, C. J., said in *Kruse* v. *Johnson*, [1898] 2 Q. B. 91; 67 L. J. Q. B. 782, that by-laws ought to be supported if possible, and that the Court ought to be slow to condemn as invalid any by-law on the ground of supposed unreasonableness. But, on the other hand, as we pointed out in the previous case of *Nokes* v. *Corporation of Islington*, [1904] 1 K. B. 610; 73 L. J. K. B. 100, if a by-law necessarily involves that which is unreasonable, it is our duty to declare it to be invalid."—*Stiles* v. *Galinski*, [1904] 1 K. B. 615, at p. 621; 73 L. J. K. B. 485, at p. 488, Lord Alverstone, C. J.

"I only desire to say that, it is now settled that this Court will not hold by-laws made by local authorities to be unreasonable and invalid except in extreme cases. I think it follows that the tribunal which has to administer the by-laws, upon a complaint being made that they have been broken, ought to apply the same liberal construction to them in favour of the party complained against as this Court applies to them in favour of the local authorities."—*Leyton Urban Council* v. *Chew*, [1907] 2 K. B. 283, at p. 288; 76 L. J. K. B. 781, at p. 786, Darling, J.

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Section VIII.

CONCERNING PARTICULAR KINDS OF STATUTES.

Retrospective and Prospective Statutes.

Nova constitutio, futuris formam imponere debet, non præteritis. 2 *Inst.* 292.

Statutes are not to be interpreted so as to have a retrospective operation, unless they contain clear and express words to that effect, or the object, subject-matter or context shows a contrary intention.

A larger retrospective effect should not be given to a statute which is to some extent intended to be retrospective than that which it can plainly be seen the legislature meant.

The consequence of holding a statute not to be retrospective are to be looked at.

Where the words of a statute admit of two interpretations you are not to interpret them so as to produce a retrospective effect, or impose disabilities not existing at the passing of the statute: but if the statute is expressed in language that is fairly capable of either interpretation, it ought to be interpreted as prospective only.

"The general principle, however, that a statute is not to be construed so as to have retrospective operation, is a just one; for

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persons ought not to have their rights affected by laws passed subsequently."—*Thompson* v. *Lack* (1846), 3 C. B. 540, at p. 551; 16 L. J. C. P. 75, at pp. 77, 78, Wilde, C. J.

"The general rule on this subject is stated by Lord Coke, in the Second Institute, 292, in his Commentary on the Statute of Gloucester. '*Nova constitutio futuris formam imponere debet, non præteritis*,' and the principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."—*Moon* v. *Durden* (1848), 2 Ex. 22, at p. 33, Rolfe, B.

"But it is, as Lord Coke says, 'a rule and law of Parliament that regularly, *nova constitutio futuris formam imponere debet, non præteritis*. This rule, which is, in effect, that enactments in a statute are generally to be construed to be prospective, and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and has been acted upon in many cases. . . . . But this rule, which is one of construction only, will certainly yield to the intention of the legislature; and the question in this and in every other similar case is, whether that intention has been sufficiently expressed."—*Ibid.*, at p. 42, Parke, B.

"We must, however, enter upon the consideration of it [the Bankruptcy Law Consolidation Act, 1849 (12 & 13 Vict. c. 106)] with a due regard to the well-known principle that statutes are not to be held to operate retrospectively unless they contain express words to that effect. Sometimes, no doubt, the legislature find it expedient to give a retrospective operation to an Act to a considerable extent; but then care ought to be taken to express that intention in clear and unambiguous language."—*Marsh* v. *Higgins* (1850), 9 C. B. 551, at p. 567; 19 L. J. C. P. 297, at p. 300, Wilde, C. J.

"Unless there be something in the language, context, or objects of an Act of Parliament showing a contrary intention, the duty and practice of Courts of justice is to presume, in conformity with the adage of Lord Coke, that the legislature enacts prospectively and not retrospectively. There may, however, be acts that are evidently on the face of them, by their language and subject-matter, intended to be retrospective; and when such is the case,

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the maxim of Lord Coke must give way."—*Kerr* v. *The Marquis of Ailsa* (1854), 1 Macq. 736, at p. 737, Lord Cranworth.

"I take it to be a clear rule of law that the language of a statute is *primâ facie* to be construed as prospective only. This is according to the legal maxim, *Nova constitutio futuris formam imponere debet, non præteritis*."—*Vansittart* v. *Taylor* (1855), 4 E. & B. 910, at p. 914; 24 L. J. Q. B. 198, at p. 199, Parke, B.

"Lord Coke's well-known canon: '*Nova constitutio futuris formam imponere debet, non præteritis.*' That is the ordinary rule as to the interpretation of all legislative enactments, and is to be observed unless there be something in the terms of a particular enactment to prevent its operation."—*Jackson* v. *Woolley* (1858), 8 E. & B. 778, at p. 787; 27 L. J. Q. B. 448, at p. 449, Williams, J.

"Nothing but clear and express words will give a retrospective effect to a statute. It would be a most dangerous construction to give a retrospective effect to a statute by implication."—*Young* v. *Hughes* (1859), 28 L. J. Ex. 161, at p. 164; 4 H. & N. 76, at pp. 83, 84, Pollock, C. B.

"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is expressed in clear, plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment. Modern legislation has almost entirely removed that blemish from the law; and wherever it is possible to put upon an Act of Parliament a construction not retrospective, the Courts will always adopt that construction."—*Midland Rail. Co.* v. *Pye* (1861), 10 C. B. N. S. 179, at p. 191; 30 L. J. C. P. 314, at p. 318, Erle, C. J. (cited by Lopes, L. J., in *In re School Board Election for Parish of Pulborough*, [1894] 1 Q. B. 725, at p. 737; 63 L. J. Q. B. 497, at p. 501, and in *Young* v. *Adams*, [1898] A. C. 469, at p. 476; 67 L. J. P. C. 75, at p. 77, Lord Watson, delivering the judgment of the Judicial Committee).

"I think it is a broad principle of construction that, unless the Court sees a clear indication of intention in an Act of Parliament to legislate *ex post facto*, and to give to the Act the effect of depriving a man of a right which belonged to him at the time of passing the Act, the Court will not give to the Act a retrospective operation. The case of *Moon* v. *Durden* [(1848), 2 Ex. 22], which was cited,

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strongly illustrates that principle."—*Evans* v. *Williams* (1865), 2 Dr. & Sm. 324, at p. 329, Sir R. T. Kindersley, V.-C.

"Except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to have a retrospective construction. That rule was laid down strongly in *Moon* v. *Durden* [(1848), 2 Ex. 22, at p. 33]. . . . . In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the legislature contemplated." —*Pardo* v. *Bingham* (1869), L. R. 4 Ch. 735, at pp. 739, 740, Lord Hatherley, L. C. (cited in *In re Chapman*, [1896] 1 Ch. 323, at pp. 327, 328; 65 L. J. Ch. 170, at p. 172, by Kekewich, J.).

"The rule which has obtained in putting a construction upon statutes—that when they are penal in their nature they are not to be construed retrospectively, if the language is capable of having a prospective effect given to it and is not necessarily retrospective." —*The Queen* v. *Vine* (1875), L. R. 10 Q. B. 195, at p. 199; 44 L. J. M. C. 60, at p. 63, Cockburn, C. J.

"This [Wine and Beer Amendment Act, 1870 (33 & 34 Vict. c. 29)] is therefore a highly penal enactment. The sound and well-established canon of construction is that such an enactment is to be read as prospective, unless a contrary intention be clearly established from the language used."—*Ibid.* at p. 201; L. J. at p. 64, Lush, J.

"It is a general rule that, where a statute is passed altering the law, unless the language is expressly to the contrary, it is taken as intended to apply to a state of facts coming into existence after the Act."—*The Queen* v. *Ipswich Union* (1877), 2 Q. B. D. 269, at p. 270; 46 L. J. M. C. 207, at p. 208, Cockburn, C. J.

"In the first place, the opinion which was pronounced by Lord Cranworth in the case of *Kerr* v. *The Marquis of Ailsa* (1854), 1 Macq. 736, followed up as it has been by similar opinions given by other judges, is decisive to this effect; that unless there is some declared intention of the legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective. It appears to me that the ground of those opinions is very plain indeed."—*Gardner* v. *Lucas* (1878), 3 App. Cas. at pp. 600, 601, Lord O'Hagan.

"Now, the general [illegible], not merely of England and Scotland, but I believe of every civilized nation, is expressed in the maxim,

'*Nova constitutio futuris formam imponere debet non præteritis*'—*primâ facie*, any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to show it, it might be retrospective. For instance, I think it is perfectly settled that if the legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal. But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid—to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *primâ facie* construction of the Act is that it is not to be retrospective, and that it would require strong reasons to show that is not the case."—*Ibid.* at p. 603, Lord Blackburn.

"The question whether an Act of Parliament is retrospective in its operation must be determined by the provisions of the Act itself, bearing in mind that a statute is not to be construed retrospectively, unless it is clear that such was the intention of the legislature."—*Quilter* v. *Mapleson* (1882), 9 Q. B. D. 672, at p. 674; 52 L. J. Q. B. 44, at p. 45, Jessel, M. R.

"It is a well-known principle of law on the construction of Acts of Parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated."—*Hickson* v. *Darlow* (1883), 23 Ch. D. 690, at p. 692; 52 L. J. Ch. 453, at p. 454, Fry, J.

"*Primâ facie* s. 3 [of Ground Game Act, 1880 (43 & 44 Vict. c. 47)] would be prospective only, that being the general rule of construction of Acts of Parliament, that you are not to interfere with rights unless you find express words, and the operation of that third section would be prospective only."—*Allhusen* v. *Brooking* (1884), 26 Ch. D. 559, at p. 564; 53 L. J. Ch. 520, at p. 521, Chitty, J.

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"Now, the particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim, *omnis nova constitutio futuris formam imponere debet non præteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that, even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the legislature meant."—*Reid* v. *Reid* (1886), 31 Ch. D. 402, at pp. 408, 409; 55 L. J. Ch. 294, at p. 298, Bowen, L. J. (cited by Sir F. H. Jeune in *The Vera*, [1899] P. 236, at p. 241).

"In determining whether any provision of an Act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act—who had been doing that which the legislature thought to be wrong—should entirely escape the consequences of their wrong-doing by reason of the repeal of the old Act."—*Ex parte Todd* (1887), 19 Q. B. D. 186, at p. 195; 56 L. J. Q. B. 431, at p. 432, Lord Esher, M. R.

"I think that, when a statute renders necessary to the validity of a transaction a condition with which it is impossible that the parties to the transaction should comply at the time when the statute comes into operation, the statute cannot apply to antecedent transactions, unless the legislature have plainly expressed their intention that it is to apply to them. It would be most unjust that transactions should be avoided when the parties to them have had no opportunity of complying with the requirements of the legislature."—*Ibid.*, at p. 198; L. J. at p. 433, Fry, L. J.

"Their lordships of course do not say that there might not be something in the context of an Act of Parliament, or to be

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collected from its language, which might give to words *primâ facie* prospective a larger operation; but they ought not to receive a larger operation unless you find some reason for giving it."—*Main* v. *Stark* (1890), 15 App. Cas. 384, at pp. 387, 388; 59 L. J. P. C. 68, at p. 70, Earl of Selborne.

"Unless the intention of the legislature is clearly expressed to that effect, criminal offences are not to be created by giving a retro-active operation to Acts of Parliament."—*The Queen* v. *Griffiths*, [1891] 2 Q. B. 145, at p. 148; 60 L. J. M. C. 93, Denman, J.

"It certainly requires very clear and unmistakeable language in a subsequent Act of Parliament to revive or recreate an expired right. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."—*Lauri* v. *Renad*, [1892] 3 Ch. 402, at pp. 420, 421; 61 L. J. Ch. 580, at p. 583, Lindley, L. J.

"It is a well-recognised principle in the construction of statutes that they operate only on cases and facts which come into existence after the statutes were passed, unless a retrospective effect is clearly intended.

"This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights, or the legal character of past transactions. It need not be penal in the sense of punishment.

"Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect."—*In re School Board Election for Parish of Pulborough*, [1894] 1 Q. B. 725, at p. 737; 63 L. J. Q. B. 497, at p. 501, Lopes, L. J.

"It is a well-known principle in the construction of statutes that where the words admit of two constructions you are not to construe them so as to produce a retrospective effect, or impose disabilities not existing at the passing of the Act."—*Ibid.*, at p. 741; L. J., at p. 503, Davey, L. J.

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"No doubt the maxim '*Omnis nova constitutio futuris formam imponere debet non præteritis*' has been applied to the extent that a new law ought to be construed so as to interfere as little as possible with vested rights; and in *Main* v. *Stark* (1890), 15 App. Cas. 384, at p. 388; 59 L. J. P. C. 68, at p. 70, the Earl of Selborne says: 'Words not requiring a retrospective operation, so as to affect an existing status prejudicially, ought not to be so construed,' yet the result is that in all cases it is necessary to ascertain what the legislature meant."—*Reynolds* v. *Att.-Gen. for Nova Scotia*, [1896] A. C. 240, at p. 244; 65 L. J. P. C. 16, at p. 17, Lord Morris.

"Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."—*In re Athlumney, Ex parte Wilson*, [1898] 2 Q. B. 547, at pp. 551, 552; 67 L. J. Q. B. 935, at p. 937, Wright, J.

Alteration of Law pending an Action.

"We are of opinion in general that the law as it existed when the action was commenced must decide the rights of the parties in the suit, unless the legislature express a clear intention to vary the relation of litigant parties to each other."—*Hitchcock* v. *Way* (1837), 6 A. & E. 943, at pp. 951, 952, Lord Denman, C. J., delivering the judgment of the Court.

(See also *post*, p. 458, "Effect of Repeal of Statutes.")

A statute dealing with procedure only, unless the contrary is expressed, applies to all actions, whether commenced before or after the passing of the statute.

"When an Act of Parliament alters the proceedings which are to prevail in the administration of justice, and there is no provision that it shall not apply to suits then pending, I think it does apply to such actions."—*Wright* v. *Hale* (1860), 6 H. & N. 227, at p. 231; 30 L. J. Ex. 40, at p. 42, Pollock, C. B.

"But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions

whether commenced before or after the passing of the Act. That this is the principle appears from the cases that have been referred to on both sides."—*Ibid.*, at p. 232; L. J., at p. 43, Wilde, B. (cited by A. L. Smith, L. J., in *The Vdau*, [1899] P. 236, at p. 245; 68 L. J. P. 101, at p. 103).

"This statute [23 & 24 Vict. c. 144 (the Matrimonial Causes Act, 1860)] does not affect the rights of suitors, but simply alters the mode of procedure in suits. A statute cannot be said to have a retrospective operation because it applies a new mode of procedure to suits which commenced before its passing."—*Watton* v. *Watton* (1866), L. R. 1 P. & M. 227, at p. 228; 35 L. J. Mat. Cas. 95, at p. 96, Sir J. P. Wilde.

"The canon of decision in *Wright* v. *Hale* [(1860), 6 H. & N. 227; 30 L. J. Ex. 40] is, that when the effect of an enactment is to take away a right, *primâ facie* it does not apply to existing rights; but where it deals with procedure only, *primâ facie* it applies to all actions pending, as well as future."—*Kimbray* v. *Draper* (1868), L. R. 3 Q. B. 160, at pp. 162, 163; 37 L. J. Q. B. 80, at p. 81, Blackburn, J.

"It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. It is said that there is one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights."—*In re Joseph Suche & Co., Ltd.* (1875), 1 Ch. D. 48, at p. 50; 45 L. J. Ch. 12, at p. 13, Jessel, M. R. (cited by Wright, J., in *In re Waverley Typewriter*, [1898] 1 Ch. 699, at p. 702; 67 L. J. Ch. 360, at p. 362; and in *In re Athlumney, Ex parte Wilson*, [1898] 2 Q. B. 547, at p. 552; 67 L. J. Q. B. 935, at p. 937).

"I think it is perfectly settled that if the legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be."—*Gardner* v. *Lucas* (1878), 3 App. Cas. 582, at p. 603, Lord Blackburn.

"The rule laid down by Wilde, B., in *Wright* v. *Hale* [(1860), 6 H. & N. 227, at p. 232; 30 L. J. Ex. 40, at p. 43] applies, that

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"Where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.'"—*Singer* v. *Hasson* (1884), 50 L. T. 326, at p. 327, A. L. Smith, J.

"It certainly was considered in many cases that where a person had commenced an action he had a vested right, and that any subsequent statute ought not to be construed as retro-active so as to alter that right. That is not an invariable rule, and it does not apply if the language of the statute is clear and express. This appears from a good many authorities, especially those affecting questions of costs, some of which are—*Freeman* v. *Moyes* [(1834), 1 Ad. & E. 338], *Wright* v. *Hale* [(1860), 6 H. & N. 227; 30 L. J. Ex. 40], *Kimbray* v. *Draper* [(1868), L. R. 3 Q. B. 160; 37 L. J. Q. B. 80]."—*Att.-Gen.* v. *Theob'd* (1890), 24 Q. B. D. 557, at p. 566, Pollock, B.

"Though, no doubt, the general rule of construction is that '*nova constitutio futuris formam imponere debet non praeteritis*,' it is pointed out in *Moon* v. *Durden* (1848), 2 Ex. 22, at p. 33, that that rule of construction yields to a sufficiently expressed intention of the legislature that the enactment shall have a retrospective operation, and there is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts."—*The Vdau*, [1899] P. 236, at p. 246; 68 L. J. P. 101, at p. 103, Vaughan Williams, L. J.

"In order that there should be a bar to the institution of proceedings in respect of a matter which is *primâ facie* within the operation of a statute, it must be clear, either necessarily or by implication, from the language used that a limitation is imposed."—*Rex* v. *Mead*, [1902] 2 K. B. 212, at p. 215; 71 L. J. K. B. 871, at p. 872, Lord Alverstone, C. J.

"The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective (*The Vdau*, [1899] P. 236; 68 L. J. P. 101), and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so

as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act comes into force, Mr. Compton-Smith would have been entitled to succeed; but when no new disability or obligation has been created by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute [the Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15, s. 7)] does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective."—*Rex* v. *Chandra Dharma*, [1905] 2 K. B. 335, at pp. 338, 339; 74 L. J. K. B. 450, at p. 451, Lord Alverstone, C. J.

Consolidation Order.

"An order for consolidation, which is intended to deal with the future procedure in the actions which are consolidated, in my judgment ought not in principle to be construed as altering the rights of parties under orders already made in one or other of the actions consolidated."—*Boke* v. *French*, [1907] 1 Ch. 428, at p. 436; 76 L. J. Ch. 299, at p. 302, Parker, J.

Declaratory Statutes.

Statutes are "*declaratory* [of the common law] where the old custom of the kingdom is almost fallen into disuse, or become disputable: in which case the Parliament has thought proper *in perpetuam rei testimonium*, and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been."—1 *Bl. Com.* 86.

"The case of *Attorney-General* v. *Hertford* [(1849), 3 Ex. 670; 18 L. J. Ex. 332] in the Court of Exchequer, is a strong authority that, if an Act is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable."—*Att.-Gen.* v. *Theobald* (1890), 24 Q. B. D. 557, at pp. 559, 560, Pollock, B.

"A declaratory act means to declare the law, or to declare that which has always been the law, and there having been doubts

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which have arisen, Parliament declares what the law is, and enacts that it shall continue what it then is."—*Jones* v. *Bennett* (1890), 63 L. T. 705, at p. 708, Lord Coleridge, C. J.

Statutory Fictions.

The limits and purposes of a statutory fiction are to be carefully ascertained.

"Where the legislature provides that something is to be deemed other than it is, we must be careful to see within what bounds and for what purpose it is to be so deemed."—*Gover's Case* (1875), 1 Ch. D. 182, at pp. 188, 189; 45 L. J. Ch. 83, at p. 90, James, L. J.

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."—*Ex parte Walton* (1881), 17 Ch. D. 746, at p. 756; 50 L. J. Ch. 657, at p. 662, James, L. J. (cited by Earl Cairns in *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, at p. 456; 53 L. J. Ch. 842, at p. 845).

(See also "Interpretation Clauses," *ante*, p. 301, meaning of expression "shall be deemed.")

Inconsistent Statutes—Repugnancy.

Where there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other.

If two inconsistent statutes be passed at different times, the last is to be obeyed, as it speaks the last intention of the makers.

If two sections in the same Act are repugnant, the latter of the two sections must prevail.

Where the proviso of a statute is directly repugnant to the purview of it, the proviso shall stand and be held to be a repeal of the purview.

"Our decision is conformable with the doctrine laid down in *The Attorney-General* v. *The Chelsea Waterworks Co.* [(1731), Fitzgibbon, 195]: there it was resolved that where the proviso of an

Act of Parliament is directly repugnant to the purview of it, the proviso shall stand and be held a repeal of the purview, *as it speaks the last intention of the makers.*"—*The King* v. *The Justices of Middlesex* (1831), 2 B. & Ad. 818, at p. 821, Lord Tenterden, C. J., delivering the judgment of the Court.

"If two inconsistent Acts be passed at different times, the last is to be obeyed, and if obedience cannot be observed without derogating from the first, it is the first which must give way. Every Act of Parliament must be considered with reference to the state of law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every Act is made either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment."—*The Dean, &c. of Ely* v. *Bliss* (1842), 5 Beav. 574, at p. 582; 11 L. J. Ch. 351, at p. 354, Lord Langdale, M. R.

"If the two sections are repugnant, the known rule is that the last must prevail."—*Wood* v. *Riley* (1867), L. R. 3 C. P. 26, at p. 27, Keating, J.

"It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other."—*Ebbs* v. *Boulnois* (1875), L. R. 10 Ch. 479, at p. 484; 44 L. J. Ch. 691, at p. 694, James, L. J. (applied by Charles, J., in *Wardens of Cholmeley School, Highgate* v. *Sewell*, [1894] 2 Q. B. 906, at p. 911; 63 L. J. Q. B. 820, at p. 824; and by Lopes, L. J., in *Imray* v. *Oakshette*, [1897] 2 Q. B. 218, at p. 223; 66 L. J. Q. B. 544, at p. 547).

"In the first place, it was said that if construed according to their ordinary grammatical construction, they [the words of a section] would practically contradict other sections in a series of Acts of Parliament which apply to burial boards and districts. If it had been found that reading them in their ordinary sense they would contradict some other enactments, but that reading them in a sense in which, though not their ordinary sense, they were reasonably capable of being read, they would not contradict such other enactments, then I agree that they should be read so that all the enactments should be read together without contradicting each other."—*The Queen* v. *Overseers of Tonbridge* (1884), 13 Q. B. D. 339, at p. 342; 53 L. J. Q. B. 488, at p. 491, Brett, M. R.

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"The usual rule that where there are two public general Acts with inconsistent provisions the later Act prevails, and all the more so if its provision is express and that of the earlier Act is only implied."—*In re Camberwell Licences, and Middlesex County Council*, [1907] 1 K. B. 51, at p. 58; 76 L. J. K. B. 44, at p. 49, Farwell, L. J.

Remedial Statutes.

Definition.

"Remedial statutes are those which are made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever: and this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial Acts of Parliament into *enlarging* and *restraining* statutes."—1 *Bl. Com.* 86.

Remedial statutes ought to be construed liberally.

"The law will never make an interpretation to advance a private and to destroy the public, but always to advance the public and to prevent every private, which is odious in law in such cases. And, therefore, it is well said in *Heydon's Case* (1584) in the Third Part of my Reports, f. 7 b. The office of judges is always to make such construction as to suppress the mischief and advance the remedy; and to suppress subtle inventions and evasions for the continuance of the mischief, *et pro privato commodo*, and to add force and life to the cure and remedy according to the true intention of the makers of the Act *pro bono publico*."—6 *Coke*, p. 139, Part XI., 73 b (cited by Pollock, C. B., in *Att.-Gen.* v. *Walker* (1849), 18 L. J. Ex. 179, at p. 184).

"In remedial cases, the construction of statutes is extended to other cases within the reason or the rule of them. But where it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction."—*Atcheson* v. *Everitt* (1776), Cowp. 382, at p. 391, Lord Mansfield, C. J.

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"But it had been properly said that this (9 Will. III. c. 8, s. 8) was a remedial statute, and in advancement of the remedy all was to be done in a way consistent with any construction of it."—*Johnes* v. *Johnes* (1814), 3 Dow, App. Cas. 1, at p. 15, Lord Eldon, L. C.

"It is by no means unusual in construing a statute to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief, where the statute is remedial. It is a mode of construction as familiar to every legal person, as expounding the statute by equity."—*Dean and Chapter of York* v. *Middlebrugh* (1828), 2 Y. & J. 196, at p. 215, Alexander, C. B.

"I admit that the common distinction between penal and remedial Acts, viz., that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a judge, yet, whatever be the Act, be it penal, and certainly if remedial, we ought always to look for its true construction. In that respect, there ought to be no distinction between a penal and a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so as to extend it."—*Nicholson* v. *Fields* (1862), 7 H. & N. 810, at p. 817; 31 L. J. Ex. 233, at p. 239, Pollock, C. B.

"The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of interpretation."—*Giovanni Dapueto* v. *James Wyllie & Co.* (1874), L. R. 5 P. C. 482, at p. 492; 43 L. J. Ad. 20, at pp. 23, 24, Sir Montague E. Smith, delivering the judgment of the Judicial Committee.

"If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit."—*Gover's Case* (1875), 1 Ch. D. 182, at p. 198, Brett, J.

(See also *ante*, p. 338, "Effect on Pre-existing Rights.")

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New Right, Obligation, Duty, or Liability, and its Remedy.

If a statute creates a new right, obligation, duty or liability and a new remedy, the new remedy must as a general rule be exclusively followed.

If a right, obligation, duty or liability is created by statute, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

If there is a liability existing at common law, and which is only re-enacted by a statute with a special form of remedy: there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law.

"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no means of enforcing its performance is ordained, the common law [illegible], in general, find a mode suited to the particular nature of th[illegible]"—*Doe* d. *Bishop of Rochester* v. *Bridges* (1831), 1 B. & Ad. [illegible] p. 859, Tenterden, C. J. (cited by Earl of Halsbury, L. C., in *Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A. C. 387, at p. 394; 67 L. J. Q. B. 645, at p. 637; and by Joyce, J., in *Devonport Corporation* v. *Tozer*, [1902] 2 Ch. 182, at p. 193; 71 L. J. Ch. 754, at p. 759).

"It was a rule of law that an action will not lie for the infringement of a right created by statute, where another specific remedy for infringement is provided by the same statute."—*Stevens* v. *Jeacocke* (1848), 11 Q. B. 731, at p. 741; 17 L. J. Q. B. 163, at p. 165, Lord Denman, C. J.

"Where new rights are given with specific remedies, the remedy is confined to those specifically given."—*Berkeley* v. *Elderkin* (1853), 1 E. & B. 805, at p. 808; 22 L. J. Q. B. 281, at p. 282, Lord Campbell, C. J.

"Where an Act of Parliament creates a right and points out a remedy, no other remedy exists."—*St. Pancras Vestry* v. *Batterbury* (1857), 26 L. J. C. P. 243, at p. 246, Williams, J.

"The general rule, where there is a new obligation made by an Act of Parliament and a new remedy, would apply."—*Blackburn*

Corporation v. *Parkinson* (1858), 28 L. J. M. C. 7, at p. 10, Hill, J.

"There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy; there the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."—*Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859), 6 C. B. N. S. 336, at p. 356; 28 L. J. C. P. 242, at p. 246, Willes, J. (cited by Farwell, J., in *Stevens* v. *Chown*, [1901] 1 Ch. 894, at p. 903; 70 L. J. Ch. 571, at p. 575; by Joyce, J., in *Devonport Corporation* v. *Tozer*, [1902] 2 Ch. 182, at pp. 193, 194; 71 L. J. Ch. 754, at p. 759; and by Buckley, J., in *Att.-Gen.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101, at p. 106; 72 L. J. Ch. 67, at p. 69).

"It is a settled rule that if a statute creates a new right and gives a particular remedy for enforcing it, there is no other remedy."—*West* v. *Bowman* (1880), 14 Ch. D. 111, at p. 120, Jessel, M. R.

"Where, as here, there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability, such mode of procedure is the only one to be followed and used for that purpose."—*Wake* v. *Mayor, &c. of Sheffield* (1883), 12 Q. B. D. 142, at p. 145; 53 L. J. M. C. 1, at p. 3, Brett, M. R.

"The ordinary rule of construction therefore applies in this case, that where the legislature has passed a new statute giving a new remedy, that remedy is the only one which can be pursued."—*The Queen* v. *County Court Judge of Essex* (1887), 18 Q. B. D. 704, at p. 707; 56 L. J. Q. B. 315, at p. 318, Lord Esher, M. R.

"Upon consideration and upon the authority of *Berkeley* v. *Elderkin* (1853), 1 E. & B. 805; 22 L. J. Q. B. 281, I am clearly of opinion that that section [sect. 17 of 1 & 2 Vict. c. 110

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(the Judgment Act, 1838)] has no application to judgments recovered in the statutory County Courts established under 9 & 10 Vict. c. 95 (the County Courts Act, 1846). That Act gave a new jurisdiction, a new procedure, new forms and new remedies, and the procedure, forms and remedies there prescribed must, where they have not been altered by subsequent legislation, be strictly complied with. I entirely concur in the language of Lord Campbell and of Erle, J., in the case cited."—*Ibid.*, at p. 708; L. J. at p. 320, Lopes, L. J.

"In *West* v. *Dorrington* (1884), 14 Ch. D. 111, it was pointed out that, before the Public Health Act, 1848 (11 & 12 Vict. c. 63), the local board could not recover from the owners of property the expenses of work done, but that that Act conferred the right to recover such expenses, and imposed a liability on the adjoining owners. That was a new liability not previously known to the law, and it is a settled rule that in such a case the remedy given by the statute is the only remedy for enforcing th right."—*In re Willesden Local Board and Wright*, [1896] 2 Q. B. 412, at p. 414; 65 L. J. Q. B. 567, at p. 569, Lord Esher, M. R.

"It has been laid down for many years that, if a duty is imposed by statute which, but for the statute, would not exist, and a remedy for default or breach of that duty is provided by the statute that creates the duty, that is the only remedy."—*Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619, at p. 624; 66 L. J. Q. B. 388, at p. 390, Lord Esher, M. R. See *Pechtes* v. *Oswaldtwistle Urban District*, [1897] 1 Q. B. 625, at pp. 627, 629; 66 L. J. Q. B. 392, at p. 394, where Lord Esher, M. R., and Lopes, L. J., state the same rule in different words.

New Offence and its Remedy.

Where a statute creates a new offence and defines particular remedies, primâ facie *a person proceeding under the statute can avail himself of the remedies so defined, and no other, except the ancillary remedy by injunction to protect the right.*

"It was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else

could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the Court will interfere and prevent the act being done—and as regards the mode of granting an injunction, the Court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated.

"The second exception is that created by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. (8), which enables the Court to grant an injunction in all cases in which it shall appear to the Court to be just or convenient. This section may be said to be a general supplement to all Acts of Parliament."—*Cooper* v. *Whittingham* (1880), 15 Ch. D. 501, at pp. 506, 507; 49 L. J. Ch. 752, at p. 755, Jessel, M. R. (cited and commented on by Joyce, J., in *Devonport Corporation* v. *Tozer*, [1902] 2 Ch. 182, at pp. 194, 195; 71 L. J. Ch. 754, at p. 760).

"The ground is said to be that where a statute creates an offence and defines particular remedies against the person committing that offence, *primâ facie* the party injured can avail himself of the remedies so defined and no other. I see no reason to call that rule in question. But it must be examined with reference to the terms in which the statute deals with the subject."—*Brain* v. *Thomas* (1881), 50 L. J. Q. B. 662, at p. 663, Lord Selborne, L. C.

"Everything that the statute [the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85)] requires must be done; but when it refers generally to powers to enforce obedience, and does not prescribe any procedure, those powers generally referred to would be the powers of the Court in which the proceedings are deemed to be taken."—*Green* v. *Lord Penzance* (1881), 6 App. Cas. 657, at p. 675; 51 L. J. Q. B. 25, at p. 43, Lord Selborne, L. C.

"If you find in an Act of Parliament the power to take the remedy in divers Courts, that remedy will, in each Court, be subject to the *lex fori* of that Court, and the *lex fori* includes the limitation of actions, which goes to the remedy, and not to the right."—*Blackburn Corporation* v. *Sanderson*, [1902] 1 K. B. 794, at p. 807; 71 L. J. K. B. 590, at p. 594, Vaughan Williams, L. J.

"It cannot be disputed, after *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; 49 L. J. Ch. 752, that if a plaintiff is suing in respect of a right personal to himself he may be protected by

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injunction." —*Att.-Gen.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101, at p. 107; 72 L. J. Ch. 67, at pp. 69, 70, Buckley, J.

(See also *post*, p. 447, "Mode of Enforcing Statutes," and p. 451, "Cumulative Statutes.")

Prohibitory Statutes.

"Prohibitory statutes prevent you from doing something which formerly it was lawful for you to do. And whenever you can find that anything done that is substantially that which is prohibited, I think it is perfectly open to the Court to say that that is void, not because it comes within the spirit of the statute, or tends to effect the object which the statute meant to prohibit, but because, by reason of the true construction of the statute, it is the thing, or one of the things, actually prohibited."—*Philpott* v. *St. George's Hospital* (1857), 6 H. L. Cas. 338, at p. 349; 27 L. J. Ch. 70, at p. 72, Lord Chelmsford, L. C.

"The argument for the appellants is, that the covenantor here has tried indirectly to do by a circuitous mode that which he could not do directly, because the statute prohibited it, and that the principle laid down in the two cases of *Doe* d. *Mitchinson* v. *Carter* [(1798), 8 T. R. 57, 300] is applicable to the present case. That principle was approved of in *Croft* v. *Lumley* [(1858), 6 H. L. Cas. 672; 27 L. J. Q. B. 321], though there was a difference of opinion as to its application in that case. The principle, as I understand it, is that whenever it can be shown that the acts of the parties are adopted for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they may have purposely caused, though they may have done it indirectly and endeavoured to conceal that they have done so. This, I think, is a sound principle, but it is essential for its application, that what is thus effected should be the thing prohibited."—*Jeffries* v. *Alexander* (1860), 8 H. L. Cas. 594, at p. 623; 31 L. J. Ch. 9, at p. 14, Blackburn, J.

Legislative Expositions.

"Reading these two statutes [Local Government Act, 1894 (56 & 57 Vict. c. 73), and Local Government (Joint Committees) Act, 1897 (60 & 61 Vict. c. 40)] together, I am of opinion that the

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legislature itself has afforded an exposition of the sense and meaning in which the expression 'urban district' is used in the earlier Act. See *Battersby* v. *Kirk* (1836), 2 Bing. N. C. 584, at p. 606; *Morgan* v. *London General Omnibus Co.* (1883), 12 Q. B. D. 201, at p. 207; 53 L. J. Q. B. 352."—*Kirkdale Burial Board* v. *Liverpool Corporation*, [1904] 1 Ch. 829, at p. 836; 73 L. J. Ch. 529, at p. 533, Swinfen Eady, J.

(See also *ante*, pp. 316—318.)

Explanatory Statutes.

"An Act of explanation which always is beneficially to be interpreted."—2 *Coke*, p. 196, Part III. 75 a.

"An Act of explanation . . . should not be construed by any strained sense against the letter of the Act [explained], for if any explanation should be made against the direct letter of the exposition made by Parliament, there would be no end of expounding."—*Butler and Baker's case* (1591), 3 Rep. 31 a.

"For that [34 Hen. VIII. c. 5] is a statute of explanation, and shall be construed only according to the words, and not with any equity or intendment; for there cannot be an explanation upon an explanation, as it is held in *Butler* v. *Baker* (1591), 3 Co. 25."—Cro. Car. 33, pl. 6, Sir Randolph Crew, C. J.

Mandatory Statutes, Directory or Imperative.

The scope and object of a statute are the only guides in determining whether its provisions are directory or imperative.

In general the provisions of statutes creating public duties are directory, and those conferring private rights are imperative.

In the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative.

"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at

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the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."—*The Liverpool Borough Bank* v. *Turner* (1860), 2 D. F. & J. 502, at pp. 507, 508; 30 L. J. Ch. 379, at pp. 380, 381, Lord Campbell, L. C.

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."—*Howard* v. *Bodington* (Feb. 27th, 1877), 2 P. D. 203, at p. 211, Lord Penzance.

"I may say that the rules for ascertaining whether the provisions of a statute are directory or imperative are very well stated in 'Maxwell on the Interpretation of Statutes' [1st edit., 1875]: Thus, at pp. 330, 331, it is laid down that the scope and object of a statute are the only guides in determining whether its provisions are directory or imperative, and the judgment of Lord Campbell in *Liverpool Borough Bank* v. *Turner* [(1860), 2 D. F. & J. 502; 30 L. J. Ch. 379] is cited in support of this proposition; at pp. 333, 337, the distinction between statutes creating public duties and those conferring private rights is pointed out, and it is stated that in general the provisions of the former are directory, but of the latter imperative; and at p. 340 it is laid down that in the absence of an express provision the intention of the legislature is to be ascertained by weighing the consequences of holding a statute to be directory or imperative."—*Caldow* v. *Pirrell* (Ap. 27th, 1877), 2 C. P. D. 562, at p. 566; 46 L. J. C. P. 541, at p. 543, Denman, J.

(See also *ante*, p. 328, "Imperative or Permissive Phrases," and *ante*, p. 331, "Obligatory or Directory Provisions.")

Fiscal, Taxing and Charging Statutes.

Every charge upon the subject must be imposed by clear and unambiguous language.

A taxing statute is to be interpreted upon the same principle, and by the same rules as any other statute.

In interpreting statutes relating to the revenue, the popular sense of the words rather than their strict legal meaning should be looked at.

Fiscal, taxing or charging statutes are to be interpreted strictly against the party in whose favour they are made.

A tax shall not be considered to be imposed (or at least, not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it shown by clear and unambiguous words, however apparently within the spirit of the law the case might otherwise appear to be. This rule does not apply to a considerable extent where the payment is to be made in return for services rendered.

Where words occur in a statute imposing taxation throughout the three Kingdoms, they should be interpreted so as to make the incidence of the taxation alike in all three Kingdoms.

"It is a well settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language."—*Denn* d. *Manifold* v. *Diamond* (1825), 4 B. & C. 243, at p. 245, Bayley, J.

"It is a sound general rule, that a tax shall not be considered to be imposed (or at least, not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it."—*Hull Dock Co.* v. *Browne* (1831), 2 B. & Ad. 43, at pp. 58, 59, Lord Tenterden, C. J. (cited by Vaughan Williams, L. J., in *Assheton Smith* v. *Owen*, [1906] 1 Ch. 179, at p. 205, 75 L. J. Ch. 187, at p. 196).

"We must look to the precise words of these Revenue Acts, because in some degree they operate as penalties."—*Doe* d. *Scruton* v. *Smith* (1832), 8 Bing. 146, at p. 152, Park, J.

"It must be observed that, *in dubio*, you are always to lean against the construction which imposes a burthen on the subject: the intention of the legislature to impose a tax must be clear: it was so held in the case of *The Hull Dock Co.* v. *Browne* [(1831), 2 B. & Ad. 43, at p. 58]. 'These rates,' said Lord Tenterden, 'are

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a tax upon the subject; and it is a sound general rule that a tax shall not be considered to be imposed (or at least, not for the benefit of a subject) without a plain declaration of the intent of the legislature to impose it.' The like law was laid down by the Court of King's Bench in the case of a company claiming against the public—*Gilbart* v. *Gladstone* [(1809), 11 East, 675, at p. 685]—where Lord Ellenborough said: 'If the words would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public and most against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they were to receive, and because the public ought not to be charged unless it be clear that it was so intended.'"—*The Stockton and Darlington Rail. Co.* v. *Barratt* (1844), 7 M. & G. 870, at p. 879, Lord Brougham.

"It is a well-established rule, that the subject is not to be taxed without clear words for that purpose, and also that every Act of Parliament must be read according to the natural construction of its words."—*In re Micklethwait* (1855), 11 Ex. 452, at p. 456; 25 L. J. Ex. 19, at p. 21, Parke, B. (cited by Lord Halsbury, L. C., in *Tennant* v. *Smith*, [1892] A. C. 150, at p. 154; 61 L. J. P. C. 11, at p. 13).

"I am desirous to say, that I disclaim in this case acting on the maxim that a burthen shall not be imposed on the public unless by clear and unambiguous language. In *In re Micklethwait* [(1855), 11 Ex. 452, at p. 456; 25 L. J. Ex. 19, at p. 21], Baron Parke says [rule above set out]. The latter is the main rule; the other subordinate. Construe the statute correctly if its meaning can be ascertained. Maxims of the sort referred to, as frequently applied, are mere invitations to erroneous construction, though, when properly understood, they are quite correct."—*Foley* v. *Fletcher* (1858), 3 H. & N. 769, at pp. 780, 781; 28 L. J. Ex. 100, at p. 106, Bramwell, B.

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable

construction, certainly such a construction is not admissible in a taxing statute, where you simply adhere to the words of the statute."—*Partington* v. *Att.-Gen.* (1869), L. R. 4 H. L. 100, at p. 122; 38 L. J. Ex 205, at p. 217, Lord Cairns (cited by Vaughan Williams, L. J., in *Att.-Gen.* v. *De Préville*, [1900] 1 Q. B. 223, at pp. 230, 231; 69 L. J. Q. B. 283, at p. 288; and by Collins, M. R., in *Att.-Gen.* v. *Selborne* (*Earl of*), [1902] 1 K. B. 388, at p. 396; 71 L. J. K. B. 289, at p. 295).

"A Taxing Act must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed."—*Cox* v. *Rabbits* (1878), 3 App. Cas. 473, at p. 478; 47 L. J. Q. B. 385, at p. 391, Lord Cairns, L. C.

"My lords, the cases which have decided that Taxing Acts are to be construed with strictness, and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that inasmuch as there was not any *à priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever might be the consequence. I cannot think that this principle applies to any considerable extent, where the payment spoken of in the Act of Parliament is a payment to be made in return for services rendered, and, above all, in a case where Parliament does not step in to give the right of payment, but rather to moderate and limit a right to payment which otherwise might exist without limit, or at all events with only such limits as would be placed upon it by a *quantum meruit* assessment."—*Pryce* v. *Monmouthshire Canal and Railway Cos.* (1879), 4 App. Cas. 197, at pp. 202, 203; 49 L. J. Ex. 130, at p. 134, Earl Cairns, L. C.

"Their lordships, therefore, having regard to the rule that the intention to impose a charge on the subject must be shown by clear and unambiguous language, &c."—*Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842, at p. 856; 50 L. J. P. C. 1, Lord Blackburn, delivering the judgment of the Judicial Committee.

"A Taxing Act is to be construed upon the same principle and by the same rules as any other Act."—*Mersey Docks and Harbour Board* v. *Lucas* (1881), 51 L. J. Q. B. 114, at p. 118, Brett, L. J.

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(cited by Vaughan Williams, L. J., in *Att.-Gen.* v. *De Preville*, [1900] 1 Q. B. 223, at p. 231; 69 L. J. Q. B. 283, at p. 288).

"The general canon of construction is stated in *Reg.* v. *Barclay* [(1881), 8 Q. B. D. 306, at p. 312; 51 L. J. M. C. 27] by Field, J., who says: 'It is a very well established rule for the construction of statutes that, if they impose a charge on the subject, they must be strictly construed as against the party in whose favour the charge is imposed.'"—*Dawes* v. *Evans* (1882), 9 Q. B. D. 238, at p. 242; 51 L. J. M. C. 132, at p. 136, Grove, J.

"The second rule is that, where the words occur in a statute imposing taxation throughout the three kingdoms, they should be construed so as to make the incidence of the taxation alike in all three kingdoms. This was considered in *Lord Saltoun* v. *Lord Advocate* [(1860), 3 Macq. 659]."—*The Queen* v. *Commissioners of Income Tax* (1888), 22 Q. B. D. 296, at p. 310; 58 L. J. Q. B. 196, at p. 201, Fry, L. J.

"Acts of Parliament which impose legacy duty, like all other Taxing Acts, are to be read strictly; that is to say, they are not to be extended so as to have the effect of imposing on the subject a tax which Parliament has not clearly made him pay. Those principles are perfectly familiar."—*In re J. Thorley*, [1891] 2 Ch. 614, at p. 623; 60 L. J. Ch. 537, at p. 538, Lindley, L. J.

"This is an Income Tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed,' I mean what is the intention of the Act as expressed in its provisions, because in a Taxing Act it is impossible, I believe, to assume any intention—any governing purpose in the Act—to do more than take such tax as the statute imposes. In various cases the principle of construction of a Taxing Act has been referred to in various forms, but I believe they may be all reduced to this—that, inasmuch as you have no right to assume that there is any governing object which a Taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation. Lord Wensleydale said, in *In re Micklethwait* (1855), 11 Ex. 452, at p. 456; 25 L. J. Ex. 19, at p. 21: 'It is a well-established rule, that the subject is not to be taxed without clear words for that

purpose; and also that every Act of Parliament must be read according to the natural construction of its words.'"—*Tennant* v. *Smith*, [1892] A. C. 150, at p. 154; 61 L. J. P. C. 11, at p. 13, Lord Halsbury, L. C. (quoted by A. L. Smith, L. J., in *Att.-Gen.* v. *Beech*, [1898] 2 Q. B. 147, at p. 150; 67 L. J. Q. B. 585, at p. 587; and by Stirling, L. J., in *Att.-Gen.* v. *Selborne* (*Earl of*), [1902] 1 K. B. 388, at p. 399; 71 L. J. K. B. 289, at p. 297).

"It has been often said by judges of very great experience that, in construing Acts relating to the revenue, the popular sense of words rather than their strict legal meaning should be looked at, and the reason for that is obvious. The object of Taxing Acts has nothing to do with the strict legal meaning of words, unless the words used are words of art, such as words which describe an estate in real property, or technical terms peculiar to English law."—*Smelting Company of Australia* v. *Commissioners of Inland Revenue*, [1896] 2 Q. B. 179, at p. 184; 65 L. J. Q. B. 513, at p. 514, Pollock, B.

"It is stated in Maxwell on Statutes, 1st ed. (1875), p. 259, that 'statutes which impose pecuniary burdens are subject to the rule of strict construction It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language by which the tax is imposed is perfectly clear and free from doubt.' For this proposition several decisions and dicta are cited, and there is no doubt as to its being a correct statement of the law. Of course the learned author does not mean to say that where the plain language of a statute imposes a tax or duty, any Court is to construe it according to any other principle than they would apply to the construction of another statute."—*Clifford* v. *Commissioners of Inland Revenue*, [1896] 2 Q. B. 187, at pp. 192, 193; 65 L. J. Q. B. 582, at p. 585, Pollock, B.

"The first point we have to consider is this: That the object of the Finance Act [1894 (57 & 58 Vict. c. 30)] is to levy upon all property, real or personal, settled or not settled, estate duty. The time at which that duty is to be payable is fixed, and fixed with reference to the death of a person who has been the owner of, or has enjoyed, the property in question. That being so, we start with a proposition which is not included in the ordinary common law principle (as it is admitted on both sides, and as we have it laid down again and again, especially by Lord Westbury); these

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Acts are not to be construed in accordance with the ordinary language of conveyancers, or in accordance with what is supposed to give effect to the principles upon which conveyancers would act; they are to be construed, as indeed all other Acts are, with a view to carrying out what is supposed to be the intention of the Act and its provisions, as expressed by the language used."—*Att.-Gen.* v. *Beech*, [1897] 2 Q. B. 535, at p. 539; 66 L. J. Q. B. 800, at p. 801, Pollock, B.

"It is unquestionably within the competence of Parliament, when imposing a tax, to modify or abrogate for the purpose of the Act any rule of law or equity which otherwise would be applicable to the subject-matter. Whether it has done so or not must always be a question of the true construction of the particular statute under consideration. The right, and indeed the only, method of interpretation is to ascertain the intention of the legislature from the language and provisions of the Act itself. In construing a statute, regard must be had to the ordinary rules of law applicable to the subject-matter, and these rules must prevail, except in so far as the statute shows that they are to be disregarded; and the burden of showing that they are to be disregarded rests upon those who seek to maintain that proposition. It is incumbent on the Crown, when claiming the tax, to make out affirmatively that the case falls within the statute. The principles applicable to the interpretation of a Taxing Act are laid down by the Lord Chancellor (Lord Halsbury) in the passage already cited (*Tennant* v. *Smith*, [1892] A. C. 150, at p. 154; 61 L. J. P. C. 11, at p. 13). You must see that the tax is expressly imposed; the subject is not to be taxed without clear words, and the Act, like every other Act, must be read according to the natural construction of the words." —*Att.-Gen.* v. *Beech*, [1898] 2 Q. B. 147, at p. 155; 67 L. J. Q. B. 585, at p. 590, Chitty, L. J.

"It has been said, and I agree, that the tax is not to be regarded as imposed unless the words in the statute are clear."—*Inland Revenue Commissioners* v. *Tod*, [1898] A. C. 399, at p. 414; 67 L. J. P. C. 42, at p. 46, Lord Herschell.

"I would observe that the art of interpreting statutes of this character—statutes which impose taxation—cannot be considered an exact science; it is rather a practical art, and the questions which arise cannot be dealt with as though they were simple questions to be settled upon principles of common law."—*Swayne*

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v. *Inland Revenue Commissioners*, [1899] 1 Q. B. 335, at p. 344, Wills, J.

"I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a Taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject; namely, to give effect to the intention of the legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject-matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the legislature has said."—*Att.-Gen.* v. *Carlton Bank*, [1899] 2 Q. B. 158, at p. 164; 68 L. J. Q. B. 788, at pp. 791, 792, Lord Russell, C. J. (cited by Farwell, J., in *City of London Electric Lighting Co.* v. *Mayor, &c. of London* (1900), 82 L. T. 530, at p. 532).

"The truth is that, when you are dealing with a question of this sort, and endeavouring to find out whether a thing [a bicycle] is taxable or not under Acts of this character, the first thing to do is to find out whether there is anything which corresponds in the ordinary and natural course of meaning to the language which the legislature at the particular time used in making the things mentioned in such Acts the subject of taxation. I do not think it is a question merely of words whether the thing sought to be made taxable was called a coach or not; if it was intended to fill the functions of a carriage according to the description given in the original Act. I quite agree that the mere fact that it was called by a different name from those enumerated in the Act would not matter, because the language would have been used by the legislature in a sense which everybody could understand, and which would comprehend the particular thing although it might be called by another name."—*Simpson* v. *Teignmouth and Shaldon Bridge Co.*, [1903] 1 K. B. 405, at pp. 411, 412; 72 L. J. K. B. 204, at p. 206, Earl of Halsbury, L. C.

"It is a wholesome principle which has often been recognised, that Taxing Acts must be reasonably clear and precise as to the subjects which are intended to be taxed."—*Horan* v. *Hayhoe*,

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[1904] 1 K. B. 288, at p. 290; 73 L. J. K. B. 133, at p. 135, Lord Alverstone, C. J.

Penal Statutes.

Rules.

A penal statute is to be interpreted, like any other instrument, according to the fair common-sense meaning of the language used.

Penal statutes should be construed strictly so that no cases shall be held to be reached by them but such as are within both the spirit and letter of such laws.

If there are two possible interpretations of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum.

If there is a reasonable interpretation which will avoid the penalty in any particular case, it must be adopted.

If the words are merely equally capable of an interpretation that would, and one that would not, inflict the penalty, the latter must prevail.

"The freedom of our Constitution will not permit that in criminal cases a power should be lodged in any judge to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be restrained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the Crown has the power to pardon."—1 Bl. Com. p. 92.

"It is not true that the Court, in the exposition of penal statutes, are to narrow the construction. We are to look to the words in the first instance, and, where they are plain, we are to decide on them. If they are doubtful, we are then to have recourse to the subject-matter; but, at all events, it is only a secondary rule."—*The King* v. *Hodnett* (1786), 1 T. R. 96, at p. 101, Buller, J.

"We must not extend a penal law to other cases than those intended by the legislature, even though we think they come

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within the mischief intended to be remedied."—*Jenkinson* v. *Thomas* (1790), 4 T. R. 665, at p. 666, Lord Kenyon.

"The rule to which I allude requires that all penal laws should be construed strictly; that no case should be holden to be reached by them but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of judges, and not by the express authority of the laws. . . . Lord Chief Baron Comyn says: 'A penal statute shall not be extended by equity, and the general words of a penal statute shall be restrained for the benefit of him against whom the penalty is inflicted.'"—*Fletcher* v. *Lord Sondes* (1826), 3 Bing. 501, at pp. 580, 581, Best, C. J.

"In construing an Act of Parliament, I apprehend every word must be understood according to the legal meaning, unless it shall appear from the context that the legislature has used it in a popular or more enlarged sense; that is the general rule; but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood in a more large and popular sense must plainly appear."—*Stephenson* v. *Higginson* (1852), 3 H. L. Cas. 638, at p. 686, Lord Truro.

"I admit that the common distinction between penal and remedial Acts, viz., that the one is to be construed strictly, the other liberally, ought not to be erased from the mind of a judge, yet, whatever be the Act, be it penal, and certainly if remedial, we ought always to look for its true construction In that respect, there ought to be no distinction between a penal and a remedial statute. If the remedial statute does not extend to the particular matter under consideration, we have no power to legislate so far to extend it. Undoubtedly we are thus far bound to a strict construction in a penal statute that, if there be a fair and reasonable doubt, we must act as in revenue cases, where the rule is, that the subject is not to be taxed without clear words for that purpose."—*Nicholson* v. *Fields* (1862), 7 H. & N. 810, at p. 817; 31 L. J. Ex. 233, at p. 235, Pollock, C. B.

"Mr. Justice Blackstone well lays down the rule in the 1st volume of his Commentaries, p. 92:—'The freedom of our Constitution will not permit that in *criminal cases* a power should be lodged in any judge to construe the law otherwise than *according to the letter*.' Our institutions were never more safe, in my opinion, than at the present moment, but we cannot afford to lose

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any of the grounds of our security, and no calamity would be greater than to introduce a lax or elastic interpretation of a criminal statute to serve a special but temporary purpose. . . . The distinction between a strict construction and a more free one has, no doubt, in modern times, almost disappeared, and the question now is: What is the true construction of a statute? If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law."—*Att.-Gen.* v. *Sillem and Others* (1864), 2 H. & C. 431, at pp. 509, 510; 33 L. J. Ex. 92, at p. 110, Pollock, C. B.

"It was much pressed in the Court below, and again before their lordships, that the statute [Foreign Enlistment Act, 1870 (33 & 34 Vict. c. 90)], being a penal, or, as it was phrased, a highly penal one, it was to be construed strictly. It appears to their lordships necessary to say a few words as to this topic, which is so often pressed in argument. No doubt all penal statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip, that there has been a *casus omissus*, that the thing is so clearly within the mischief that it must have been intended to be included, and would have been included if thought of. On the other hand, the person charged has a right to say that the thing charged, although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument."—*Dyke* v. *Elliot* (1872), L. R. 4 P. C. 184, at p. 191; 41 L. J. Ad. 65, at p. 66, James, L. J., delivering the judgment of the Court (Sir J. W. Colville, James and Mellish, L. JJ., and Sir E. M. Smith).

"Their lordships . . . . hold, that when a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question; and that this principle is not affected by the fact that a penalty has a particular destination."—*Redpath* v. *Allan* (1872), L. R. 4 P. C. 511, at p. 517; 42

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L. J. Ad. 8, at p. 10, Sir R. Phillimore delivering the judgment of the Judicial Committee.

"We are called upon to construe a penal enactment (Mines Regulation Act, 1860 (23 & 24 Vict. c. 101)). Those who contend that the penalty may be inflicted, must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty."—*Dickenson* v. *Fletcher* (1873), L. R. 9 C. P. 1, at p. 7; 43 L. J. M. C. 25, at p. 28, Brett, J.

"In construing an Act like the present [The Licensing Act, 1872 (35 & 36 Vict. c. 94)], by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed an offence within the section."—*Graff* v. *Evans* (1882), 8 Q. B. D. 373, at p. 377; 51 L. J. M. C. 25, Field, J.

"But then comes the question whether the plaintiffs are also entitled to recover penalties under section 6 [The Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68)]. We must be very careful in construing that section because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections."—*Tuck & Sons* v. *Priester* (1887), 19 Q. B. D. 629, at p. 638; 56 L. J. Q. B. 553, Lord Esher, M. R.

"The well-settled rule that the Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it."—*Ibid.*, at p. 645, Lindley, L. J.

"It is a sound rule of construction that when any penalty or disability is imposed by statute on any of her Majesty's subjects, the Court, before which any charge is preferred, must be able to see clearly what the conduct is which will render a person liable to the penalty so imposed."—*Crane* v. *Lawrence* (1890), 25 Q. B. D. 152, at p. 154; 59 L. J. M. C. 110, at p. 111, Cave, J.

"I have certainly always understood the rule to be that where there is an enactment which may entail penal consequences, you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it in express language."—

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London County Council v. *Aylesbury Dairy Co.*, [1898] 1 Q. B. 106, at p. 109; 67 L. J. Q. B. 24, at p. 26, Wright, J.

"We have the authority of Lord Esher in *Tuck and Sons* v. *Priester* (1887), 19 Q. B. D. 629, at p. 638; 56 L. J. Q. B. 553, at p. 561, to the effect that if there are two possible constructions of a penal clause in a statute, one which would mitigate and the other which would aggravate the penalty, we ought to adopt that which will impose the smaller sum."—*Hildesheimer* v. *W. & F. Faulkner, Ltd.*, [1901] 2 Ch. 552, at p. 561; 70 L. J. Ch. 800, at p. 802, Collins, L. J.

Mode of Enforcing Statutes.

Where a statute creates an obligation and enforces the performance in a specific manner, as a general rule that performance cannot be enforced in any other manner.

Where a statute creates an obligation and does not enforce the performance in a specific manner, as a general rule that performance can be enforced in a mode suited to the particular nature of the case by the common law.

If an offence was punishable at common law, and a statute is passed which prescribes a particular remedy by a summary proceeding, either method of proceeding may be pursued.

Where a statutory duty is created, it depends to a great extent on the purview of the legislature whether any person who can show that he has sustained injuries for the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed.

"It is a clear and established principle that when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause on the ground of its being a misdemeanour."—*Rex* v. *Harris* (1791), 4 T. R. 202, at p. 205, Ashhurst, J.

"Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case."—*Dor* d. *The Bishop of Rochester*

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v. *Bridges* (1831), 1 B. & Ad. 847, at p. 859, Lord Tenterden, C. J.

"It was a rule of law that an action will not lie for the infringement of a right created by statute where another specific remedy for infringement is provided by the same statute."—*Stevens* v. *Jeacocke* (1847), 11 Q. B. 731, at p. 741; 17 L. J. Q. B. 163, at p. 165, Erle, J., delivering the judgment of the Court.

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue, either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely but provides no particular form of remedy: there the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."—*Wolverhampton New Waterworks* v. *Hawkesford* (1859), 6 C. B. N. S. 336, at p. 356; 28 L. J. 242, at p. 246, Willes, J. (cited by Farwell in *Stevens* v. *Chown*, [1901] 1 Ch. 894, at p. 903; 70 L. J. Ch. 571, at p. 575; by Joyce in *Devonport Corporation* v. *Tozer*, [1902] 2 Ch. 182, at pp. 193, 194; 71 L. J. Ch. 754, at p. 759; and by Buckley, J., in *Att.-Gen.* v. *Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101, at p. 106; 72 L. J. Ch. 67, at p. 69).

"I must venture, with great respect to the learned judges who decided that case [*Couch* v. *Steel* (1853), 3 E. & B. 402; 23 L. J. Q. B. 121], and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell [3 E. & B. at p. 411; 23 L. J. Q. B. at p. 125] justify the broad general proposition that appears to have been there laid down—that wherever a statutory duty is created, any person who can show that he has sustained injuries from the non-performance of that duty can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to

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deal is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works."—*Atkinson* v. *Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, at p. 448; 46 L. J. Ex. 775, at pp. 779, 780, Lord Cairns, L. C.

"It is unnecessary to determine here whether *Couch* v. *Steel* (1853), 3 E. & B. 402; 23 L. J. Q. B. 121, was properly decided upon the particular Act under which the action in that case was brought; I am, however, bound to say that I entertain the strongest doubt whether the broad rule there enunciated can be maintained—the rule, that is to say—that where a new duty is created by statute, and a penalty is imposed for its breach, which penalty is to go to the person injured by such breach, the penalty, however small and inadequate a compensation it may be, is in such a case to be regarded as indicating an intention on the part of the legislature that there should be no action by such person for damages, but that where a similar duty is created, and a similar penalty imposed which is not to go to the person injured, then the intention is that he is to have a right of action. I do not think that that proposition can be supported."—*Ibid.* at p. 449; L. J. at p. 780, Brett, L. J. (Lord Herschell shared in these doubts. See *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, at p. 3[illegible], 62 L. J. Q. B. 65, at p. 67.)

"Where, as here, there is an Act of Parliament which has imposed a new liability, and given particular means of enforcing such new liability, such mode of procedure is the only one to be followed and used for that purpose."—*Wake* v. *Mayor of Sheffield* (1883), 12 Q. B. D. 142, at p. 145; 53 L. J. M. C. 1, at p. 3, Brett, M. R.

"The case has been argued with great care, and various authorities on the subject have been cited. The general rule to be deduced from them seems in substance to be that the provisions and object of the particular enactment must be looked at in order to discover whether it was intended to confer a general right which might be the subject of an action, or to create a duty sanctioned only by a particular penalty, in which case the only remedy for breach of the duty would be by proceedings for the penalty."—*Vallance* v. *Falle* (1884), 13 Q. B. D. 109, at p. 110; 53 L. J. Q. B. 459, at p. 461, Stephen, J.

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"I agree with what was said by Lord Tenterden in *Doe* v. *Bridges* [(1831), 1 B. & Ad. 847, at p. 859, see *supra*, p. 447]. He appears to me to have stated that as being a general rule, not as one which is absolutely rigid and may not admit of special exceptions; and notwithstanding criticism that has been applied to what he said, I think it is a good working rule for getting at the meaning of the legislature in the cases to which it applies."—*Lamplugh* v. *Norton* (1889), 22 Q. B. D. 452, at p. 455; 58 L. J. Q. B. 279, at p. 281, Lord Esher, M. R.

"The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar, and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* d. *The Bishop of Rochester* v. *Bridges* [(1831), 1 B. & Ad. 847, at p. 859, see *supra*, p. 447]. He says: 'Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'"—*Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387, at p. 394; 67 L. J. Q. B. 635, at p. 637, Earl of Halsbury, L. C.

"The law is stated nowhere more clearly or, I think, more accurately, than by Lord Tenterden in the passage cited by my noble and learned friend on the Woolsack (Earl of Halsbury, L. C.). Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation, and on considerations of policy and convenience."—*Ibid.*, at pp. 397, 398; L. J. at p. 639, Lord Macnaghten.

"I may add to that that I do not myself think that the present case is one coming within the rule, of which *Pasmore* v. *Oswaldtwistle Urban Council*, [1898] A. C. 387, at p. 394; 67 L. J. Q. B. 635, at p. 637, was an illustration, namely, that where an Act creates an obligation and enforces the performance in a specific manner, as a general rule the performance cannot be enforced in any other manner. I do not think that that rule applies where there are two different rights created by the statute, one a right to have compensation, and another a different right to have adjudication upon the subject of that compensation."—*Rex* v. *Stepney Corporation*, [1902] 1 K. B. 317, at p. 325; 71 L. J. K. B. 238, at p. 244, Channell, J.

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(See also *ante*, p. 429, "New Right, Obligation, Duty, or Liability and its Remedy," and *ante*, p. 431, "New Offence and its Remedy.")

Cumulative Statutes.

Accumulative Penalties.

"The rule touching the repeal of laws is *leges posteriores priores contrarias abrogant*: but subsequent Acts of Parliament in the affirmative giving new penalties and instituting new methods of proceeding, do not repeal former methods and penalties of proceeding ordained by preceding Acts of Parliament without negative words . . . both stand together."—*Middleton* v. *Crofts* (1736), 2 Atk. 650, at p. 675, Lord Hardwicke, L. C.

"Now, it is a general rule that subsequent statutes which add accumulative penalties do not repeal former statutes [6 Mod. 140; 11 Rep. 63 b]."—*Rex* v. *Jackson* (1775), Cowp. 297, at p. 298, Lord Mansfield, C. J.

"I have looked into the case of (1736) *Middleton* v. *Croft* as it is reported in Cas. temp. Hardw. 326; it was a case of prohibition, argued by eminent civilians, and involved an elaborate discussion upon the authority of the canons. Lord Hardwicke there says, 'Subsequent Acts of Parliament in the affirmative only, although giving new penalties, are never taken to be a repeal of former Acts, unless there be negative words or a plain contrariety between the two Acts, so as there is a plain indication in the latter of an intention to repeal the former.'"—*Dakins* v. *Seaman* (1842), 9 M. & W. 777, at pp. 788, 789, Lord Abinger, C. B.

"Now, the distinction between a statute creating a new offence with a particular penalty, and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty, is well settled. In the former case the new offence is punishable by the new penalty only; in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included. The rule was recognized by Lord Mansfield in *Rex* v. *Wright* (1758), 1 Burr. 543, and in a note to 2 Hawkins's Pleas of the Crown (1824 ed.), p. 290, is thus stated: 'The true rule seems to be this: where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts "that

the doing an act, not punishable before, shall for the future be punishable in such and such a particular manner," there it is necessary to pursue such particular method, and not the common law method of indictment.' The same principles apply equally whether the offence is regarded as an invasion of public rights calling for criminal, or private rights, calling for civil proceedings; see *Shepherd* v. *Hills* (1855), 11 Ex. 55; 25 L. J. Ex. 6."—*Lane* v. *Dowling & Son* (1906), 2 K. B. 772, at p. 784; 75 L. J. K. B. 1019, at p. 1025, Farwell, L. J.

(See also *post*, p. 471, "Remedy by Implication.")

Accumulative Damages.

"It has been held in many instances that where a statute gives accumulative damages to the party grieved, and is not a penal action, for in penal actions no costs are allowed, but if the action be brought by the party grieved he is entitled to costs."—*Woodgate* v. *Knatchbull* (1787), 2 T. R. 148, at p. 154, Ashhurst, J.

(See also *ante*, p. 429, "New Right, Obligation, Duty or Liability and its Remedy.")

Same Offence with different Punishments.

Where the same offence is re-enacted with a different punishment the prior enactment is repealed.

"If a crime be created by statute, with a given penalty, and be afterwards repeated in another statute with a lesser penalty attached to it, I cannot say that the party ought to be held liable to both. There may, no doubt, be two remedies for the same act, but they must be of a different nature. The new Act, then, would be in effect a repeal of the former penalty."—*Henderson* v. *Sherborne* (1837), 2 M. & W. 236, at p. 239, Lord Abinger, C. B.

"My judgment (in *Henderson* v. *Sherborne*, *supra*) was founded on the principle, that where the same offence is re-enacted with a different punishment, it repeals the former law."—*Att.-Gen.* v. *Lockwood* (1842), 9 M. & W. 378, at p. 391, Lord Abinger, C. B. (And see *Robinson* v. *Emerson* (1866), 4 H. & C. 352, at p. 355, Martin, B.)

"Lord Campbell [in *Michell* v. *Brown* (1858), 1 Ell. & Ell. 267, at p. 274; 28 L. J. M. C. 53, at p. 55], delivering the judgment of the Court, said, 'If a later statute again describes an offence

created by a former statute, and affixes a different punishment to it, varying the procedure, &c., we think that the prosecutor must proceed for the offence under the later statute. If the later statute expressly altered the quality of the offence, as by making it a misdemeanour instead of a felony, or a felony instead of a misdemeanour, the offence could not be proceeded for under the earlier statute; and the same consequence seems to follow from altering the procedure and the punishment. The later enactment operates by way of substitution and not cumulatively, giving an option to the prosecutor or the magistrate.' That, in principle, is very much in point with the present case."—*Whitehead* v. *Smithers* (1877), 2 C. P. D. 553, at p. 557; 46 L. J. M. C. 231, at p. 236, Lord Coleridge, C. J.

(See also *Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, [1891] 2 Q. B. 170, at pp. 177, 178; 60 L. J. M. C. 17?, at pp. 177, 178, where Charles, J., cited the above quotation from *Michell* v. *Brown*.)

Interpretation Act, 1889 [52 & 53 Vict. c. 63].

Sect. 33. "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act [1st January, 1890], the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence."

Avoiding Statutes.

Statutes, the effect of which is to cut down, abridge, restrain or avoid any written instrument, are to have a limited interpretation.

"It is a general rule, in the interpretation of Acts of Parliament, that an enactment, the effect of which is to cut down, abridge or restrain any written instrument, shall have a limited construction."—*Morris* v. *Mellin* (1827), 6 B. & C. 446, at p. 449, Lord Tenterden.

"It is a general rule that, in order to avoid any written instrument by positive enactment, the words of that enactment ought to be so clear and express as to leave no doubt of the intention of the legislature."—*Ibid.* at p. 450, Bayley, J.

"On looking at the cases on this subject, I think that this rule of interpretation has been laid down, that although a statute contains no express words making void a contract which it prohibits, yet, when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law."—*Melliss* v. *Shirley Local Board* (1885), 16 Q. B. D. 446, at pp. 451, 452; 54 L. J. Q. B. 143, at p. 145, Lord Esher, M. R.

"In our judgment clauses in statutes avoiding transactions or instruments are to be interpreted with reference to the purpose for which they are inserted, and when open to question are to receive a wide or a limited construction according as the one or the other will best effectuate the purpose of the statute (per Turner, L. J., in *Jortin* v. *South Eastern Rail. Co.* [(1855), 6 D. M. & G. 270, at p. 275; 24 L. J. Ch. 343, at pp. 348, 349])."—*In re Bardell* (1888), 20 Q. B. D. 340, at p. 344; 57 L. J. Q. B. 263, at p. 264, Fry, L. J., reading the judgment of the Court of Appeal (Lord Esher, M. R., and Fry and Lopes, L. JJ.).

(See also *ante*, p. 340, "Effect on Contracts.")

Obsolete and Obsolescent Statutes.

"An Act of Parliament cannot be repealed by non-user, notwithstanding any practice that may have obtained to the contrary."—*White* v. *Boot* (1788), 2 T. R. 274, at p. 275, *per curiam*.

"Though where the words of an Act of Parliament are plain, it cannot be repealed by *non-user*; yet where there has been a series of practice, without any exception, it goes a great way to explain them where there is any ambiguity."—*Leigh* v. *Kent* (1789), 3 T. R. 362, at p. 364, Lord Kenyon, C. J.

"Whatever may be the law in another country [Scotland], in this no Act of Parliament is lost by desuetude."—*Tyson* v. *Thomas* (1825), McCl. & Younge, 119, at p. 127, Hullock, B.

"No doubt exists that a British Act of Parliament does not become inoperative by mere non-user, however long a time may have been since it was known to have been actually put in force;

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but the fact of non-user may be extremely important, when the question is whether there has been a repeal by implication."—*The India* (1864), B. & L. 221, at p. 224; 33 L. J. Adm. 193, Dr. Lushington.

"It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute."—*Hobbert* v. *Purchas* (1871), L. R. 3 P. C. 605, at p. 650, Lord Hatherley, L. C.

(See also *post*, p. 478, "No Repeal by Non-user.")

Section IX.

EXPIRING, CONTINUING AND REPEALING STATUTES.

Expiring and Continuing Statutes.

"When an Act is continued, everybody is estopped to say it is not in force."—*Rex* v. *Morgan* (1737), 2 Stra. 1066, Lord Hardwicke, C. J.

"The 1 James I. c. 22 having expired before the 21 James I., and has been only re-enacted since that time; but on this point I have not entertained a doubt from the beginning. We are all most clearly of opinion that this must be considered as an action on the 1 James I. c. 22; and that the subsequent laws, which have continued it from time to time, all give effect to it as an Act made in the reign of the 1 James I."—*Shipman* v. *Henbest* (1790), 4 T. R. 109, at p. 114, Lord Kenyon, C. J.

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Consequence of an Act expiring before the Bill for continuing the same shall have received the Royal Assent.

The Acts of Parliament (Expiration) Act, 1808 (48 Geo. III. c. 106)—25th June, 1808.

"Where any bill may have been or shall be introduced into this present or any future session of Parliament for the continuance of any Act which would expire in such sessions, and such Act shall have expired before the bill for continuing the same shall have received the royal assent, such continuing Act shall be deemed and taken to have effect from the date of the expiration of the Act intended to be continued as fully and effectually, to all intents and purposes, as if such continuing Act had actually passed before the expiration of such Act; except it shall be otherwise especially provided in such continuing Act: Provided nevertheless, that nothing herein contained shall extend or be construed to extend to affect any person or persons with any punishment, penalty, or forfeiture whatsoever, by reason of anything done or omitted to be done by any such person or persons contrary to the provisions of the Act so continued, between the expiration of the same and the date at which the Act continuing the same may have received or shall receive the royal assent."

"It is by no means a consequence of an Act of Parliament's expiring, that rights acquired under it should likewise expire. Take the case of a penalty imposed by an Act of Parliament; would not a person who had been guilty of the offence upon which the legislature had imposed the penalty while the Act was in force, be liable to pay it after its expiration?"—*Stevenson* v. *Oliver* (1841), 8 M. & W. 234, at p. 240; 10 L. J. Ex. 338, at pp. 340, 341, Lord Abinger, C. B.

"Then comes the question, whether the privilege of practising (as apothecaries) given by the statute 6 Geo. IV., referred to in the replication, is one which continues notwithstanding the expiration of that statute. That depends on the construction of the temporary statute. There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."—*Ibid.*, at p. 241; L. J. at p. 341, Parke, B.

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Repeal of Statutes in same Session.

"Our decision is conformable with the doctrine laid down in *The Attorney-General* v. *The Chelsea Waterworks Co.* [(1731), Fitzgibbon, 195]; there it was resolved, that where the proviso of an Act of Parliament is directly repugnant to the purview of it, the proviso shall stand, and be held a repeal of the purview, *as it speaks the last intention of the makers*. At the time when that resolution was come to, if two Acts of Parliament, passed in the same session, were repugnant, it was not possible to know which of them received the royal assent first, for there was then no indorsement on the roll of the day on which the bills received the royal assent, and all Acts passed in the same session were considered as having received the royal assent on the same day, and were referred to the first day of the session. Now, however, it is known on what day each bill receives the royal assent, it being provided by the (1792-3) 33 Geo. III. c. 13 [the Acts of Parliament (Commencement) Act, 1793], that a certain parliamentary officer [the clerk of the Parliaments] shall indorse [in English] on every Act of Parliament [which shall pass after the 8th day of April, 1793, immediately after the title of such Act] 'the day, month, and year when the same shall have passed and shall have received the royal assent; and such indorsement shall be taken to be a part of such Act, and to be the date of its commencement when no other commencement shall be therein provided.' It appears that, in this case, the metropolitan Act received the royal assent a few days after the local Act, and consequently we are of opinion that, so far as the two Acts are contradictory to each other, the metropolitan Act, which last received the royal assent, must have the effect of repealing the other."—*The King* v. *The Justices of Middlesex* (1831), 2 B. & Ad. 818, at p. 821, Lord Tenterden, C. J., delivering the judgment of the Court.

(See also *ante*, p. 249, "Date and Commencement.")

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21).

Sect. 1. "Every Act to be passed after the commencement of this Act [4th February, 1851] may be altered, amended, or repealed in the same session of Parliament, any law or usage to the contrary notwithstanding." (Repealed, Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41.)

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Interpretation Act, 1889 (52 & 53 Vict. c. 63) (which came into operation on the 1st January, 1890).

Sect. 10. "Any Act may be altered, amended, or repealed in the same session of Parliament."

Sect. 39. "In this Act the expression 'Act' shall include a local and personal Act, and a private Act."

Effect of Repeal.

No Repeal by Recital only.

"The bare recital in a statute is not sufficient to repeal the positive provisions of a former statute without a clause of repeal."—*Dore* v. *Gray* (1788), 2 T. R. 358, at p. 365, Ashhurst, J.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21).

Sect. 3. "Where it is only intended to amend or repeal any portion only of such section, it shall be necessary still either to recite such portion or to set forth the matter or thing intended to be amended or repealed." (Commenced and took effect on 4th February, 1851. Repealed, Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41.)

Expressio unius est exclusio alterius.—Co. Litt. 210a.

"Inasmuch as there are certain statutes enumerated which are repealed, *expressio unius est exclusio alterius*, and accordingly those statutes and those alone are repealed."—*Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 965; 48 L. J. Q. B. 186, at p. 196, Lord Blackburn.

No Revival by mere Repeal of Repealing Statute.

"When an Act of repeal is repealed, the first Act repealed is revived, &c., as appears in *Spencer's Case*, 15 Edw. III., title Petition, 2."—6 *Coke*, p. 199, Part XII. 7.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21).

Sect. 5. "Where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions." (Commenced and took effect on 4th

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February, 1851. Repealed, Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41.)

"The 5th section of Lord Brougham's Act (13 & 14 Vict. c. 21) has for its object to prevent the revival of a statute contrary to the intention of the legislature."—*Micklin* v. *Attwood* (1869), L. R. 4 Q. B. 333, at p. 340; 38 L. J. Q. B. 181, at p. 185. Hannen, J.

Interpretation Act, 1889 (52 & 53 Vict. c. 63)

Sect. 11 (1). "Where an Act [including a local and personal and a private Act] passed after the year 1850, whether before or after the commencement of this Act [1st January, 1890], repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed unless words are added reviving that enactment."

Repealed Provisions to remain in force until Substituted Provisions.

Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21).

Sect. 6. "Wherever any Act shall be made, repealing in whole or in part any former Act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions shall remain in force until the substituted provision or provisions shall come into operation by force of the last made Act." (Commenced and took effect on 4th February, 1851. Repealed, Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 41.)

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Sect. 11 (2). "Where an Act passed after the year 1850, whether before or after the commencement of this Act [1st January, 1890], repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation."

A repealed statute or a repealed clause of a statute is considered as if it had never existed, except as to transactions passed and closed.

A repealed section may be looked to for the purposes of interpretation.

"It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions past

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and closed) as if it had never existed. That is the general rule; and we must not destroy that by indulging in conjectures as to the intention of the legislature."—*Surtees* v. *Ellison* (1829), 9 B. & C. 750, at p. 752, Lord Tenterden, C. J. (cited by Huddleston, B., in *Att.-Gen.* v. *Lamplough* (1878), 3 Ex. D. 214, at p. 218; 47 L. J. Ex. 555, at p. 557).

"I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law."—*Kay* v. *Goodwin* (1830), 6 Bing. 576, at pp. 582, 583, Tindal, C. J. (cited by Huddleston, B., in *Att.-Gen.* v. *Lamplough* (1878), 3 Ex. D. 214, at p. 217; 47 L. J. Ex. 555, at p. 557).

"There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed."—*Stevenson* v. *Oliver* (1841), 8 M. & W. 234, at p. 241; 10 L. J. Ex. 338, at p. 341, Parke, B.

"The general rule is, that a statute, from the time when it is repealed, can no longer be acted upon. The Court was governed by that rule in *The Queen* v. *Mangan* [(1838), 8 A. & E. 496], which cannot be distinguished from this case, and no attempt was made there to assert the difference which is now suggested between form and substance. I think that the effect of a repeal is the same whether the alteration affect procedure only, or matter which is more of substance."—*The Queen* v. *The Inhabitants of Denton* (1852), 18 Q. B. 761, at p. 770; 21 L. J. M. C. 207, at p. 208, Lord Campbell, C. J.

"I apprehend that where an Act of Parliament, or part of an Act of Parliament, is repealed, it must, as was laid down by Lord Tenterden in *Surtees* v. *Ellison* [(1829), 9 B. & C. 750, at p. 752], be considered as if it had never existed, except as to transactions which are passed and closed."—*Ex parte Griswood* (1859), 4 De G. & J. 544, at p. 557; 28 L. J. Ch. 769, at p. 776, Turner, L. J.

"The effect of a repeal of an enactment by the legislature has been pointed out in the authorities cited, which show that generally, when the legislature repeals an enactment (and every clause in an enactment is an Act of Parliament), the effect is as completely to obliterate it from the records of Parliament as if it had never

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passed."—*Att.-Gen.* v. *Lamplough* (1878), 3 Ex. D. 214, at p. 220; 47 L. J. Ex. 555, at p. 558, Cleasby, B.

"Where an Act of Parliament repeals a clause, it is not that the Act of Parliament is repealed which imposes the duty, but the clause of the Act of Parliament imposing the duty is repealed. We have only to substitute the word 'clause' for 'Act of Parliament,' and then the *dicta* in *Surtees* v. *Ellison* (1829), 9 B. & C. 750, at p. 752, and *Kay* v. *Goodwin* (1830), 6 Bing. 576, at pp. 582, 583, apply, that where an Act of Parliament is repealed, the effect of the repeal is that it is to be taken as if the statute had never been enacted, except as to transactions begun or prosecuted while it was existing law. Substitute, therefore, the word 'clause' for 'Act of Parliament,' and this clause is to be taken as if it had never existed, and if that be so it must be taken as if those articles had never been taxed. What effect has that upon another and a totally different clause, which it is admitted applied before the repealing Act of Parliament to totally different subjects, which did not include the particular preparation in question? No judge ever laid down as law that where a particular clause in an Act of Parliament is repealed, the whole Act must be read as if that clause had never been enacted; all that can be said is that the clause is to be taken as if it never had been enacted."—*Ibid.*, at pp. 222, 223; L. J. at p. 560, Kelly, C. B.

"It is argued that you cannot look at the repealed portion of the Act of Parliament to see what is the meaning of what remains of the Act. I know that it is not the argument of the Solicitor-General, but that opinion has been expressed. I, however, dissent from it. If it were an accurate opinion, this consequence would follow: that an Act of Parliament which at one time had one meaning would by the repeal of some one clause in it have some other meaning. . . . I should say that where an Act of Parliament has been repealed it is as to all matters completed and ended at the time of its repeal as though it had never existed as a governing law with respect to those subject-matters."—*Ibid.*, at pp. 227, 228; L. J. at p. 561, Bramwell, L. J.

"The judgments of the majority in the Exchequer Division lay down that the moment an Act of Parliament is partly repealed we cannot look at the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted. I cannot help thinking that that part of the judgments is not sustainable, for what we have to consider is not what was the

construction of the first statute, but what is the effect of the repealing statute. We cannot tell what is the effect of the latter without looking at the meaning of the statute which it has repealed. We must treat it as we treat all statutes for the purpose of construing them; we must look at the facts which were existing at the time the Act passed, to see what was its meaning."—*Ibid.*, p. 231; L. J. at p. 562, Brett, L. J.

"If it is an Act which determines the construction of another Act of Parliament for the time being, the repeal cannot make it wrong for us to look at it. The construction of an Act of Parliament must be once and for all. It cannot be altered by the repeal of a statute which has defined the construction of the Act." *Parker* v. *Talbot*, [1905] 2 Ch. 643, at p. 655; 75 L. J. Ch. 8, at p. 13, Vaughan Williams, L. J.

Effect of Repeal on Contracts.

"The distinction there [*Jaques* v. *Withy* (1788), 1 H. Bl. 65] in argument was, 'If it had been originally a good contract, and a statute has passed to make it void, and then that statute had been repealed, the contract would have been set up again. But here there was *originally a void contract*, being entered into while the statute was in full force, and therefore cannot be made valid by the repeal of that statute.'"—*Hitchcock* v. *Way* (1837), 6 A. & E. 943, at p. 947, Coleridge, J.

(See also *ante*, p. 340, "Effect on Contracts," and *ante*, p. 453, "Avoiding Statutes.")

Effect of Repeal in future Statutes.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Sect. 38 (2). "Where this Act or any Act passed after the commencement of this Act [1st January, 1890] repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

"(a) revive anything not in force or existing at the time at which the repeal takes effect; or,

"(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or,

"(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed: or,

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"(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or,

"(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed."

Particular enactment not repealed by general enactment in the same statute.

"The rule is, that where a general intention is expressed, and the Act expresses also a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of an exception."—*Churchill* v. *Crase* (1828), 5 Bing. 177, at p. 180, Best, C. J.

"The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular statute must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."—*Pretty* v. *Solly* (1859), 26 Beav. 606, at p. 610, Sir John Romilly, M. R.

(See also *ante*, p. 382, "Statutes conferring Powers.")

Prior Special Statute and Subsequent General Statute.

A prior special statute is not repealed by a subsequent general statute, unless by express reference or necessary implication.

It depends upon the intention of the legislature whether a subsequent statute does or does not control a prior statute.

"It cannot be contended that a subsequent Act of Parliament will not control the provisions of a prior statute if it were intended to have that operation, but there are several cases in the books to show that, where the intention of the legislature was apparent that the subsequent Act should not have such an operation, there, even

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though the words of such statute, taken strictly and grammatically, would repeal a former Act, the Courts of law, judging for the benefit of the subject, have held that they ought not to receive such a construction."—*Williams* v. *Pritchard* (1790), 4 T. R. 2, at p. 3, Lord Kenyon. (See remarks by Channell, J., in *Sion College* v. *London Corporation*, [1900] 2 Q. B. 581, at p. 586; 69 L. J. Q. B. 766, at pp. 769, 770.)

"The question of law would arise which was discussed before the Lords Justices in *The Trustees of the Birkenhead Dock Co.* v. *Laird* [(1853), 4 D. M. & G. 732; 23 L. J. Ch. 457], namely, whether a special Act of Parliament, creating special rights or imposing special duties, is to be considered as repealed by a subsequent general Act, which makes no reference to it. All the reasoning applicable to the cases there cited by Lord Justice Turner from Judge Jenkin's Reports applies quite as strongly to the case before me. . . . . The reason in all those cases is clear. In passing the special Act the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case, and, having so done, they are not to be considered, by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated."—*Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31, at pp. 53, 54; 30 L. J. Ch. 777, at p. 782, Sir W. Page Wood, V.-C. (See also *ante*, pp. 382—385.)

"But the insertion of a saving clause is never a safe ground for determining the construction of any Act of Parliament, whether local or general. We all know the anxiety there is on the part of everyone who imagines that his rights may be infringed by the passing of an Act, whether general or local, to procure the insertion of a saving clause to protect them, even where the ordinary rules of construction supersede the necessity of any such protection; and certainly the insertion of the saving clause, to which I was referred, cannot lead me to the conclusion that the general rule of construction, that a special Act is not repealed by a subsequent general enactment in which the special Act is not referred to, is inapplicable."—*Fitzgerald* v. *Champneys* (1861), 2 J. & H. 31, at p. 59; 30 L. J. Ch. 777, at p. 783, Sir W. Page Wood, V.-C.

"The general principle to be applied to the construction of Acts of Parliament is, that a *general* Act is not to be construed to repeal

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a previous *particular* Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together. . . . The rule with respect to general Acts of Parliament, and their effect upon previous particular statutes, is well laid down by the present Chancellor [Lord Hatherley] in the case referred to of *Fitzgerald* v. *Champneys* [(1861), 2 J. & H. 31; 30 L. J. Ch. 777]. The authorities on the subject are very numerous; and I will content myself with referring very shortly to one or two. In *Lyn* v. *Wyn* [(1662), O. Bridg. C. P. 122, at p. 127], a very important case with respect to ecclesiastical leases, it is said by Sir Orlando Bridgman, C. J., 'The law will not allow the exposition to revoke or alter, by construction of *general words*, any *particular* statute, where the words may have their proper operation without it.' . . . . I would also refer to *Dr. Foster's Case* [(1615), 6 *Coke*, p. 119, Part XI. 63 a], where there is this passage, 'only it must be known that, forasmuch as Acts of Parliament are established with such gravity, wisdom, and universal consent of the whole realm, for the advancement of the commonwealth, they ought not, by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated.'"—*Thorpe* v. *Adams* (1871), L. R. 6 C. P. 125, at pp. 135, 136; 40 L. J. M. C. 52, at p. 56, Bovill, C. J.

"It is a fundamental rule in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless such an intention appears by necessary implication. We had occasion to consider that matter in the recent case of *Thorpe* v. *Adams* [(1871), L. R. 6 C. P. 125; 40 L. J. M. C. 52]."—*The Queen* v. *Champneys* (1874), L. R. 6 C. P. 384, at p. 394; 40 L. J. C. P. 95, at p. 99, Bovill, C. J.

"The general rule is that subsequent and contrary statutes repeal earlier ones. That is a good rule, but it does not apply here. The true rule cannot be better expressed than it is in a judgment of Sir Montagu Smith in *Conservators of the Thames* v. *Hall* [(1868) L. R. 3 C. P. 415, at p. 421], where he applies the rule to the special legislation in the Merchant Shipping Act, 1854, as affected by the Thames Conservancy Act, 1857. He says: 'The rule, as laid down by Sir Orlando Bridgman, is that "the law will not allow the exposition to revoke or alter by construction of general words any particular statute, where the words may have their proper operation without it."'" *Dodds* v. *Shepherd* (1876), 1 Ex. D. 75, at p. 78; 45 L. J. Ex. 457, at p. 458, Bramwell, B.

"It is common learning that one statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but then the inconsistency must be so great that they cannot both be to their full extent obeyed."—*Hill* v. *Hall* (1876), 1 Ex. D. 411, at p. 414; 45 L. J. M. C. 153, at p. 156, Grove, J.

"But there is a well-known rule which says that, though a subsequent law abrogates a prior inconsistent law, that is not so where the prior law is not one of general application."—*Ex parte Attwater* (1876), 5 Ch. D. 27, at p. 32; 46 L. J. Bk. 41, at p. 42, Bramwell, J. A.

"It is a rule that posterior laws repeal prior ones to the contrary. But that rule is subject to a qualification excellently, as it seems to me, expressed by Sir P. B. Maxwell in his book on the interpretation of statutes. He says at p. 157 (First Edition), under the heading '*Generalia specialibus non derogant*,' 'It is but a particular application of the general presumption against an intention to alter the law beyond the immediate scope of the statute to say that a general Act is to be construed as not repealing a particular one by mere implication. A general later law does not abrogate an earlier special one. It is presumed to have only general cases in view, and not particular cases, which have been already provided for by a special Act; or, what is the same thing, by custom. Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless it manifests that intention in explicit language.'"—*Garnett* v. *Bradley* (1877), 2 Ex. D. 349, at pp. 351, 352; 46 L. J. Ex. 545, at p. 546, Bramwell, L. J.

"I prefer taking the law as it is laid down by Lord Justice Turner in a well-known case which gave rise to a considerable amount of discussion—that of *Hawkins* v. *Gathercole* [(1855), 6 D. M. & G. 1, at p. 21; 24 L. J. Ch. 332, at p. 338]. . . . . Lord Justice Turner reviews the whole subject in his judgment: . . . . he says that in construing Acts of Parliament, 'Regard must also be had to the intent and meaning of the legislature. The rule upon this subject is well expressed in the case of *Stradling* v. *Morgan* [(1560), Plowd. 199, at p. 204], in which case it is said: "That the judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular, where the intent was particular"; and after referring to

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several cases, the report contains the following remarkable passage: —"From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." My lords, the doctrine is laid down there as fully as in the learned text-writer [Maxwell's Interpretation of Statutes], cited by Lord Justice Brunwell [*Garnett* v. *Bradley* (1877), 2 Ex. D. 349, at p. 351], and the grounds and reasons of it are very well explained and satisfactorily established. This will be found, I think, on looking into and analysing the various cases on the subject, which I do not enter into because it is unnecessary so to do, to be the governing idea and conception, and the conclusion which has been founded upon it by the Courts of Judicature. Where an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or, it may be, affected adversely by a particular clause of the enactment, then the legislature is presumed to have had that very special subject-matter, and that very special class of persons, in contemplation when the subsequent statute was passed; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the

Court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the legislature had been turned towards the former special enactment, and in passing the general Act, that it had made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act."—*Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at pp. 950, 951, 952, 953, Lord Hatherley. (Cited in *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 352, at p. 372; 52 L. J. Q. B. 505, at p. 515, by Lord Blackburn; and in *In re Williams* (1887), 36 Ch. D. 573, at p. 577; 57 L. J. Ch. 264, at p. 266, by North, J.)

"There is another rule which has been laid down, which, I think, is a good rule if it is properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law, standing as an exceptional proviso upon the general law."—*Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at p. 967; 48 L. J. Q. B. 186, at p. 197, Lord Blackburn. (See *Sion College* v. *London Corporation*, [1900] 2 Q. B. 581; 69 L. J. Q. B. 766.)

"It is a well-settled doctrine that an express provision in an Act of Parliament like this of 18 & 19 Vict. c. 134 [the Court of Chancery Act, 1855], is not repealed by general words in a subsequent statute [the Judicature Act, 1873] which does not refer to it unless the two statutes are necessarily inconsistent with one another: *Thorpe* v. *Adams* [(1871), L. R. 6 C. P. 125; 40 L. J. M. C. 52]; and *Hill* v. *Hall* [(1876), 1 Ex. D. 411; 45 L. J. M. C. 153]."—*Ex parte Mayor of London* (1883), 25 Ch. D. 384, at p. 391; 53 L. J. Ch. 6, at p. 9, Kay, J.

"It is now well settled, that a general enactment of a later Act cannot repeal a specific enactment in an earlier Act merely by implication." [His Lordship referred to *Thorpe* v. *Adams* (1871), L. R. 6 C. P. 125; 40 L. J. M. C. 52; and *Hill* v. *Hall* (1876), 1 Ex. D. 411; 45 L. J. M. C. 153.]—*Gard* v. *Commissioners of Sewers* (1883), 49 L. T. 325, at p. 327, Kay, J.

"Now, if anything be certain, it is this: that where there are

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general words in a later Act capable of reasonable and sensible application, without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. For that principle I may refer to *Hawkins* v. *Gathercole* [(1855), 6 D. M. & G. 31; 24 L. J. Ch. 332]."—*Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59, at p. 68; 54 L. J. P. 9, at p. 13, Earl of Selborne, L. C. (Cited by Grantham, J., in *Whitechapel District Board of Works* v. *Cross* (1901), 84 L. T. 595, at p. 598.)

"Now, the rule, as I understand it, is this: that where there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation, unless it can find some reference in the general Act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal. There are numerous authorities on the point, amongst which I may refer to *Dr. Foster's Case* [(1615), 6 *Coke*, p. 107, Part XI. 56 b]; *Lyn* v. *Wyn* [(1662), O. Bridg. C. P. 122, at p. 127]; *Fitzgerald* v. *Champneys* [(1861), 30 L. J. Ch. 777; 2 J. & H. 31]. In the case last mentioned, Vice-Chancellor Sir W. Page Wood gave the reason for the rule. He said [p. 54]: 'The reason in all these cases is clear. In passing the special Act, the legislature had their attention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and having so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated.'"—*In re Smith's Estate* (1887), 35 Ch. D. 589, at p. 595; 56 L. J. Ch. 726, at p. 729, Stirling, J.

"There is a well-known rule which has application to this case, which is that a subsequent general Act does not affect a prior special Act by implication. That this is the law cannot be doubted."—*Lancashire Asylums Board* v. *Manchester Corporation*, [1900] 1 Q. B. 458, at pp. 470, 471; 69 L. J. Q. B. 234, at p. 239, A. L. Smith, L. J.

"It is a familiar doctrine that when you have two Acts of Parliament, one special and the other general, the latter does not repeal the former unless there is clear evidence of an intention to do so."—*Rex* v. *Salisbury* (*Bishop of*), [1901] 1 Q. B. 573, at p. 579; 70 L. J. K. B. 593, at pp. 428, 429, Channell, J.

Clause in private statute repealed by subsequent public Act.

"Although that section is not in terms repealed, yet it becomes a clause in a private Act of Parliament quite inconsistent with a clause in a subsequent public Act. That is sufficient to get rid of the clause in the private Act."—*The Great Central Gas Consumers' Co.* v. *Clarke* (1862), 13 C. B. N. S. 838, at p. 840; 32 L. J. C. P. 41, at p. 43, Pollock, C. B.

Prior General and subsequent Special Statute.

Where there are provisions in a special statute which are clearly inconsistent with the provisions of a prior general statute, the provisions of the general statute must yield to those of the special statute.

If the special statute gives in itself a complete rule on the subject, the expression of that rule will undoubtedly amount to an exception of the subject-matter of the rule out of the general Act.

"In considering the question how far an enactment in a general statute is varied or excepted by the special Act, Lord Chancellor Westbury laid down the following rule, that 'if the particular Act gives in itself a complete rule on the subject, the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act.' *Ex parte St. Sepulchre, In re The Westminster Bridge Act* [(1864), 33 L. J. Ch. 372]."—*London, Chatham, and Dover Rail. Co.* v. *Woolwich Board of Works* (1873), L. R. 8 C. P. 185, at p. 189; 42 L. J. M. C. 70, at p. 72, Keating, J., delivering the judgment of the Court (Bovill, C. J., and Keating and Brett, JJ.).

"In the next place it is to be borne in mind that where there are provisions in a special Act which are inconsistent with the provisions of a prior general Act, the provisions of the general Act must yield to those of the special Act. The case of *Att.-Gen.* v. *Great Eastern Rail. Co.* [(1872), L. R. 7 Ch. 475; (1873), L. R.

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6 H. L. 367 ; 41 L. J. Ch. 505] is an authority for that, if authority was wanting. I believe that many other authorities would be found if they were looked for."—*Corporation of Yarmouth* v. *Simmons* (1878), 10 Ch. D. 518, at p. 528; 47 L. J. Ch. 792, at pp. 794, 795, Fry, J.

"In the result, I am of opinion that the argument of Mr. Kennedy, which, speaking in general terms, is neither more nor less than that the general law upon the question of compulsory pilotage is repealed by implication by the 39th section of the New Brighton Pier Act, 1864, cannot be sustained."—*The Clan Gordon* (1882), 7 P. D. 190, at p. 193, Sir Robert Phillimore.

"The provisions of a public Act of Parliament can only be overridden or varied by clear and express enactment or clear implication in a private Act."—*Wallasey United Tramways and Omnibus Co.* v. *Wallasey Urban District Council* (1900), 17 T. L. R. 152, Earl of Halsbury, L. C.

Repeal by Implication.

Leges posteriores priores contrarias abrogant.—1 Rep. 25 b.

Repeal by implication is never to be favoured.

Every affirmative statute is a repeal by implication of a precedent affirmative statute so far as it is inconsistent or repugnant thereto.

When the new enactment is couched in general affirmative language, and the previous law, whether a law of custom or not, can well stand with it, the general affirmative language does not repeal the previous law.

If two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together.

When the repeal is not express, the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand together.

"Every affirmative statute is a repeal by implication of a precedent affirmative statute, so far as it is contrary thereto: for *leges posteriores priores contrarias abrogant*."—7 *Bac. Abr. Statute* (D.), p. 442.

"A later Act of Parliament hath never been construed to repeal a prior Act, without words of repeal, unless there be a contrariety

and repugnancy between them, or at least some notice taken of the former law in the subsequent one, so as to indicate an intention in the law-makers to repeal it."—*Middleton* v. *Crofts* (1736), 2 Atk. 650, at p. 675, Lord Hardwicke, L. C.

"I take the rule of law to be, that an affirmative statute is not, without express words, repealed by a subsequent affirmative statute, unless the two statutes cannot stand together."—*Ex parte Warrington* (1853), 3 D. M. & G. 159, at p. 171; 22 L. J. Bk. 33, at p. 39, Turner, L. J.

"What words will constitute a repeal by implication it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal, on the ground that the intention to repeal, if any had existed, would have been declared in express terms; so, on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences; or if the entire subject-matter were taken away by the subsequent statute. Perhaps the most difficult case for consideration is where the subject-matter has been so dealt with in subsequent statutes, that, according to all ordinary reasoning, the particular provision in the prior statute could not have been intended to subsist, and yet if it were subsisting no palpable absurdity would be occasioned."—*The India* (1864), B. & L. 221, at p. 224; 33 L. J. Ad. 193, at pp. 193, 194, Dr. Lushington.

"In Dwarris on Statutes, 2nd ed., pp. 530, 531, it is said: 'Every affirmative statute is a repeal of a precedent affirmative statute, where its matter necessarily implies a negative, but only so far as it is clearly and indisputably contradictory and contrary to the former Act in the very matter and the repugnancy such that the two Acts cannot be reconciled.' Various instances illustrating the application of this rule are afterwards cited in the book which I have mentioned, and I may also refer to the reasoning in *Foster's Case* (1615), 6 Coke, p. 107, Part XI. 56b."—*Hill* v. *Hall* (1876), 1 Ex. D. 411, at pp. 413, 414; 45 L. J. M. C. 153, at p. 155, Cleasby, J.

"It is common learning that one statute may be impliedly repealed by a subsequent statute necessarily inconsistent with it; but then the inconsistency must be so great that they cannot both

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be to their full extent obeyed."—*Ibid.*, at p. 414; L. J. at p. 156, Grove, J.

"Affirmative Acts only repeal one another when a repugnancy clearly exists between them."—*Ibid.*, at p. 415; L. J. at p. 157, Field, J.

"Now, my lords, an Act saying that all statutes inconsistent with itself shall be repealed, really goes no farther than the general law, but it becomes a question upon which there is a vast quantity of authority in different ways, as to what shall be the inconsistency which shall cause the repeal of an earlier statute or an existing general rule. I do not know that it is better stated anywhere than in *Foster's Case* ((1615), 6 Rep. p. 107; 11 Co. Rep. 62 b), where it is said: 'This Act of 35 Eliz. is all in the affirmative, and therefore shall not repeal or abrogate a precedent affirmative law before; and the said rule that *leges posteriores priores contrarias abrogant*, was well agreed; but as to this purpose, *contrariam est multiplex*.' And then he proceeds to give five instances, I think, of different rules, where he says that there may be a contrariety shown in the statute, and he ends by saying what I have quoted. . . . . I shall not attempt to do what Lord Coke has not done. I shall not attempt to recite all the contrarieties which make one statute inconsistent with another; the *contraria* which make the second statute repeal the first. But there is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely, that when the new enactment is couched in general affirmative language, and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. There the general affirmative words used in the new law would not of themselves repeal the old. But when the new affirmative words are, as was said in *Stradling* v. *Morgan* ((1560), Plowd. 199, at p. 206), such as by their necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together; the second repeals the first."—*Garnett* v. *Bradley* (1878), 3 App. Cas. 944, at pp. 965, 966; 48 L. J. Q. B. 136, at pp. 196, 197, Lord Blackburn.

"So that the ordinary rule of construction applies—that if two statutes can be read together without contradiction, or repugnancy, or absurdity, or unreasonableness, they should be read together."—

The Queen v. *Ouslter* (1880), 50 L. J. M. C. 4, at p. 6; 43 L. T. 404, Brett, L. J.

"Repeal by implication is never to be favoured; it is no doubt the necessary consequence of inconsistent legislation whenever it occurs, but which must not be imputed to the legislature unless absolutely necessary."—*Dobbs* v. *Grand Junction Waterworks Co.* (1882), 9 Q. B. D. 151, at p. 158, Field and Bowen, JJ.

"We ought not to hold a sufficient Act repealed, not expressly as it might have been, but by implication, without some strong reason."—*Great Western Rail. Co.* v. *Swindon and Cheltenham Rail. Co.* (1884), 9 App. Cas. 787, at p. 809; 53 L. J. Ch. 1075, at p. 1087, Lord Bramwell.

"When the repeal is not express, the burden is on those who assert that there is an implied repeal to show that the two statutes cannot stand consistently the one with the other."—*Lybbe* v. *Hart* (1885), 29 Ch. D. 8, at p. 15, Chitty, J.

"Now it is clear that the provisions of an earlier Act may be revoked or abrogated in particular cases by a subsequent Act, either from the express language used being addressed to that particular point, or from implication or inference from the language used."—*In re Williams* (1887), 36 Ch. D. 573, at p. 578; 57 L. J. Ch. 264, at p. 266, North, J.

"But it is a maxim of construction that where the provisions in two Acts of Parliament are clearly inconsistent, then there is of necessity an implied repeal of the inconsistent provisions of the earlier Act."—*The Queen* v. *Commissioners of Inland Revenue* (1888), 21 Q. B. D. 569, at p. 577; 57 L. J. M. C. 92, at p. 95, Field, J.

"Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with, or repugnant to, the provisions of an earlier one, that the two cannot stand together, in which case the maxim, '*Leges posteriores priores contrarias abrogant*,' applies. Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is a necessary inconsistency in the two Acts standing together. *Thorpe* v. *Adams* [(1871), L. R. 6 C. P. 125; 40 L. J. M. C. 52]. Lord Coke, in *Gregory's Case* (1596), 3 *Coke*, p. 295, Part VI. 19 b, lays it down 'that a later statute in the affirmative shall not take away a former Act, and *eo potior*, if the former be particular and the latter be general.' And Lord Hardwicke, in the case of *Middleton* v. *Crofts* [(1736), 2 Atk.

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650, at p. 675], is to the same effect."—*Kutner* v. *Phillips*, [1891] 2 Q. B. 267, at pp. 271, 272; 60 L. J. Q. B. 505, at p. 507, A. L. Smith, J.

"The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together? In which cases '*Leges posteriores contrarias abrogant.*'"—*Churchwardens, &c. of West Ham* v. *Fourth City Mutual Building Society*, [1892] 1 Q. B. 654, at p. 658; 61 L. J. M. C. 128, at p. 130, A. L. Smith, J.

"Where Parliament passes a later Act without reference to an earlier Act, and that earlier Act is one which has been in force for a long time, and is, therefore, well known, it seems reasonable that we should try to construe the two consistently if it is possible to do so."—*Hill* v. *Pannifer*, [1904] 1 K. B. 811, at p. 818; 73 L. J. K. B. 556, at p. 559, Kennedy, J.

"An enactment may no doubt be repealed by implication under very special conditions. In the case of *Seward* v. '*Vera Cruz*' (1884), 10 App. Cas. 59, at p. 68; 54 L. J. P. 9, at p. 13, there is a very clear statement by Lord Selborne of the principle which governs the question of repeal by implication. He there said: 'Now, if anything be certain, &c.' (see *ante*, pp. 468, 469)."—*Headland* v. *Coster*, [1905] 1 K. B. 219, at p. 227; 74 L. J. K. B. 210, at p. 214, Collins, M. R.

Repeal of Proviso by Implication.

"It is a well-known rule in the construction of statutes, that if a substantive enactment in a former Act is repealed, that which comes by way of proviso upon it is impliedly repealed also."—*Horsnail* v. *Bruce* (1873), L. R. 8 C. P. 378, at p. 385; 42 L. J. C. P. 140, at p. 143, Bovill, C. J.

Repeal saved by Incorporation.

"But there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third does not affect the second."—*Clark* v. *Bradlaugh* (1881), 8 Q. B. D. 63, at p. 69; 51 L. J. Q. B. 1, at p. 7, Brett, L. J.

"If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act you have no occasion to refer to the former Act at all."—*In re Wood's Estate* (1886), 31 Ch. D. 607, at p. 615; 55 L. J. Ch. 488, at p. 490, Lord Esher, M. R.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Sect. 38 (2). "Where this Act or any Act passed after the commencement of this Act [1st January, 1890] repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

"(b) affect the previous operation of any enactment so repealed, or any thing duly done or suffered under any enactment so repealed."

Repeal of Sections modifying an unrepealed Statute.

"But then a further argument was raised on their [the appellants'] behalf, for which we are indebted to the ingenuity of Mr. Druce. He argued that, assuming Lord Campbell's Act [9 & 10 Vict. c. 93 (The Fatal Accidents Act, 1846)] to be modified only by the 504th and 505th sections of the Merchant Shipping Act, 1854 [17 & 18 Vict. c. 104], and not repealed by the Merchant Shipping Repeal Act, 1854 [17 & 18 Vict. c. 120], the modifications introduced by the above sections ought to be taken to have been incorporated into Lord Campbell's Act, and that, being so incorporated, they must subsist, notwithstanding the repeal of the above sections by the Merchant Shipping Amendment Act, 1862 [25 & 26 Vict. c. 63]. I must confess that in the complications of these Acts I felt at the time when this case was argued in some degree embarrassed by this argument; but on considering it I am satisfied that it cannot be supported. The modification introduced by these sections is not in terms incorporated into Lord Campbell's Act. It must, no doubt, have affected that Act so long as it subsisted, but when it was destroyed, its effect must have ceased. Otherwise, the consequence would be, that where any provision of an Act of Parliament has been modified by a subsequent Act, the modification would not be altered without at the same time repealing or altering the original Act, a proposi-

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tion which cannot, I think, be maintained."—*Gladstone* v. *Barker* (1865), L. R. 1 Ch. 223, at p. 229; 35 L. J. Ch. 259, at p. 264, Turner, L. J.

"That an Act which, while substituting temporary provisions only, purports to repeal a prior permanent one will not be read as merely suspending its operation during the currency of the repealing statute, unless the intention of the legislature to that effect be expressed, was decided by Lord Ellenborough in *Warren* v. *Windle* (1803), 3 East, 205."—*Taylor* v. *New Windsor Corporation*, [1898] 1 Q. B. 186, at pp. 204, 205; 67 L. J. Q. B. 96, at p. 103, Collins, L. J.

Repeal of one Private Statute by another.

One private statute cannot repeal another private statute except by express enactment, or necessary inconsistency.

"Now, it must be remembered that these several Acts, though declared public Acts, are substantially and in their nature private ones, and it is a rule of law that one private Act of Parliament cannot repeal another, except by express enactment; there is no such enactment in the defendants' Act in reference to those of the plaintiff; and the latter are therefore, I consider, unaffected by the former. I have said that, in my opinion, the rule of law as to the construction of such Acts is not to do anything which would be in effect a repeal of any clause, unless in a subsequent Act some words are inserted which would operate as an express repeal of the former. That appears to be the rule as laid down by the learned Judge Jenkyns in *Sir Fouk Greval's Case*, reported in his work called 'Eight Centuries of Reports,' the Third Century, Case 41, p. 120."—*The Trustees of the Birkenhead Docks* v. *Laird* (1853), 24 L. J. Ch. 457, at pp. 458, 459; 4 D. M. & G. 732, Turner, L. J.

"Where two statutes give authority to two public bodies to exercise powers which cannot, consistently with the object of the legislature, co-exist, the earlier must necessarily be repealed by the later statute."—*Doe* v. *The Metropolitan Board of Works* (1862), 12 C. B. N. S. 161, at p. 174; 31 L. J. C. P. 223, at p. 224, Erle, C. J.

Repeal by Non-user.

"An Act of Parliament cannot be repealed by non-user, notwithstanding any practice that may have obtained to the contrary."—*White* v. *Boot* (1788), 2 T. R. 274, at p. 275, *per curiam*.

"Though, where the words of an Act of Parliament are plain, it cannot be repealed by *non-user*, yet where there has been a series of practice, without any exception, it goes a great way to explain them where there is any ambiguity."—*Leigh* v. *Kent* (1789), 3 T. R. 362, at p. 364, Lord Kenyon, C. J.

"No doubt exists that a British Act of Parliament does not become inoperative by mere non-user, however long the time may have been since it was known to have been actually put in force: but the fact of non-user may be extremely important when the question is whether there has been a repeal by implication."—*The India* (No. 2) (1864), B. & L. 221, at p. 224; 33 L. J. Ad. 193, Dr. Lushington.

"It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law for determining the true construction of obscurely framed documents."—*Hebbert* v. *Purchas* (1871), L. R. 3 P. C. 605, at p. 650, Lord Hatherley, L. C., delivering the judgment of the Judicial Committee.

(See also *ante*, p. 454, "Obsolete and Obsolescent Statutes.")

Repeal and Re-enactment.

"Their lordships . . . conceive that, in dealing with a statute which professes merely to repeal a former statute of limited operation, and to re-enact its provisions in an amended form, they are not necessarily to presume an intention to extend the operation of those provisions to classes of persons not previously subject to them, unless the contrary is shown; but that they are to determine on a fair construction of the whole statute, considered with reference to the surrounding circumstances, whether such an intention existed."—*Brown* v. *McLachlan* (1872), L. R. 4 P. C. 543, at p. 550; 42 L. J. P. C. 18, at p. 23, Sir W. Colville, delivering the judgment of the Judicial Committee.

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Effect of Repeal and Re-enactment with or without modification in future Statutes.

Interpretation Act, 1889 (52 & 53 Vict. c. 63).

Sect. 38 (1). "Where this Act or any Act passed after the commencement of this Act [1st January, 1890] repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

"When the modification takes the form of extending and not narrowing the former provisions, it amounts to a modification within the meaning of the Interpretation Act. . . . . In these days the passing of Acts modifying existing statutes is not infrequent, and the draftsman is entitled to rely on the Interpretation Act."—*Stevens* v. *General Steam Navigation Co.*, [1903] 1 K. B. 890, at p. 894; 72 L. J. K. B. 417, at p. 420, Stirling, L. J.

Repeal with Saving Clause.

"Where you have a repeal, and you have also a saving clause, you have to consider whether the substituted enactment contains anything incompatible with the previously existing enactment. The question is, Aye or No, is there incompatibility between the two? And in those cases the judges, in holding that there was a saving clause large enough to annul the repeal, said that you must see whether the true effect was to substitute something incompatible with the enactment in the Act repealed; and that if you found something in the repealing Act incompatible with the general enactments in the repealed Act, then you must treat the jurisdiction under the repealed Act as *pro tanto* wiped out. That is settled by the cases of *In re Busfield* (1886), 32 Ch. D. 123; 55 L. J. Ch. 467; and *Hume* v. *Somerton* (1890), 25 Q. B. D. 239; 59 L. J. Q. B. 420."—*In re R.*, [1906] 1 Ch. 730, at p. 736; 75 L. J. Ch. 421, at p. 423, Collins, M. R.

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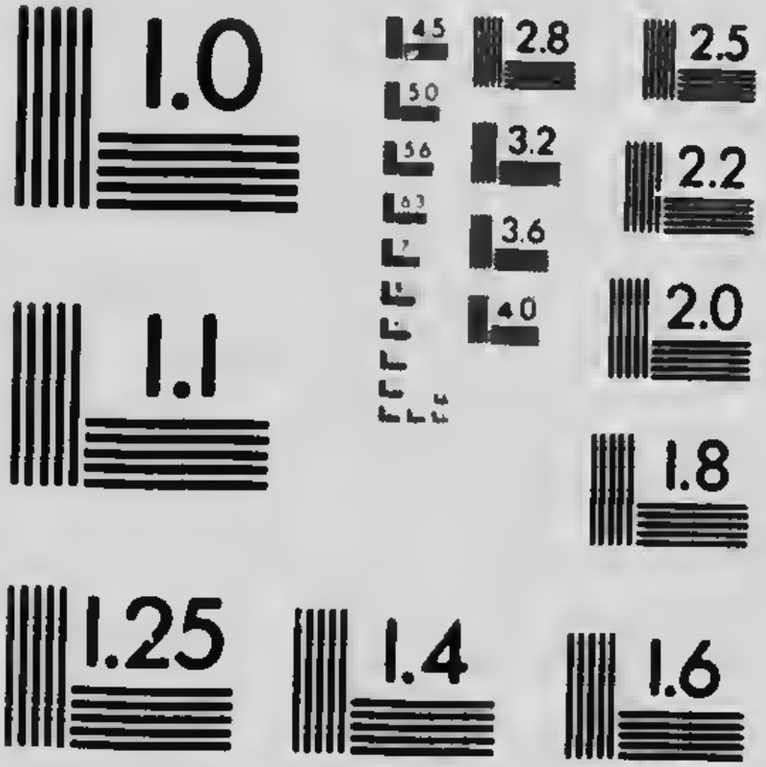

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Part VIII.—WILLS.

Section I.

Testator Inops Consilii.

Wills are more favoured in interpretation than formal deeds.

"I must not, however, omit, that in devises by last will and testament (which, being often drawn up when the party is *inops consilii*, are always more favoured in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice) . . . ."—2 *Bl. Com.* p. 172.

"That a devise be most favourably expounded, to pursue if possible the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments."—2 *Bl. Com.* 381.

"In the case of a will, the testator is supposed to have been *inops consilii*, and on that ground alone a greater latitude is allowed in the construction of legal terms."—*Lewis* v. *Rees* (1856), 3 K. & J. 132, at p. 147, Page Wood, V.-C.

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"The ground on which the Courts have declared a testator's will void for uncertainty really is that the testator was *inops consilii*." *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, at p. 361; 69 L. J. Ch. 850, at p. 855, Farwell, J.

Illiterate Testator.

"Every inaccuracy of grammar and every impropriety of terms shall be corrected, if that intention [of the testator consistent with the rules of law] be clear and manifest."—*Thellusson* v. *Woodford* (1799), 4 Ves. 227, at p. 311, Lawrence, J.

"The testator appears to have been an exceedingly illiterate man; and the rules of grammar and the usual meaning of technical language may be disregarded in construing his will. But we cannot strike out from his will any word which, standing where it is, has a clear and definite operation in the disposal of his property."—*Hall* v. *Warren* (1861), 9 H. L. C. 420, at p. 427, Lord Campbell, L. C.

Rules of Interpretation.

Rules of Interpretation and Rules of Law Distinguished.

"Wills, and the construction of them, do more perplex a man than any other learning, and to make a certain construction of them, this *excedit jurisprudentium artem*: but I have learned this good rule: always to judge in such cases as near as may be, and according to the rules of law, and in so doing I shall not err."—*Roberts* v. *Roberts* (1640), 2 Bulst. 123, at p. 130, Lord Coke.

"In my opinion, rules of construction and rules of law differ very broadly in this point of view: that one [rule of construction] is a rule which points out what a Court should do in the absence of express or implied intention to the contrary; the other [rule of law] is one which takes effect when certain conditions are found, although the testator may have indicated an intention to the contrary."—*In re Coward, Coward* v. *Larkman* (1887), 57 L. T. 285, at p. 290, Fry, L. J.

Importance of Rules of Interpretation of Wills.

"The Court must proceed on known principles and established rules, not on loose conjectural interpretations, or by considering

what a man may be imagined to do in the testator's circumstances." —*Stephenson* v. *Heathcote* (1758), 1 Ed. 37, at p. 43, Henley, Lord Keeper.

"But the rules which are to govern the construction of wills, as well as of all other written instruments, are now very clearly established, and it is impossible to overrate the importance (notwithstanding all the temptations from supposed hardship or probable intention) of steadily, strictly and faithfully adhering to those rules, for the sake of the great interests of society in avoiding litigation, and affording the only chance of obtaining as much certainty in the construction of wills as such a subject is capable of. It is better, as Mr. Fearne said (p. 173), 'that the intention of twenty testators every week should fail of effect than that the rules should be departed from upon which the security of titles and the general enjoyment of property so essentially depended." —*Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68, at pp. 113, 114; 28 L. J. Ch. 110, at p. 114, Lord Wensleydale.

"With respect to wills in particular, it is far better to have settled rules which will enable the members of families to know what the law gives them than that every variation of language used by a testator, or his lawyer, should entail on family after family the costs, the heartburning and misery of litigation."—*Wake* v. *Varah* (1876), 2 Ch. D. 348, at p. 357; 45 L. J. Ch. 533, at p. 537, James, L. J.

"We are bound to have regard to any rules of construction which have been established by the Courts."— *Ralph* v. *Carrick* (1879), 11 Ch. D. 873, at p. 878; 48 L. J. Ch. 801, at p. 804, Cotton, L. J.

Application of Rules of Interpretation.

Rules of interpretation are simply rules to be applied where there is no definite expression of intention in the will.

Rules of interpretation are only intended to aid us when there is ambiguity, and not to enable us to get rid of the express words of the testator if expressed in clear language.

"The Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified; yet not adhering slavishly to them, when to do so would obviously defeat the intention which may be collected from the whole will."—

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Allgood v. *Blake* (1873), L. R. 8 Ex. 160, at p. 164; 42 L. J. Ex. 101, at p. 104, Blackburn, J., delivering the judgment of the Exchequer Chamber (Blackburn, Keating, Mellor, Grove, and Honyman, JJ.)

"As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that, in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. Even very intelligent persons whose minds are not so trained are accustomed to jump at a conclusion as to what a person means by considering what they, under similar circumstances, think they would have done That is conjecture only, and conjecture on an imperfect knowledge of the circumstances of the case, because the facts known to the testator may not all be before them, and the testator's mind, as regards the attention to be paid to the claims of the different parties dependent upon him, may not have been constituted as their minds are constituted, so that it cannot be concluded that he would have acted in the same way as they. We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it."—*Ralph* v. *Carrick* (1879), 11 Ch. D. 873, at p. 878; 48 L. J. Ch. 801, at p. 804, Cotton, L. J.

"I am in no way disposed, if there be any definite canon or rule of construction established, to depart from that, because that must produce uncertainty."—*In re Adams and the Kensington Vestry* (1884), 27 Ch. D. 394, at p. 409; 54 L. J. Ch. 87, at p. 95, Cotton, L. J.

"As regards the construction of wills, I cannot agree to the departure from well-known rules of construction which apply unless the testator has expressed a different intention by the words which he has used, when of course such rules will not apply."—*In re Bedson's Trusts* (1885), 28 Ch. D. 523, at p. 526, Cotton, L. J.

"Being a rule of construction, it is to be followed only where the testator has not expressed his own intention, has not given any other guide to the Court which has to consider his will."—*In re Coward, Coward* v. *Larkman* (1887), 57 L. T. 285, at p. 287, Cotton, L. J.

"All rules of construction are simply rules to be applied where there is no definite expression of intention in the instrument. If there is, you do not want any rule of construction. Even when it has been laid down as a rule that certain words have a particular meaning, still, if there is any expression in the will which shows that the testator intended to use them in a different sense, we must give them the meaning which he has shown that he intended them to bear. Rules of construction are only intended to aid us where there is ambiguity, and not to enable us to get rid of the express words of the testator if expressed in clear language. This view is supported by the observations of Lord Halsbury in *Leader* v. *Duffey* [(1888), 13 App. Cas. 294, at p. 301; 58 L. J. P. C. 13, at p. 16], where he said that it was the duty of the Court to construe the words of the instrument with such help as could be obtained from the instrument, and not to look at rules of construction as positive rules to which effect must be given even where the testator has expressed a different intention."—*In re Hamlet, Stephen* v. *Cunningham* (1888), 39 Ch. D. 426, at pp. 434, 435; 58 L. J. Ch. 242, at pp. 246, 247, Cotton, L. J.

"I must apply any established rule of construction which has been adopted by the Court."—*Kirby-Smith* v. *Parnell*, [Feb. 5, 6, 1903] 1 Ch. 483, at p. 490; 72 L. J. Ch. 468, at p. 470, Buckley, J.

"My lords, I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction; and if I cannot, why, then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole. . . . I protest against the notion that any canon of construction entitles you to indulge your imagination and go into what the testator would have said if he had thought of it."—*Inderwick* v. *Tatchell*, [March 10, 1903] A. C. 120, at p. 122; 72 L. J. Ch. 393, at p. 394, Earl of Halsbury, L. C.

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"When I have the honour of presiding in this Court and am called upon to determine cases upon the construction of wills, I frequently find that I am prevented by some rule of construction from deciding in accordance with that which I believe to be the real intention of the testator."—*In re Barnsworth*, [1905] 2 Ch. 1, at p. 5; 74 L. J. Ch. 353, at p. 353, Lord Alverstone, C. J.

"I have attempted to do in this case what I have very often done before in giving judgment upon the subject of a will. My intention is, if I can, to construe the will which is before us itself and give the natural meaning to the words and the sentences therein contained. I believe that half the difficulties have arisen by adopting some words that learned judges have used on another occasion with reference to another will as if it was a canon of construction for all wills."—*Gorringe* v. *Mahlstadt*, [1907] A. C. 225, at p. 226; 76 L. J. Ch. 527, at p. 528, Earl of Halsbury.

Artificial Rules.

A will—especially one of personal property—ought to be interpreted according to the rules of interpretation applicable to all documents (*see* ante, *pp.* 55—86), *and not according to artificial rules which have been carried too far.*

A will of real property in which well-known technical words and phrases are used ought to be construed according to the established technical meaning of such words and phrases. (See also *post*, p. 548, "Technical Words and Expressions.")

"I agree with the late Master of the Rolls (Sir George Jessel) that the artificial rules which have been laid down for the construction of wills have been carried too far, and that a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents, and not according to such artificial rules. What I am saying does not apply to wills of real property, in which well-known technical phrases as to realty are used, and where, therefore, such will should be construed according to the established technical meaning of such words of art."—*In re Bolson's Trusts* (1885), 28 Ch. D. 523, at p. 525; 54 L. J. Ch. 644, at pp. 645, 646, Brett, M. R.

Comity of Nations.

The comity of nations is, and ever must be, uncertain, and cannot be reduced to any certain rule.

"There is indeed great truth in the remarks which have been judicially promulgated on this subject by a learned Court. 'When so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles. They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the Court, which decides, will prefer the laws of its own country to that of the stranger.'"—Story on the Conflict of Laws, s. 28 (cited by Farwell, J., in *In re Johnson, Roberts* v. *Attorney-General*, [1903] 1 Ch. 821, at pp. 829, 830; 72 L. J. Ch. 682, at pp. 684, 685).

"As has been well said in an American case of *Hilton* v. *Guyot* [quoted in Muir on Conflict of Laws, p. 6], 'Comity is neither matter of absolute obligation nor of mere curtesy and goodwill. It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.' I cannot think that I should have due regard to such rights if I were to abrogate our own ordinary rules simply for the sake of securing uniformity with the views taken of those rules by another country."—*In re Johnson, Roberts* v. *Attorney-General*, [1903] 1 Ch. 821, at p. 829; 72 L. J. Ch. 682, at p. 684, Farwell, J.

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Testator's Domicil.

(a) *A domicil is the relation which the law creates between an individual and a country whereby the man attracts to himself the municipal law and customs of that country.*

(b) *No man is without a domicil of origin*, i.e., *the domicil of his father if the child be legitimate, or the domicil of his mother if illegitimate.*

(c) *There may be a domicil of origin*, i.e., *of birth, or a domicil of choice*, i.e., *the choice of a permanent residence in a new country, that is, not his country of origin. Where a domicil of origin is proved, it lies upon the person who asserts a change of domicil to establish it.*

(d) *The domicil of origin may be extinguished by act of law, as on marriage (in the case of a woman), exile for life, or sentence of death, but it cannot be destroyed by the will and act of the party.*

(e) *The domicil of origin clings and adheres to the subject of it, and prevails until an actual change is made by which the personal* status *of another domicil is acquired, whereupon the domicil of origin remains in abeyance during the continuance of the domicil of choice.*

(f) *In order to acquire a new domicil a man must have a fixed intention or determination to strip himself of his nationality, or in other words to renounce his birth-right in the place of his original domicil.*

(g) *The domicil of origin revives and exists wherever there is no other domicil.*

(h) *A domicil of choice cannot exist in a country where the law refuses to recognize a domicil of choice.*

(i) *To the Court of the testator's domicil belongs the interpretation of his will.*

(k) *The law of the domicil at the time of the testator's death is in general the law governing his will unless there is any reason, from the nature of the will or otherwise, to suppose that the testator made it with reference to the law of some other country.*

"Their lordships, however, do not wish to intimate any doubt that the law of the domicil at the time of the death is the governing law (see Story, Conflict of Laws, s. 473), nor any that

the statute 7 Will. IV. & 1 Vict. c. 26 (the Wills Act, 1837) applies only to wills of those persons who continue to have an English domicil and are consequently regulated by the English law."—*Bremer* v. *Freeman* (1857), 10 Moore, P. C. 306, at p. 359; 1 Deane, Ecc. Rep. 192, Lord Wensleydale, in delivering the judgment of the Court (cited by Stirling, J., in *In re Price*, *Tomlin* v. *Latter*, [1900] 1 Ch. 442, at p. 451; 69 L. J. Ch. 225, at pp. 229, 230).

"Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling, and the various inducement for pleasure, for curiosity, or for economy, so frequently lead persons to make temporary residences out of their native country."—*Whicker* v. *Hume* (1858), 7 H. L. Cas. 124, at p. 159, Lord Cranworth.

"To the Court of the domicil belongs the interpretation and construction of the will of the testator. To determine who are the next of kin or heirs of the personal estate of the testator is the prerogative of the judge of the domicil. In short, the Court of the domicil is the *forum concursûs* to which the legatees under the will of a testator, or the parties entitled to the distribution of the estate of an intestate, are required to resort. To these general rules must be added a remark on the great danger and inexpediency of the Court of a foreign country taking upon itself the task of interpreting the will of a testator, which is written, not in the language of that country, but in the language of the country of the domicil. I entirely adopt upon this point the opinion of Lord Lyndhurst in advising your lordships in the case of *Trotter* v. *Trotter* [(1828), 4 Bligh, N. S. 502]."—*Enohin* v. *Wylie* (1862), 10 H. L. Cas. 1, at pp. 13, 14; 31 L. J. Ch. 402, at p. 405, Lord Westbury, L. C.

"In order to acquire a new domicil, a man must intend *quatenus in illo exuere patriam*."—*Moorhouse* v. *Lord* (1863), 10 H. L. Cas. 272, at p. 283; 32 L. J. Ch. 295, at p. 298, Lord Cranworth.

"The will must be construed according to the law of the testator's domicil. That is a proposition for which I need refer to no authorities. It is enough to say, that nearly all of them are mentioned in the text and notes of the well-known work of Mr. Justice Story, who lays down the rule in these terms [Conflict of Laws, 7th ed.

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1872, at p. 598]: 'Let us proceed,' he says, 'to the consideration of the rules by which wills and testaments are to be interpreted. And, in the first place, in regard to wills and testaments of personal property. In such cases where the will or testament is made in the place of the domicil of the testator, the general rule of the common law is, that it is to be construed according to the law of the place of his domicil in which it is made. A will, therefore, made of personal estate in England, is to be construed according to the meaning of the terms used by the law of England; and this rule equally applies, whether the judicial inquiry as to its meaning and interpretation arises in England, or any other country."—*Boges* v. *Bedale* (1864), 1 H. & M. 798, at pp. 802, 803; 33 L. J. Ch. 283, at p. 285, Wood, V.-C. (cited by Lush, L. J., in *In re Goodman's Trusts* (1881), 17 Ch. D. 266, at p. 289; 50 L. J. Ch. 425, at p. 437).

"The law is, beyond all doubt, clear with regard to the domicil of birth, that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired."—*Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307, at p. 310, Lord Cairns, L. C. (cited by Lord Macnaghten, in *Winans* v. *Att.-Gen.*, [1904] A. C. 287, at p. 290; 73 L. J. K. B. 613, at pp. 616, 617).

"And unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that the domicil of origin continues."—*Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307, at p. 321, Lord Westbury (cited by Lord Macnaghten in *Winans* v. *Att.-Gen.*, [1904] A. C. 287, at p. 291; 73 L. J. K. B. 613, at p. 617).

"International law depends on rules which, being in great measure derived from the Roman law, are common to the jurisprudence of all civilized nations. It is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother if illegitimate. This has been called the domicil of origin, and is involuntary. Other domicils including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the

continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice.

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi*, can be inferred the fact of domicil is established. The domicil of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the *status civilis* of the criminal; but it cannot be destroyed by the will and act of the party. Domicil of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner."—*Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441, at pp. 457, 458, Lord Westbury (cited by Sir Barnes Peacock, in delivering the judgment of the Judicial Committee in *Platt* v. *Att.-Gen. of New South Wales* (1878), 3 App. Cas. 336, at p. 342; 47 L. J. P. C. 26, at pp. 29, 30; and by Lord Watson in *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431, at p. 437; 57 L. J. P. C. 88, at p. 91; and by Farwell, J., in *In re Johnson, Roberts* v. *Attorney-General*, [1903] 1 Ch. 821, at p. 826; 72 L. J. Ch. 682, at p. 683).

"What is a domicil? I have had before me a great number of authorities, and the conclusion I draw is this, that in order that a man may change his domicil of origin he must choose a new domicil—the word 'choose' indicates that the act is voluntary on his part—he must choose a new domicil by fixing his sole or principal residence in a new country (that is, a country which is not

his country of origin), with the intention of residing there for a period not limited as to time. You must therefore show permanent residence in a new country. Neither of these is a simple fact, for I take it that all these questions of fact involve a good deal more than can be seen by the eye. Residence is not eating, drinking, and sleeping at a particular house; all these things may be done, and done for years, while a person is travelling. On the other hand, a person may have a residence and yet not visit it for a great number of years; that may be his only residence, he may have no other home. It is therefore difficult to say what residence is; but that is what the law requires. Again, what is the meaning of permanent residence? That is a question which cannot be decided by mere length of time, the answer to it must involve the consideration of the intention of the person."—*King* v. *Foxwell* (1876), 3 Ch. D. 518, at p. 520; 45 L. J. Ch. 693, at p. 695, Jessel, M. R.

"Now, a man having acquired a domicil of choice, may abandon it, without it being incumbent on him to acquire a new domicil of choice; that is to say, he may abandon his domicil of choice without acquiring, in strictness, any new domicil; because his domicil of origin reverts. That doctrine is laid down by Lord Westbury in *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441, at pp. 457, 458."—*King* v. *Foxwell* (1876), 3 Ch. D. 518, at p. 521; 45 L. J. Ch. 693, at p. 696, Jessel, M. R.

"This will, being an English will, must of course be construed according to English law."—*In re Andros* (1883), 24 Ch. D. 637, at p. 638; 52 L. J. Ch. 793, at p. 794, Kay, J.

"The idea of a domicil, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicil to be found in the books. In most, if not all of these, from the Roman Code (10, 39, 7) to Story's Conflict (sect. 41), domicil is defined as a locality—as the place where a man has his principal establishment and true home. Probably Lord Westbury was more precisely accurate when he stated, in *Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307, at p. 320, that domicil is not mere residence, 'it is the relation which the law creates between an individual and a particular locality or country.' The same learned Lord in *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 444, at p. 458, speaking of the acquisition of a residential domicil, said: 'Domicil of choice is a conclusion or inference which the law derives from the act of a man fixing voluntarily his sole or chief residence in a particular

place, with an intention of continuing to reside there for an unlimited time.' According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend. But the law which thus regulates his personal *status* must be that of the governing power in whose dominions he resides; and residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil."—*Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431, at pp. 439, 440; 57 L. J. P. C. 88, at p. 91, Lord Watson.

"In general a will is to be construed according to the law of the domicil of the testator; 'but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country': Dicey, Conflict of Laws, p. 695."—*In re Price, Tomlin* v. *Lutter*, [1900] 1 Ch. 442, at p. 452; 69 L. J. Ch. 225, at p. 230, Stirling, J.

"It is common ground that this, being the will of a domiciled Englishman, must be governed by the law of England so far as construction is concerned."—*In re Fergusson's Will*, [1902] 1 Ch. 483, at p. 486; 71 L. J. Ch. 360, at p. 362, Byrne, J.

"In my opinion the true view is this—the question having arisen in an English Court primarily falls to be decided in accordance with the law administered by that Court. That law distributes movables according to the domicil at the death; and, according to that law, every person must have a domicil somewhere or other, either of origin or of choice. When the Court has ascertained that the domicil of origin has been displaced by domicil of choice, distribution of movables follows the domicil of choice; but in order to establish a new domicil of choice, the Court has to be satisfied that it has been adopted *animo et facto*—it is essential that there should be both *animus* and *factum*. When, therefore, the law of the land said to be chosen as the new domicil disregards domicil and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicil *de facto*; and the case is accordingly remitted to this Court as a case where the *propositus* has intended but has failed to obtain an

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effectual domicil of choice. No change is effectual unless the *factum* is proved, and the *factum* cannot exist in a country where the law refuses to recognize it. The result is that this Court must conclude that a domicil of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicil at all, and that the *propositus*, therefore, is left with his domicil of origin unaffected."—*In re Johnson, Roberts* v. *Att.-Gen.*, [1903] 1 Ch. 821, at pp. 827, 828; 72 L. J. Ch. 682, at pp. 683, 684, Farwell, J.

"Now, the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home."—*Winans* v. *Att.-Gen.*, [1904] A. C. 287, at p. 288; 73 L. J. K. B. 613, at p. 615, Earl of Halsbury.

"Domicil of origin, or as it is sometimes called, perhaps less accurately, 'domicil of birth,' differs from domicil of choice mainly in this—that its character is more enduring, its hold stronger, and less easily shaken off.

"In *Munro* v. *Munro* (1840), 7 Cl. & F. 842, at p. 876, Lord Cottenham observed that it was one of the principles adopted, not only by the law of England, but generally by the laws of other countries, 'that the domicil of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicil and acquiring another as his sole domicil. . . . Residence alone,' he adds, 'has no effect *per se*, though it may be most important as a ground from which to infer intention.' 'The law,' said Lord Cairns, L. C., in *Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307, at p. 310, 'is beyond all doubt clear with regard to the domicil of birth that the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired.' The onus of proving that a domicil has been chosen in substitution for the domicil of origin lies upon those who assert that the domicil of origin has been lost.

"'Residence and domicil,' as Lord Westbury points out [*Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307, at p. 320], are two perfectly distinct things . . . . (at p. 321) although residence may

be some small *primâ facie* proof of domicil, it is by no means to be inferred from the fact of residence that domicil results, even although you do not find the party had any other residence in existence or in contemplation.' Lord Chelmsford's opinion—*Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441, at p. 455—was that 'in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to show that, however long a residence may have continued, no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil.' Such an intention, I think, is not to be inferred from an attitude of indifference or a disinclination to move increasing with increasing years, least of all from the absence of any manifestation of intention one way or the other. It must be, to quote Lord Westbury again, a 'fixed and settled purpose.' 'And,' says his lordship [at p. 321], 'unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues.' So heavy is the burden cast upon those who seek to show that the domicil of origin has been superseded by a domicil of choice! and rightly, I think. A change of domicil is a serious matter—serious enough when the competition is between two domicils both within the ambit of one and the same kingdom or country—more serious still when one of the two is altogether foreign. The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil.

"To the same effect was the inquiry which Lord Cairns proposed for the consideration of the House in *Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307, at p. 311. It was this: whether the person whose domicil was in question had 'determined' to make, and had, in fact, made the alleged domicil of choice 'his home with the intention of establishing himself and his family there, and ending his days in that country'? In a later case, *Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617, at p. 645; 41 L. J. Ch. 74, at p. 89, which came before Wickens, V.-C., who was an excellent lawyer, and, owing to the official position which he long held, peculiarly conversant with cases of this sort, all the authorities were reviewed. The competition there was between a Scotch domicil of origin and an alleged English domicil of choice. The

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learned Vice-Chancellor thought the case 'a peculiar and difficult one.' He put the question in this way: 'What has to be here considered,' he said, 'is whether the testator . . . . ever actually declared a final and deliberate intention of settling in England, or whether his conduct and declaration lead to the belief that he would have declared such an intention if the necessity of making the election between the countries had arisen.' "—*Ibid.*, at pp. 290—292; L. J., at pp. 616, 617, Lord Macnaghten.

"I take it to be clearly settled—by the *Lauderdale Peerage Case* (1885), 10 App. Cas. 692; *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441; *Bell* v. *Kennedy* (1868), L. R. 1 H. L. Sc. 307—that the burden of proof in all inquiries of this nature lies upon those who assert that a domicil of origin has been lost, and that some other domicil has been acquired. Further, I take it to be clearly settled that no person who is *sui juris* can change his domicil without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as home, or in other words, an intention to remain without any intention of further change, except possibly for some temporary purpose: see Story's Conflict of Laws, s. 43, and *In re Craigoish*, [1892] 3 Ch. 180, at p. 192; *Attorney-General* v. *Pottinger* (1861), 6 H. & N. 733; 30 L. J. Ex. 284; and *Douglas* v. *Douglas* (1871), L. R. 12 Eq. 617; 41 L. J. Ch. 74. . . . . Intention may be inferred from conduct, and there are cases in which domicil has been changed, notwithstanding a clear statement that no change of domicil was intended. See *Re Steer* (1858), 3 H. & N. 599; 28 L. J. Ex. 22; and per Wickens, V.-C., in 12 Eq. 644. An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from other circumstances of an intention to remain. See *Attorney-General* v. *Pottinger* (1861), 6 H. & N. 733, at p. 747; 30 L. J. Ex. 284, at p. 292, per Bramwell, B.; and *Doucet* v. *Geoghegan* (1878), 9 Ch. D. 441."—*Ibid.*, pp. 299, 300; L. J., at p. 621, Lord Lindley.

"I myself think, in my view of the law, that it is expressed very well indeed by Lord Curriehill, approved and quoted by Lord President Inglis, in the case of *Steel* v. *Steel* (1888), 15 Rettie, 896, at p. 908. 'It is, I think,' says the learned judge, 'by no means

an easy thing to establish that a man has lost his domicil of origin, for, as Lord Cranworth said in the case of *Moorhouse* v. *Lord* (1863), 10 H. L. Cas. 272, at p. 283; 32 L. J. Ch. 295, at p. 298: "In order to acquire a new domicil, according to an expression which I believe I used on a former occasion and which I shall not shrink on that account from repeating, because I think it is a correct statement of the law, 'a man must intend *quatenus in illo exuere . patriam*,'" and I venture to translate these words into English as meaning that he must have a fixed intention or determination to strip himself of his nationality, or in other words, to renounce his birthright in the place of his original domicil. The serious character of such a change is very well expressed by Lord Curriehill in the case of *Donaldson* v. *M'Clure* (1857), 20 Dunlop, 307, at p. 321. He says: "It [an *animus* or intention to abandon one domicil for another] means something far more than a mere change of residence. It imports an intention not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicil confers on the denizens of the country, —in their domestic relations, such as those of husband and wife, parent and child, master and servant—in their purchases, and sales and other business transactions—in their political and municipal *status*, and in their daily affairs of common life; but also the laws by which the succession to property is regulated after death. The abandonment or change of a domicil is therefore a proceeding of a very serious nature, and an intention to make such an abandonment requires to be proved by satisfactory evidence." ' My lords, I do not believe that it could be expressed more clearly or distinctly than it is in that judgment."—*Huntly* (*Marchioness*) v. *Gaskell*, [1906] A. C. 56, at pp. 66, 67; 75 L. J. P. C. 1, at p. 4, Earl of Halsbury.

Mobilia Sequuntur Personam.

Personal property is subject to the law that governs the person of the owner.

"It is a clear proposition, not only of the law of *England*, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it,

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either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner, having property in the funds here, dies, that property is claimed according to the right of representation given by the law of his own country."—*Sill* v. *Worswick* (1791), 1 H. Bl. 665, at p. 690, Lord Loughborough, C. J.

"The general rule on the subject is, as stated by Mr. Dicey (Conflict of Laws, p. 684), that 'any will of moveables which is valid according to the law of the testator's domicil at the time of his death is valid' in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England."—*In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442, at p. 451; 69 L. J. Ch. 225, at p. 229, Stirling, J.

"But although this [*mobilia sequuntur personam*] is the general rule, it is perhaps somewhat too broadly stated in this dictum [Lord Loughborough's, *supra*]."—*Dalaney* v. *Merry & Son*, [1901] 1 Q. B. 536, at p. 540; 70 L. J. Q. B. 377, at p. 380, Channell, J.

"The rights of the parties claiming in an English Court moveables (and there is no question in this case of leaseholds or real estate) of an intestate depend on the law of his domicil at the time of his death. It is a settled principle of English law that no one shall be without a domicil. Every one takes at birth the domicil of his father if he be legitimate, or of his mother if illegitimate, and he may in later life acquire a domicil of choice. But until he does so, or if he abandons his domicil of choice, his domicil of origin remains or revives. To quote Lord Watson [see *Abd-ul-Messih* v. *Farra* (1888), 13 App. Cas. 431, at p. 439; 57 L. J. Ch. 88, at p. 91]: 'The same learned lord [Westbury], in *Udny* v. *Udny* (1869), L. R. 1 H. L. Sc. 441, at p. 458, speaking of the acquisition of a residential domicil, said: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time" According to English law, the conclusion or inference is, that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled,

so that it becomes the measure of his personal capacity upon which his majority or minority, his succession, and testacy or intestacy must depend.'"—*In re Johnson, Roberts* v. *Attorney-General*, [1903] 1 Ch. 821, at pp. 826, 827; 72 L. J. Ch. 682, at p. 683, Farwell, J.

The rule is inapplicable to immovables, i.e., *to land, whether held for a chattel interest or for a freehold interest.*

"The territory and soil of England, by the law of nature and of nations, which is recognized also as part of the law of England, is governed by all statutes which are in force in England. This leasehold property in Belgrave Square is part of the territory and soil of England, and the fact that the testator had a chattel interest in it, and not a freehold interest, makes it in no way whatever less so. An Act of Parliament limiting the period for which accumulations are permitted, has as much force in Belgrave Square and upon every part of the property in the land of Belgrave Square, as it has in any other part of England: and for that purpose it appears to me to be totally immaterial what is the quantity of interest dealt with by the will. All the general doctrines and maxims which are to be found in any of the books of authority really go the same way. The passage which Mr. Fry quoted from Story, in which the words of Lord Loughborough were cited with approbation (see Story's Conflict of Laws, sect. 380, 2nd ed.: 'It is a clear proposition not only of the law of England, but of every country in the world, where law has the semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no visible locality, but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession'), is simply a translation into the phraseology of the English law of the maxim of the general law, *mobilia sequuntur personam*, and is certainly not meant to apply arbitrarily in a new sense, because Lord Loughborough used the word 'personal' instead of 'moveable.' The doctrine depends upon a principle which is expressed in the Latin words:

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and that is the only principle of the whole of our law as to domicil when applicable to the succession of what we call personal estate. It is so, not by any special law of England, but by the deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally. Domicil is allowed in this country to have the same influence as in other countries in determining the succession of moveable estate; but the maxim of the law of the civilized world is *mobilia sequuntur personam*, and is founded on the nature of things. When '*mobilia*' are in places other than that of the person to whom they belong, their accidental *situs* is disregarded, and they are held to go with the person. But land, whether held for a chattel interest or held for a freehold interest, is in nature, as a matter of fact, immoveable, and not moveable. The doctrine is inapplicable to it; and Story, in that very passage cited by Mr Fry from placitum 447, manifestly recognizes that where he says that all lands and all houses are necessarily immoveable; and then he speaks of their universally partaking of the law of immoveable property or 'property savouring of the realty'—language which must be used with respect to an interest less than fee simple, and less than what we call freehold; because to speak of a thing 'partaking' or 'savouring' implies that, by the positive law of the country, they also are made to partake and savour in some respects of a law not applicable to all kinds of immoveable property. I think, therefore, that the doctrine which appears to me to be clearly the true doctrine is recognized by necessary implication in those passages to which reference has been made; and Story says, with regard to some things, such as fixtures, which may or may not be moveable or immoveable, which are ambiguous in their nature, that if they are at all connected with immoveable property, then it belongs to the law of the country in which that property is situated to determine whether they should be deemed moveable or immoveable. The attempt to infer that things immoveable in their nature are to be considered moveable constructively, because the beneficial interest is allowed to go like the beneficial interest in and succession to moveables, appears to me to be quite turning away Story's doctrine from its real substance, which is this,—that so strong is the force of the immoveable character where it is found, that it will attract to itself *primâ facie* things which are ambiguous, at least to the extent of obliging other nations to recognize the law of the place where the immoveable property is situate, as

entitled to lay down the rule with regard to those ambiguous things connected with it."—*Fricke* v. *Lord Carbery* (1873), L. R. 16 Eq. 461, at pp. 466, 467, Lord Selborne, L. C., for ... R.

Will containing Foreign Terms.

A will expressed in the technical terms of the law of a country where the testator is not domiciled is to be interpreted with reference to the law of that country.

"In *Studd* v. *Cook* [(1883), 8 App. Cas. 577] there was a will made by a domiciled Englishman, dealing not only with English real property but also with real property in *Scotland*, but devising the real property in Scotland together with that in *England* according to English forms and in English terms, terms, I need hardly say, which, though intelligible in *Scotland*, are not known to the Scotch law. The majority of the judges in *Scotland* and the House of Lords decided that you must derive your knowledge of the intention of the testator by considering what the meaning of the technical terms was according to English law, and then give them an equivalent effect in *Scotland*. I do not think I have mistaken the effect of the decision of the House of Lords. I conceive, therefore, that if the testator in the present case were an Englishman and had made a will in the Scotch form, and if I came to the conclusion that he had adopted the Scotch form and used Scotch terms purposely, I should be bound to inquire what the force and effect of those Scotch terms were according to Scotch law, and then to give them their equivalent weight in construing his will in England."—*Bradford* v. *Young* (1884), 26 Ch. D. 656, at p. 669; 54 L. J. Ch. 96, at p. 100, Pearson, J.

"If we had come to the conclusion that the domicil was Scotch, I should have thought that as the will contained Scotch terms, the construction ought to be decided by Scotch law. . . . But I am of opinion that his domicil at the time of his death was English. That being so, we come to the construction of this, as of any other English will. There is nothing to show that the testator intended it to be construed according to the law of Scotland. It is true there are some words used which are more frequently used in Scotch documents than in English, but this is not a document dealing with technical limitations of real estate, but only with personal estate the law of which depends upon the

domicil of the testator."—*Bradford* v. *Young* (1885), 29 Ch. D. 617, at pp. 622, 623, Cotton, L. J.

"*Primâ facie*, being an English will it must be construed by English law, but it was drawn by a Scotch lawyer and certain Scotch terms were used in it, and it was contended that for that reason it ought to be construed as a Scotch document. I think this is a question of intention, and I see no indication of such an intention here. The will is perfectly intelligible to an Englishman. A few words might have to be explained, but this is not sufficient to induce us to depart from the general rule."—*Ibid.*, at p. 624, Lindley, L. J.

"The will looks like the production of a Scotchman trying to write like an Englishman. In my opinion, therefore, the will must be construed according to English law."—*Ibid.*, at p. 625, Fry, L. J.

(See as to will in French, *In re Cliff's Trusts*, [1892] 2 Ch. 229; 61 L. J. Ch. 130.)

"In general a will is to be construed according to the law of the domicil of the testator; 'but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country': Dicey, Conflict of Laws, p. 695."—*In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442, at p. 452; 69 L. J. Ch. 225, at p. 230, Stirling, J.

"'Where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country.' See Dicey, Conflict of Laws, p. 695."—*Att.-Gen.* v. *Jewish Colonization Association*, [1901] 1 Q. B. 123, at pp. 142, 144; 70 L. J. Q. B. 101, at pp. 113, 114, Stirling, L. J.

Will exercising a Power.

Testator Domiciled Abroad.

A will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it be invalid according to the law of domicil of the testator at the time of his death.

The rules for interpreting a will exercising a power are, except so far as they are altered by the Wills Act, 1837, the same as those for construing a will disposing of the testator's own property.

The provisions of sects. 9 and 10 of the Wills Act, 1837 (as to execution and attestation), have no application to wills of persons not domiciled in England.

"There is, however, a series of cases referred to in the argument which seems to establish that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to the law of domicil of the testator at the time of his death: see *In the Goods of Alexander* (1860), 29 L. J. P. M. & A. 93; *In the Goods of Hallyburton* (1866), L. R. P. & M. 90; *In the Goods of Huber*, [1896] P. 209."—*In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442, at pp. 451, 452; 69 L. J. Ch. 225, at p. 230, Stirling, J.

"The provisions of sects. 9 and 10 of the Wills Act, 1837 [as to execution and attestation] have no application to wills of persons not domiciled in England. This was decided by Stirling, J., in the case of *In re Price, Tomlin* v. *Latter*, [1900] 1 Ch. 442, at pp. 451, 452; 69 L. J. Ch. 225, at p. 230, where he cites Dicey's Conflict of Laws, p. 684, and *Bremer* v. *Freeman* (1857), 10 Moo. P. C. 306, 359; and although in that case Stirling, J., does not, I think, agree with what was said by Kay, J., in *In re Kirwan's Trusts* (1883), 25 Ch. D. 373; 52 L. J. Ch. 952, in reference to the application of the negative words in sect. 10 of the Wills Act to the case before him, he at the same time points out that the decision in *In re Kirwan's Trusts* (1883), 25 Ch. D. 373, at p. 452; 52 L. J. Ch. 952, may be rested on these grounds [see [1900] 1 Ch. 442, at p. 452]: 'First, the power was required to be executed by an instrument in a special form, which the instrument said to be an

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execution of the power did not satisfy. Secondly, the Wills Act had no application, inasmuch as the testator was domiciled abroad; and although the instrument was not invalidated by the prohibitory portion of sect. 10, it did not derive validity from the enabling portion of that section. . . . Thirdly, although the instrument was valid by Lord Kingsdown's Act (24 & 25 Vict. c. 114, the Wills Act, 1861), still, as was pointed out by Kay, J., that statute does not contain any enactment dealing with wills made in exercise of powers.'"—*Barretto* v. *Young*, [1900] 2 Ch. 339, at p. 343; 69 L. J. Ch. 605, at pp. 606, 607, Byrne, J.

"The rules for construing a will exercising a power are, except so far as they are altered by the Wills Act, the same as those for construing a will disposing of a testator's own property. In each case it is a question of intention, to be gathered from the words used, and not from speculation as to what the testator would probably have desired. If the language used is such that a devise of his own property would have failed by reason of some subsequent act, an appointment under a special power in the same language must equally fail. The subsequent act need not be the act of the testator himself. For example, a devise of Blackacre, which is subject to mortgage, will be defeated if the mortgagee sells under his power of sale in the testator's lifetime, and the devisee will not take the surplus proceeds in the hands of the mortgagee. A will may, however, be so framed as to indicate an intention to give or appoint property, however invested, or notwithstanding any change of investment."—*In re Moses*, [1902] 1 Ch. 100, at p. 123; 71 L. J. Ch. 101, at pp. 110, 111, Cozens-Hardy, L. J.

Section II.

FORMS OF WILLS.

No Technical Form necessary.

"The rule of construction of wills is, 'That *no technical form* is necessary to convey the testator's meaning.'"—*Strong ex dem. Cummin* v. *Cummin* (1759), 2 Burr. 767, at p. 770, Lord Mansfield, C. J.

"It is not necessary that any technical or artificial form of words should be used in a will."—*Hay* v. *The Earl of Coventry* (1789), 3 T. R. 83, at p. 86, Lord Kenyon, C. J.

Original Will may be looked at.

Will partly in Print; Blanks in a Will.

A golden rule—a will should be interpreted so as to lead to a testacy, not to an intestacy.

"In my opinion, when you have to construe a disputed will you must look at the will and read it. You must use your eyes as one of the means given you to enable you to construe what people have said. The main argument in this case is founded on there being a blank in the will, and how can you tell that there is a blank without looking at the will? I know of no rule that for the purpose of construing a will you may not look at the original will itself. Looking at the will in the present case, it is impossible not to take notice of the fact that part of it is in a common form, not drawn up for the purpose of this particular will. The blank spaces were not left by the testatrix herself, but were left for the purpose of being filled up by any testator who might happen to use the form. When the form is filled up as a will, it must be

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read according to ordinary loose English grammar and ideas. There is one rule of construction which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not to an intestacy. This is a golden rule."—*In re Harrison* (1885), 30 Ch. D. 390, at pp. 393, 394; 55 L. J. Ch. 799, at p. 800, Lord Esher, M. R.

"I am of the same opinion. I fully agree that for many purposes the first thing to be looked at is the probate copy of a will. But when I look at the probate copy in this case I find that there is a blank space in it. This is consistent either with an accidental omission to fill up the blank, or with an intention not to fill it up. It then becomes very material to look at the original will, and upon looking at it we find that it is on a printed form in which blanks are left for the purpose of being filled up by the person using it. The testatrix has not filled in this blank, and I think the only way in which you can construe the words is by reading them as if they were consecutive. The conclusion that the testatrix intended to fill up the blank at some future time would be inconsistent with her declared intention to revoke all former wills and make that her last will and testament."—*Ibid.*, at p. 397; Baggallay, L. J.

A Codicil is to be looked at as part of the Will.

"The Court may not only look, but is bound to look, at the will and at all the other codicils, for the purpose of explaining any subsequent codicil."—*Hartley* v. *Tribier* (Feb. 15, 1853), 16 Beav. 510, at p. 515; 22 L. J. Ch. 890, at p. 891, Sir John Romilly, M. R.

"It appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but, rather, that, the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil."—*Darley* v. *Martin* (June 11, 1853), 13 C. B. 683, at p. 691; 22 L. J. C. P. 249, at p. 252, Jervis, C. J.

"I think, therefore, that, following the considered judgment of the Court of Common Pleas in *Darley* v. *Martin* (1853), 13 C. B.

683; 22 L. J. C. P. 249, and this decision of Kindersley, V.-C. [*Grover* v. *Raper* (1856), 5 W. R. 134], I may have recourse to the codicil to clear up the ambiguity in the will."—*In re Venn*, [1904] 2 Ch. 52, at p. 56; 73 L. J. Ch. 507, at p. 508, Joyce, J.

(See also, *post*, p. 580, "Ambiguities," and "Subsequent Acts," p. 588.)

Date.

Will is an ambulatory instrument, and speaks and takes effect from testator's death.

The date is only primâ facie *evidence of the time when the will was made.*

The Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 24. "Every will [not made before 1st January, 1838] shall be construed, with reference to the real estate 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."

"Supposing the general rule as to the exclusion of parol evidence to apply to cases of this kind [wills], Dr. Wambey has cited abundant authority to show that it has no application to the date of the instrument. . . . . Then comes the case in the House of Lords [*Randfield* v. *Randfield* (1860), 6 Jur. N. S. 901; 30 L. J. Ch. 177] where parol evidence was admitted, apparently without a question being raised, showing that a will purporting on the face of it to be executed before the passing of the Wills Act, was actually executed after the Act came into operation."—*Reffell* v. *Reffell* (1866), L. R. 1 P. & M. 139, at p. 142; 35 L. J. P. 121, at p. 122, Sir J. P. Wilde.

"I confess I am confirmed in the view which I entertain of the true construction of the 24th section of the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26). With whatever purpose, or in respect of whatever supposed defect in the law, that section was enacted, I can only say that the language there seems to me plain and unambiguous—that I am to construe this will as if the condition of things to which it refers was that immediately before the testator's death. I do not believe that, for any such purpose as is now contended, you have any right to go into the history of the testator's property, and see when he came into possession of it. My lords, I say that by way of protest against the construction

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proposed to be placed upon that section of the Wills Act."—*Higgins* v. *Dawson*, [1902] A. C. 1, at p. 7; 71 L. J. Ch. 132, at p. 136, Earl of Halsbury, L. C.

"A will is 'ambulatory,' and incomplete in its operation during the life of the testator. It is a disposition, or, in the case of a power, a designation, of certain property in favour of a certain individual, dependent upon the existence of both the property and the person at the moment of the death of the testator."—*In re Moses, Beddington* v. *Beddington*, [1902] 1 Ch. 100, at p. 123; 71 L. J. Ch. 101, at p. 110, Cozens-Hardy, L. J.

"The question is whether, in the language of Cozens-Hardy, L. J., the general principle is applicable to the determination of this case that, when you are dealing with a will, which is an ambulatory document, you have no right to refer to the circumstances under which it was made, or the date in respect of which it was made, or the property that existed at the time when it was made: you are remitted, by virtue of the 24th section of the Wills Act, to the moment of death to show what it is that is being disposed of. . . . . Of course, the broad proposition which Cozens-Hardy, L. J., lays down cannot be doubted: when you are dealing with a will you are dealing with an ambulatory instrument, and it operates nothing and can operate nothing till it becomes consummated by the death of the testator; it must wait till then. That is a principle which I think no one has controverted or can controvert: that it must speak from the date of the will, as the 24th section of the Wills Act says, in relation to the property of the testator, whether it is real or personal, or what comes within the 24th section by virtue of the interpretation clause, a power of appointment which may be in him at the time of his death."—*Beddington* v. *Baumann*, [1903] A. C. 13, at pp. 15, 16; 72 L. J. Ch. 155, at p. 156, Earl of Halsbury, L. C.

"To take Lord Davey's phrase in *Beddington* v. *Baumann*, [1903] A. C. 13, at p. 19; 72 L. J. Ch. 155, 'A [the] will is an ambulatory document, having no force or effect until the death of the gentleman who made the will.' When an Act says that no person shall dispose by will of any property, it means an effectual disposition by the will and the death of the testator both coalescing."—*In re Baroness Llanover, Herbert* v. *Freshfield*, [1903] 2 Ch. 330, at p. 335; 72 L. J. Ch. 729, at p. 731, Farwell, J.

(See *ante*, p. 341, "Effect on Wills of Statutes.")

Punctuation.

"My lords, so far as punctuation is concerned, I believe there is no trace of any punctuation in the original will; but whether that be so or not, I entirely concur in the opinion expressed by Sir William Grant, in a case before him [*Sandford* v. *Raikes* (1816), 1 Mer. 646 - 651], that 'it is from the words, and from the context, and not from the punctuation,' that the meaning of the testator is to be collected."—*Gordon* v. *Gordon* (1871), L. R. 5 H. L. 254, at p. 276, Lord Westbury.

Section III.

CASES ON WILLS.

(a) *Authorities are not to be cited in cases of interpretation of wills unless to lay down some general principle or to explain some technical expression.*

(b) *If the judges can tell what a testator intends, and can give effect to his intention as expressed, they should not be driven out of it by other cases or decisions in other cases.*

(c) *If a long course of decisions has established a particular meaning as belonging to particular words and phrases, the testator must be supposed to have used those words in that sense, and they must be so interpreted.*

(d) *The true way to interpret a will is to form an opinion apart from the decided cases, and then to see whether those decisions in reason and spirit or principle require any modification of that opinion.*

"We are not to draw the sources of our judgment from the mere language or construction of other wills differently compounded, but from the language and intention of the testator in the will before us, or, as it is sometimes expressed, *ex visceribus testamenti*."—*Doe* d. *Wright* v. *Jesson* (1816), 5 M. & S. 95, at p. 97, Lord Ellenborough, C. J.

"The question is not upon the letter, however, but upon the spirit; the question is, whether looking at those four cases

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together, they do not, in spirit, give a rule of construction, within the influence of which the present will does, as to the Long Annuities, fall."—*Barton* v. *Mount* (1848), 2 De G. & Sm. 383, at p. 388, Knight-Bruce, V.-C. [quoted by V.-C. Bacon in *Thursby* v. *Thursby* (1875), L. R. 19 Eq. 395, at p. 411; 44 L. J. Ch. 289, at pp. 295, 296].

"Undoubtedly, it is a difficult thing, after this long interval of time (since 1812), to arrive at any different interpretation, but, nevertheless, it is your lordships' duty not to accept any construction merely upon the credit due to high authority; unless you conscientiously believe it to be the construction which most accords with the words, and best effectuates the intention of the testator."—*Parker* v. *Tootal* (1865), 11 H. L. Cas. 143, at p. 158; 34 L. J. E. 198, at p. 202, Lord Westbury, L. C.

"There can be nothing more certain than that every will is to be construed by itself, not with reference to other wills; and all the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have by judges of high authority been applied in cases more or less similar."—*Waite* v. *Littlewood* (1872), L. R. 8 Ch. 70, at p. 73; 42 L. J. Ch. 216, at p. 219, Lord Selborne, L. C.

"The rule had often been departed from that authorities are not to be cited in cases of construction unless to lay down some general principle, or to explain some technical expression. . . . He should always endeavour to prevent the decisions of other judges upon the words of other wills being cited as a guide for the construction of words resembling them in the will before him."—*Waring* v. *Currey* (1873), 22 W. R. 150, Jessel, M. R.

"It would not be right to overrule the decision of a Court of co-ordinate jurisdiction, unless we were very clearly satisfied that it was wrong; and it would lead to endless confusion and interminable litigation if the Courts were to make or find minute differences in the language of instruments for the purpose of escaping from the authority or apparent authority of previous decisions. With respect to wills in particular, it is far better to have settled rules which will enable the members of families to know what the law gives them, than that every variation of language used by a testator, or his lawyer, should entail on family after family the costs, the heartburning and misery of litigation."—*Wake* v. *Varah* (1876), 2 Ch. D. 348, at p. 357; 45 L. J. Ch. 533, at p. 537, James, L. J.

"In real estate wills, as I have often said and I will now repeat, I do not feel myself to have the same liberty as regards construing a will according to its meaning, as I have in the case of what are commonly called personal estate wills, and for this reason, that land in this country is held by title, and that the very complicated and curious law affecting real estates depends almost entirely on judicial decisions as to the construction of particular instruments—I mean as regards the effect of limitations—and any judge who attempted to interfere with the authorities by starting anew, and giving a new construction to a will, because he thought it expressed something different, would be in fact legislating and making new laws as regards real property which no judge has a right to do, and which would do infinite mischief if he were right in his conclusion that the original meaning of the words was different from that which they had been taken to bear by a long or an old course of decisions."—*Miles* v. *Harford* (1879), 12 Ch. D. 691, at pp. 698, 699, Jessel, M. R.

"The Court has to say what was the intention as appearing from the whole will. Cases can be of but little use, for the words of one will are seldom the same as those of another; but, no doubt, when it has been held that a particular devise indicates an intention so strong that other words must be strained to give way to it, that is a great help to those who argue that other words must give way to a similar devise; and where it has been held that some particular words indicate so strongly an intention that they cannot be strained to give way to a general indication of intention, it is a help to those who argue that they should not give way."—*Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, at p. 206; 51 L. J. P. C. 53, at pp. 58, 59, Lord Blackburn, delivering the judgment of the Judicial Committee.

"I understand having recourse to authorities for the purpose of grappling with a difficulty when it arises, but it appears to me a misuse of cases on construction to depart from a plain instrument and to find from authorities something which you do not find in the instrument itself, and which you import from the authorities into the instrument, and thereby raise a doubt, and then have recourse to the same authorities for the purpose of seeing how the doubt is to be met. It appears to me that is fundamentally erroneous, and I think our duty is upon a plain will to adopt the construction which the words require."—*In re Tredwell, Jeffray* v.

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Tredwell, [1891] 2 Ch. 640, at pp. 653, 654; 60 L. J. Ch. 657, at p. 662, Lindley, L. J.

"I have often had occasion to say of a case upon the construction of a will, that was a decision on a particular will, the judge looking at every word of the special clauses. How can it be an authority upon the construction of another and a different will?" —*Scalé* v. *Rawlins*, [1892] A. C. 342, at p. 343; 61 L. J. Ch. 421, Lord Halsbury, L. C.

"Rules of law must be attended to; but if in any case the intention of a testator is expressed with sufficient clearness to enable the Court to ascertain it, the Court ought to give effect to it in that case, unless there is some law which compels the Court to ignore it; and the mere fact that in other wills more or less like it other judges have not been satisfied as to the intentions expressed in them is not sufficient ground for defeating an intention where the Court holds it to be sufficiently expressed in the particular will which it is called upon to construe."—*In re Palmer*, *Palmer* v. *Ainsworth*, [1893] 3 Ch. 369, at pp. 373, 374; 62 L. J. Ch. 988, at p. 990, Lindley, L. J.

"In order to ascertain the meaning of a testator using ordinary language—that is to say, using the English language as it is ordinarily used—one has to be guided by two cardinal rules—one of them, to my mind, of the first importance beyond everything else in the construction of wills and other written documents, but especially of wills; the other not establishing an extension of the first, but really going side by side with it, and not applicable with the same generality. The first rule is that which has been expressed by many judges in many cases, notably by Lord Wensleydale in *Greville* v. *Browne* (1859), 7 H. L. Cas. 689, at p. 703; but more strongly, if I may venture to say so, and more plainly in a case which has only just been reported of *In re Morgan*, [1893] 3 Ch. 222; 62 L. J. Ch. 789, where Lord Justice Lindley [at p. 228], L. J., at p. 793, says this, 'I do not see why, if we can tell what a man intends, and can give effect to his intention as expressed, we should be driven out of it by other cases or decisions in other cases. I always protest against anything of the sort. Many years ago the Courts slid into the bad habit of deciding one will by the previous decisions upon other wills. Of course, there are principles of law which are to be applied to all wills; but you once get at a man's intention, and there is no law to prevent you from giving it effect, effect ought to be

given to it.' That is, to my mind, the first rule to bear in mind beyond everything else. But if a series of decisions, accepted by the profession, and presumably known to all testators, or, at any rate, to those whose duty it is to prepare their wills, have established that certain words and certain phrases mean certain things, and have a certain result, then effect must be given to that, and those words must have that meaning, and that only, and you really are but using them grammatically, according to the dictionary, because the dictionary is to be found in those decisions. And that is what Lord Wensleydale says in *Greville* v. *Browne* (1859), 7 H. L. Cas. 689, at p. 703, following the passage I referred to just now: 'If indeed a long course of decisions has established a particular meaning as belonging to particular words, the testator must be supposed to have used those words in that sense, and they must be so construed; but short of that, I think very little effect is to be attributed to former decided cases.'"—*In re Barden*, [1894] 1 Ch. 693, at pp. 697, 698; 63 L. J. Ch. 412, at pp. 412, 413, Kekewich, J.

"When I see an intention clearly expressed in a will, and find no rule of law opposed to giving effect to it, I disregard previous cases."—*In re Stone*, *Baker* v. *Stone*, [1895] 2 Ch. 196, at p. 200; 64 L. J. Ch. 637, at p. 640, Lindley, L. J.

"It is permissible to refer as authorities to any decision on other wills not expressed in exactly the same language, only so far as they illustrate a principle."—*In re Pickworth*, [1899] 1 Ch. 642, at p. 652; 68 L. J. Ch. 324, at pp. 328, 329, Rigby, L. J.

"It has been said by the Court of Appeal [*In re Blantern*, W. N. (1891) 54] that the true way to construe a will is to form an opinion apart from the decided cases, and then to see whether these decisions require any modification of that opinion; not to begin by considering how far the will in question resembles other wills upon which decisions have been given. I proceed, therefore, to examine the language of the codicil which we have to construe."—*In re Sanford*, [1901] 1 Ch. 939, at p. 941; 70 L. J. Ch. 591, at p. 593, Joyce, J.

"In construing a will what I like to do is, before going to the authorities, to read the will itself carefully, and to see whether, apart from authorities, I cannot gather what the meaning of the testator was. Of course, in construing the will I must bring in aid all those rules of law and construction which the authorities have laid down; but if in doing so, and construing the will for myself, I come to one conclusion, I do not think it is a wise or

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right thing to attempt to construe one will—a will like this—by the determination put by a judge on another will, merely because that other will is something like the present. No doubt it is tempting, if you find a will something like the will you have to construe already construed by a judge, to start with the assumption that the first decision was right (which is a right assumption), and then to proceed to see how the will differs, and then to consider each difference in detail and to see whether that difference ought to lead you to a different conclusion from that arrived at by the judge in the prior case. To my mind such a method of procedure often leads to a very erroneous conclusion as to a will taken as a whole."—*In re Gorringe*, [1906] 2 Ch. 341, at p. 347; 75 L. J. Ch. 687, at p. 691, Romer, L. J.

"A decision on language used in a will may be said to govern subsequent decisions when the Court has authoritatively laid down the meaning of special phraseology; such a decision rightly governs subsequent ones, because it justifies the profession in using the phraseology in that sense, and by so justifying them, it induces them to use that phraseology when they intend to convey the meaning which it has thus been authoritatively decided to bear, and therefore it would be unjust for us, in the absence of special circumstances, to depart from the rules laid down by such a case." —*Ibid.*, at p. 353; L. J., at p. 694, Fletcher Moulton, L. J.

Section IV.

INTENTION.

Distinction between the Case of a Deed and a Will.

"He (Lord Eldon) first adverts to the well-known distinction which has at all times prevailed as to the construction of deeds and wills, and which I have always understood to be this, that, although

in both cases the Courts look to the intention of the parties, yet in construing a deed, unless there be in the deed some manifest contrariety or contradiction, rendering a different interpretation necessary in order to effectuate the intention of the parties, the Courts are guided by the strict legal meaning of words; but, in the case of a will, the testator is supposed to have been *inops consilii*, and on that ground a greater latitude is allowed in the construction of legal terms."—*Lewis* v. *Rees* (1856), 3 K. & J. 132, at pp. 146, 147; 26 L. J. Ch. 101, at p. 104, Sir W. Page Wood, V.-C.

"Now the cardinal rule in the construction of wills is to give effect to the intention of the testator."—*In re Arnold's Trusts* (1870), L. R. 10 Eq. 252, at p. 256; 39 L. J. Ch. 875, at p. 876, Malins, V.-C.

Discovery of Testator's Intention.

The intention of dying intestate in cases of ambiguity is not to be imputed to a testator.

"There is the other rule which the Court always acts upon, namely, not to impute to a testator the intention of dying intestate."—*In re Redfern* (1877), 6 Ch. D. 133, at p. 136; 47 L. J. Ch. 17, at p. 19, Bacon, V.-C.

"There is one rule of construction which, to my mind, is a golden rule, viz., that when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not to an intestacy. This is a golden rule."—*In re Harrison* (1885), 30 Ch. D. 390, at pp. 393, 394; 55 L. J. Ch. 799, at p. 800, Lord Esher, M. R.

"The principles to be applied are these. First, I ought to read the whole of the will and from it ascertain the testator's intention. Secondly, in ascertaining the intention, I ought to a certain extent —we all know what the expression means—to lean against an intestacy, and not to presume that the testator meant to die intestate if, on a fair construction, there is reason for saying the contrary."—*Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 484, at pp. 489, 490; 72 L. J. Ch. 468, at p. 470, Buckley, J.

"It is said that the Court leans against an intestacy. I do not

know whether that expression at the present day means anything more than this, that in cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view to avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will."—*In re Edwards, Jones* v. *Jones*, [1906] 1 Ch. 570, at p. 574; 75 L. J. Ch. 321, at p. 323, Romer, L. J.

Intention known from the words used in the will.

"It is to be observed, that where the words of a will have a plain sense, and no doubt is in any matter within or without the words touching the matter of the devise, there the words of the will shall always be taken to be the intent of the devisor, and his intent to be what the words say."—*Bac. Ab.* Wills and Testaments, G.

"The Court is bound to give effect to all the will."—*Gray* v. *Minnethorpe* (1790), 3 Ves. 103, at p. 105, Lord Loughborough, L. C.

"*Intention* may mean what the testator intended *to have done*; whereas the only question, in the construction of wills, is on the *meaning of the words*."—*Doe* d. *Sams* v. *Garlick* (1845), 14 M. & W. 698, at pp. 701, 702, Parke, B.

"We are to ascertain by construing the will *non quod voluit sed quod dixit*, or rather, we are to ascertain *quod voluit* by interpreting *quod dixit*."—*Grover* v. *Burningham* (1850), 5 Ex. 184, at pp. 193, 194, Rolfe, B.

"The first duty of the Court expounding the will is to ascertain what is the meaning of the words used by the testator. It is very often said that the intention of the testator is to be the guide; but that expression is capable of being misunderstood, and may lead to a speculation as to what the testator may be supposed to have intended to write, whereas the only and proper inquiry is, What is the meaning of that which he has actually written? That which he has written is to be construed by every part being taken into consideration according to its grammatical construction, and the ordinary acceptation of the words used, with the assistance of such parol evidence of the surrounding circumstances as is admis-

sible to place the Court in the position of the testator."—*Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, at p. 876, Lord Wensleydale.

"The question in expounding a will, as Sir J. Wigram most correctly states in his excellent work on the application of parol evidence to the construction of wills [2nd ed. (1840) p. 7], 'is not what the testator meant, but what is the meaning of his words.'"—*Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68, at p. 114; 28 L. J. Ch. 110, at p. 114, Lord Wensleydale.

"The testator appears to have been an exceedingly illiterate man; and the rules of grammar and the usual meaning of technical language may be disregarded in construing his will. But we cannot strike out from his will any word which, standing where it is, has a clear and definite operation in the disposal of his property."—*Hall* v. *Warren* (1861), 9 H. L. Cas. 420, at p. 427, Lord Campbell, L. C.

"There is no rule more clearly established than this, that when the intention of a testator is clearly manifest the Court will endeavour to carry out that intention as far as the words will permit."—*Cross* v. *Maltby* (1875), L. R. 20 Eq. 378, at p. 381, Malins, V.-C.

"We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of the will."—*Seale* v. *Rawlins*, [1892] A. C. 342, at pp. 344, 345; 61 L. J. Ch. 421, at p. 423, Lord Watson.

"What a man intends and the expression of his intention are two different things. He is bound, and those who take after him are bound, by his expressed intention. If that expressed intention is unfortunately different from what he really desires, so much the worse for those who wish the actual intention to prevail."—*Simpson* v. *Foxon*, [1907] P. 54, at p. 57; 76 L. J. P. 7, at p. 8, Sir Gorell Barnes, P.

Intention ought to be agreeable to the rules of law.
Intention ought to be collected out of every part of the will.
Every word of a will should have its effect.
A will should be interpreted ut res magis valeat quam pereat.

"As touching the general rules to be observed for the true construction of wills *in lestamentis plenius testatoris intentionem*

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scrutamur. But yet this is to be observed with these two limitations: (1) His intent ought to be agreeable to the rules of law; (2) This his intent ought to be collected out of the words of the will. As to this, it may be demanded, how shall this be known? To this it may be thus answered: (1) To search out what was the scope of his will: (2) To make such a construction, so that all the words of the will may stand: for to add anything to the words of the will, or in the construction made to relinquish and leave out any of the words, is *malè dicta glossa*. But every string ought to have his sound."—*Blomfield* v. *Blomfield* (1615), 3 Buls. 103, Dodderidge, J.

"It is a certain rule, in the exposition of wills especially, that every word shall have its effect and not be rejected if any construction can possibly be put upon it." *Barker* v. *Giles* (1725), 2 P. Wms. 279, at p. 282, King, L. C.

"The intention of a testator is to be collected from the *whole* of his will, *ex visceribus testamenti*; so as to leave the mind quite satisfied about what the testator meant; and as a will of lands must be in *writing*, such construction of the testator's intention must be founded upon the *writing itself*."—*Baldeby* v. *Leppingwell* (1764), 3 Burr. 1533, at p. 1541, Wilmot, J.

"It is a certain rule of construction, that every word of a will must have a meaning imputed to it, if it is capable of a meaning without a violation of the general intent, or of any other provision in the will, with which it may appear inconsistent."—*Reeves* v. *Brymer* (1799), 4 Ves. 692, at p. 697, Sir R. P. Arden, M. R.

"I know no rule I can adopt more safely than that, which I did adopt in *Sims* v. *Doughty* [(1800), 5 Ves. 243 (see the note, 2nd edition, p. 247)], and upon which I have always acted, viz., to give effect to every word of the will; provided an effect can be given to it not inconsistent with the general intent of the whole will, taken together; for if the general intention can be collected, it is the duty of the Court to adapt every regulation to that general intent."—*Constantine* v. *Constantine* (1801), 6 Ves. 100, at p. 102, Sir W. Grant, M. R.

"We have now reached the sound rule, that for the purpose of collecting the intention, every part of the will must be considered. That rule was first established by the great judge whom we have just lost, the late Master of the Rolls (Sir W. Grant), and was confirmed by myself in *Boothe* v. *Blundell* [(1815), 1 Mer. 193]."—*Gittens* v. *Steele* (1818), 1 Swanst. 24, at p. 28, Lord Eldon, L. C.

"Another undoubted rule of construction is, that every part of that which the testator meant by the words he has used should be carried into effect as far as the law will permit, but no further; and that no part should be rejected, except what the law makes it necessary to reject."—*Doe* d. *Gallini* v. *Gallini* (1833), 5 B. & Ad. 621, at p. 641, Denman, C. J.

"The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed. Redundancy or repetition in such independent papers will no more necessarily vitiate any of them, than similar defects if appearing on the face of a single document. Now, it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the Court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered relates to the disposition of the testator's property and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate—is the true question."—*Lemage* v. *Goodman* (1865), L. R. 1 P. & D. 57, at p. 62; 35 L. J. P. 28, at pp. 30, 31, Sir P. Wilde (cited by Sir Gorell Barnes in *Simpson* v. *Foxon*, [1907] P. 54, at p. 58; 76 L. J. P. 7, at pp. 8, 9).

"The primary rule of construction is, to give effect, if possible, to the whole will. If there is a construction which will so operate without doing violence to any part of the will, that construction ought to be adopted."—*Gravenor* v. *Watkins* (1871), L. R. 6 C. P. 500, at p. 510; 40 L. J. C. P. 197, at p. 200, Brett, J.

"There is a maxim to which I hold, perhaps as strongly as anyone, that, if possible, you should construe a will *ut res magis valeat quam pereat*."—*Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172, at p. 179; 55 L. J. Ch. 121, at p. 124, Pearson, J.

"The first thing to be done is to arrive at the true meaning and view of the will. We must not for that purpose fix our minds too much upon one clause in the will. We, of course, must not neglect anything, but we must take the whole will together, and see what, as a fair result—not necessarily an absolutely demon-

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strated result, but as the reasonable conclusion to be arrived at from the whole will—is the meaning of the testator." *In re Hunter*, [1897] 2 Ch. 105, at p. 115; 66 L. J. Ch. 545, at p. 550, Rigby, L. J.

"I agree, especially in the view that, when it is possible so to construe a will as not to render a material part of it void by an application of the rule against perpetuities, it is desirable to do so. Of course, as the Master of the Rolls (Lindley, M. R.) has said, the Court has no right to misconstrue a will with that object, but, if the language of a will is ambiguous, it is right to lean rather to a construction which will undoubtedly carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear."—*In re Turney, Turney* v. *Turney*, [1899] 2 Ch. 739, at p. 747; 69 L. J. Ch. 1, at p. 5, Sir F. H. Jeune.

"The rule is to construe a will *ut res magis valeat quam pereat*, and to give effect so far as possible to all the words used by the testator."—*In re Sanford, Sanford* v. *Sanford*, [1901] 1 Ch. 939, at p. 943; 70 L. J. Ch. 591, at p. 594, Joyce, J.

"There is not wanting authority to show that in a case of obscurity or ambiguity, even when the question is one of invalidity on the ground of remoteness, repugnancy, or the like, weight may be given to the consideration that it is better to effectuate than to frustrate the testator's intention: see Lord Selborne in *Perks* v. *Mosley* (1880), 5 App. Cas. 714, 719; 50 L. J. Ch. 57, at p. 59; and per Lord Kingsdown in *Tarns* v. *Whitcomb* (1858), 11 P. C. 526, 543."—*In re Sanford*, [1901] 1 Ch. 939, at p. 944; 70 L. J. Ch. 591, at p. 594, Joyce, J.

"One does not doubt that, where you are construing either a will or any other instrument, it is perfectly legitimate to look at the whole instrument—and, indeed, you must look at the whole instrument—to see the meaning of the whole instrument, and you cannot rely upon one particular passage in it to the exclusion of what is relevant to the explanation of the particular clause that you are expounding. That is perfectly true as a general proposition."—*Higgins* v. *Dawson*, [1902] A. C. 1, at pp. 3, 4; 71 L. J. Ch. 132, at p. 134, Earl of Halsbury, L. C.

Implication—Conjecture.

"There is hardly any case where implication is of necessity, but it is called 'necessary' because the Court finds it so to answer the intention of the devisor."—*Coryton* v. *Helyar* (1745), 2 Cox, 340, at p. 348, Lord Hardwicke (cited by Knight Bruce, L. J., in *Windus* v. *Windus* (1856), 6 D. M. & G. 549, at p. 554).

"A necessary implication is that implication arising upon the words the testator has made use of, which clearly satisfies the Court what was his meaning. It is put in opposition to conjecture. Conjecture is, when you suppose what would have been the testator's meaning if he had the whole case before him; and what, if he had thought of such an event, he would have said upon it. That is conjecture; but for implication, you must find out his meaning, whether expressed or implied, from his words. If they have an express meaning, and he has made use of inaccurate words, you must construe his words; if they are words of sense, or declarations which are noways accurate in legal phrase, you must see clearly what is the testator's meaning; and if the testator's meaning is doubtful, if a Court of justice cannot say they are satisfied his intention was so, the whole will is void for uncertainty. Necessary implication, therefore, is that which leaves no room to doubt. It is not an implication upon conjecture: you are not to conjecture what he would have done in an event he never thought of; that will not do, though many cases have been determined with a view to such an event."—*Jones* v. *Morgan* (1773), Fearne, C. R., App. No. III. (10th ed. (1844), Vol. I, 577, at p. 589), Lord Mansfield, C. J.

"If the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared."—*Tourus* v. *Wentworth* (1858), 11 Moo. P. C. 526, at p. 543, the Right Hon. T. Pemberton Leigh, delivering the judgment of the Judicial Committee.

"Implication may be founded upon two grounds. It may either arise from an elliptical form of expression which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form

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of gift, or upon a direction to do something which cannot be carried into effect without of necessity involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction."—*Parker* v. *Tootal* (1865), 11 H. L. Cas. 143, at p. 161; 34 L. J. Ex. 198, at p. 203 (Lord Westbury).

(See also *post*, p. 533, "Spirit and Letter," and "Technical Words and Expressions," p. 548.)

Recitals, Effect of.

"Where a testator in one part of his will has recited that he had given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication. The distinction between the two cases is marked and obvious. In the former, the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed. In the latter, as it is expressed by Mr. Jarman, Vol. 1, p. 460, 'such recitals do not in general amount to a devise, for as the testator evidently conceives that the person referred to possesses a title independently of his own, he does not intend to make an actual disposition in favour of such person.'"—*Adams* v. *Adams* (1842), 1 Hare, 537, at pp. 540, 541; 11 L. J. Ch. 305, Wigram, V.-C.

"If there are in the will no words amounting to a gift, or such a direction to pay, as indicates an intention to confer the bounty of the testatrix, but merely words of erroneous recital or recognition of indebtedness, no intention of giving a legacy will be disclosed by the will. I do not understand the case of *Adams* v. *Adams* (1842), 1 Hare, 537; 11 L. J. Ch. 305, which was so much relied upon, to go beyond that proposition. The mere recital that someone named in the will as a legatee in respect of another legacy has an interest independent of the will in an estate or fund under the control of a testator, will not be a sufficient indication of an intention to make a gift by will of that interest, even though such recital may be accompanied by a direction to

pay; and if that is a true proposition, it is *à fortiori* a true proposition where the interest recited is an interest of a creditor to whom the estate is indebted. To infer the intention to confer a bounty, you must, in my judgment, find in the will, in addition to the direction to pay, evidence of the intention to confer a bounty."—*In re Roare, Pike* v. *Handyn*, [1898] 1 Ch. 153, at pp. 160, 161; 67 L. J. Ch. 87, at p. 91, Vaughan Williams, L. J.

Testator's Object.

"I took occasion a few days ago [*Thellusson* v. *Woodford* (1799), 4 Ves. 227, at p. 329] to observe, that in construing a will I should not go upon grounds of favour or disfavour to the object of the testator, if I could discover his intention."—*Innes* v. *Johnson* (1799), 4 Ves. 568, at p. 574, Sir R. P. Arden, M. R.

"Whilst the intention of the testator ought to be our only guide to the interpretation of his will, it must be his intention to be collected from the words employed by himself in his will. No surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will, unless such object can be collected from the plain language of the will itself.

"We hold it to be a necessary rule in the investigation of the intention of a testator, not only that we ought to look to the words of the will alone, to determine the operation and effect of the devise, but that we ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate, when such estate is once collected from the words of the will itself."—*The Earl of Scarborough* v. *Doe* d. *Savile* (1836), 3 A. & E. 897, at pp. 962, 963, Tindal, C. J., delivering the judgment of the Exchequer Chamber.

Golden Rule.

The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the will, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance and inconsistency, but no further.

"But is there not a rule of common sense, as strong as any case can be, that words in a will are to be construed according to their

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natural sense, unless some obvious inconvenience or incongruity would result from so construing them?"—*Doe* d. *Usher* v. *Jessop* (1819), 12 East, 288, at p. 293, Lord Ellenborough, C. J.

"It appears to me that the best language in which that rule is expressed is in the words of Mr. Justice Burton, in *Warburton* v. *Loveland* (1828), 1 Hud. & B. (Ir.) 623, at p. 648, where he applies it to the construction of statutes" [see *ante*, p. 302]. "*Tibbetts* v. *Colt* (1836), 1 M. & W. 259, at p. 264; 5 L. J. Ex. Eq. 25, at p. 34, Parke, B. [referred to by Knight Bruce, L. J., in *Gundry* v. *Pinniger* (1852), 1 D. G. M. & G. 502, at p. 504; 21 L. J. Ch. 405, at p. 406].

"The rule of construction, and the rule which, in modern times particularly, the Courts have always been anxiously inclined to follow, has been to adhere as rigidly as possible to the express words that are found, whether in wills or in deeds, and to give to those words their natural ordinary meaning, unless by so doing it appears from the context that you are using them in a different sense from that in which the testator or the maker of the deed intended to use them, or, unless by so using them, you would be doing something which would manifestly lead to an inconsistency, which could not have been the intention of the party making the instrument."—*Grey* v. *Pearson* (1857), 6 H. L. Cas. 61, at p. 78; 26 L. J. Ch. 473, at p. 477, Lord Cranworth, L. C.

"I have been long and [illegible]y impressed with the wisdom of the rule, now I believe universally adopted, at least in the Courts of law in Westminster Hall, that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. This is laid down by Mr. Justice Burton in a very excellent opinion which is to be found in the case of *Warburton* v. *Loveland* [(1828), 1 Hud. & B. (Ir.) 623, at p. 648]."—*Ibid.*, at p. 106; L. J. at p. 481, Lord Wensleydale.

"The case now before your lordships is one of many in which the mind is imperceptibly tempted to swerve from the established rules of construction, by the apparent hardship of the case and the highly probable conjecture that the testator never could have intended that which his words have expressed. Nothing can be more reasonable than to suppose that he meant in this case to

provide that his son's children, after their father's death, should take the property bequeathed to their father for life, whether he died in his mother's lifetime or afterwards. But the rules which are to govern the construction of wills, as of all other written instruments, are now very clearly established, and it is impossible to overrate the importance (notwithstanding all the temptations from supposed hardship or probable intention) of steadily, strictly and faithfully adhering to those rules for the sake of the great interests of society in avoiding litigation and affording the only chance of obtaining as much certainty in the construction of wills as such a subject is capable of. It is better, as Mr. Fearne says [p. 173], 'that the intentions of twenty testators every week should fail than that the rules should be departed from, upon which the security of titles and the general enjoyment of property so essentially depend.' The question, in expounding a will, as Sir James Wigram most correctly states in his excellent work on the application of parol evidence to the construction of wills (p. 7, 2nd ed.), 'is not what the testator meant, but what is the meaning of his words.' The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he had written means. The will must be expressed in writing, and that writing only was to be considered. It is now, I believe, universally admitted that, in construing that writing, the rule is to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended or abridged, so as to avoid these consequences, but no further. This rule was, in substance, laid down by Mr. Justice Burton in *Warburton* v. *Loveland* (1828), 1 Hud. & B. 623, at p. 648. It had previously been described as 'a rule of common sense, as strong as [any case] can be,' by Lord Ellenborough in *Doe* d. *Usher* v. *Jessop* (1810), 12 East, 288, at p. 293. It had been stated as 'a cardinal rule,' from which, if we depart, we launch into a sea of difficulties not easy to fathom, by my noble and learned friend [Lord Cranworth] when Chancellor—*Gundry* v. *Pinniger* (1852), 1

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D. G. M. & G. 502; 21 L. J. Ch. 405, at p. 406; and as the 'golden rule,' when applied to Acts of Parliament, by Chief Justice Jervis in *Mattison* v. *Hart* (1854), 14 C. B. 357, at p. 385; 23 L. J. C. P. 108, at p. 114; and by the late Mr. Justice Maule, as 'the most general of rules, a general rule of great utility,' in *Gether* v. *Capper* (1855), 24 L. J. C. P. 69, at p. 71. Many other authorities might be cited, but there was no doubt of the excellence and generality of the rule."—*Abbott* v. *Middleton* (July 9, 1858), 7 H. L. Cas. 68, at pp. 113, 114, 115; 28 L. J. Ch. 110, at p. 111. Lord Wensleydale.

"If we apply the rules now firmly established for the construction of wills and all other instruments, I must own that it appears to me that there is no reasonable doubt in this case. I have often had occasion, particularly in *Grey* v. *Pearson* (1857), 6 H. L. Cas. 106; 26 L. J. Ch. 473, and *Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68; 28 L. J. Ch. 110, to call your lordships' attention to the paramount importance of adhering to these rules. Our duty is to ascertain not what the testator may be supposed to have intended, but the meaning of the words he has used, and these we must construe according to their ordinary and grammatical sense, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be collected from the whole instrument, followed from it, or, it may be added, some inconsistency with the subject on which the will is meant to operate, and then the sense might be modified so as to avoid those consequences, but no farther. It is vastly more important to attend to these rules than to look out for our guides to previous decisions on the construction of similar instruments and to compare them."—*Slingsby* v. *Grainger* (March 24, 25, 1859), 7 H. L. Cas. 273, at pp. 283, 284; 28 L. J. Ch. 616, at pp. 617, 618. Lord Wensleydale.

"I entirely agree that to the words in this will we must apply the rule of construction now, I believe, universally applied in Westminster Hall: that in construing all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or to some repugnance, or to some inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified, so as to avoid that absurdity, repugnance or inconsistency, but no further—*Warburton* v. *Loveland* (1828), 1 Hudson & B. Irish Cas. 623, at p. 648, Burton, J."—*Thellusson* v. *Rendlesham*

(July, 1859), 7 H. L. Cas. 429, at p. 519; 28 L. J. Ch. 948, at p. 966, Lord Wensleydale.

"Now, in construing instruments, I have always followed the rule laid down by the House of Lords in *Grey* v. *Pearson* [(1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473], which is to construe the instrument according to its literal import, unless there is something in the subject or context which shows that that cannot be the meaning of the words."—*Lorther* v. *Beatinck* (1874), L. R. 19 Eq. 166, at p. 169; 44 L. J. Ch. 197, at p. 198, Jessel, M. R.

"All these refinements and nice distinctions of words appear to me to be inconsistent with the modern view—which is, I think, in accordance with reason and common sense—that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole, in order to give effect, if it is possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself, and, having made that fallacious assumption, to bend the language in favour of the assumption so made."—*Leader* v. *Duffey* (1888), 13 App. Cas. 294, at p. 301; 58 L. J. P. C. 13, at p. 16, Lord Halsbury, L. C. (cited and approved in *In re Hamlet* (1888), 39 Ch. D. 426, at p. 435; 58 L. J. Ch. 242, at pp. 246, 247, per Cotton, L. J.).

Circumstances—Extrinsic Evidence.

Admissibility of Extrinsic Evidence to aid the interpretation of Wills.

Where the meaning to be attached to the words of a will varies according to the surrounding facts and circumstances—e.g., names of persons, places and things—those facts and circumstances must be regarded for the purpose of explaining the expressions of the testator's wishes.

Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out.

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If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the expositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption.

The general rule is that, in interpreting a will, the Court is entitled to put itself in the position of the testator at the time he made his will, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words.

All the facts and circumstances respecting persons or property to which a will relates are undoubtedly legitimate, and often necessary evidence to enable the meaning and application of the testator's words to be understood, though not for the purpose of altering or adding to them.

"It may be laid down as a general rule, that all facts relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will."—*Doe* d. *Templeton* v. *Martin* (1833), 4 B. & Ad. 771, at p. 785, Parke, J.

"The observations already made (if well founded) establish the right of every claimant under a will to bring under the view of the Court which is to expound it every material fact to which the will expressly or tacitly refers; they establish that Courts of law recognise that natural dependence which exists between language and the circumstances with reference to which it is used, and which makes a knowledge of such circumstances necessary to the right interpretation of the language; and consequently that a reference to such circumstances, in expounding a will, is strictly consistent with the office simply of determining the meaning of the testator's words."—Wigram on Extrinsic Evidence, pp. 83, 105 (3rd ed. (1840) p. 83; 4th ed. (1858) p. 94).

"Speaking philosophically, you must always look beyond the instrument itself, to some extent, in order to ascertain who is meant: for instance, you must look to names and places. There may, indeed, be no difficulty in ascertaining who is meant, when a person who has five or six names, and some of them unusual ones, is described in full; while, on the other hand, a devise simply to John Smith would necessarily create some uncertainty."—*Clayton* v. *Lord Nugent* (1844), 13 M. & W. 200, at p. 207; 13 L. J. Ex. 363, at p. 366, Rolfe, B.

"Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and, where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded is the law of the country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."—*Dossee* v. *Mullick* (1857), 6 Moo. Ind. App. Cas. 526, at pp. 550, 551, Turner, L. J., delivering the judgment of the Judicial Committee.

"'The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills and of contracts required to be in writing, seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquising, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used. But the language used in a contract is the language used to *another* in the course of an isolated transaction, and the words must take their meaning from those things of and concerning which they are used, and those only. This does not affect the law, but it is of some consequence in the application of it, as it narrows the field of inquiry.'—Blackburn's Contract of Sale, p. 50, n. No authority is referred to for this proposition; but such was then my opinion, and I still think the same."—*Grant* v. *Grant* (1870), L. R. 5 C. P. 727, at pp. 728, 729; 39 L. J. C. P. 272, at p. 275, n. (13), Blackburn, J.

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"The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised; but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed?"—*Crook* v. *Hill* (Feb. 16, 1871), L. R. 6 Ch. 311, at pp. 315, 316; 40 L. J. Ch. 216, at p. 219, James, L. J.

"I am aware that if there be a doubtful construction of a will, the circumstances of the case may be used to guide our choice; but we must not first make the construction, which is clear in itself, doubtful in order to make what we think a more reasonable will for the testator. It is not enough that a will may admit of a forced construction. Of course, if it would not, no circumstances could alter the words."—*Gordon* v. *Gordon* (June 8th, 1871), L. R. 5 H. L. 254, at p. 271, Lord Hatherley, L. C.

"The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be reasonably and with sufficient certainty applied."—*Charter* v. *Charter* (1874), L. R. 7 H. L. 364, at p. 377; 43 L. J. P. 73, at p. 80, Lord Cairns, L. C. (cited by Joyce, J., in *In re Gibbs*, *Martin* v. *Harding*, [1907] 1 Ch. 465, at p. 469; 76 L. J. Ch. 238, at p. 240).

"The general rule is that, in construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he

used those words. As is said in Wigram on Extrinsic Evidence, p. 9, 'The question in expounding a will is not what the testator meant, as distinguished from what his words express, but simply what is the meaning of his words.' But we think that the meaning varies according to the circumstances of and concerning which they are used. In *Doe* d. *Hiscocks* v. *Hiscocks* [(1839), 5 M. & W. 363, at pp. 367, 368; 9 L. J. Ex. 27, at p. 29] in the judgment of the Court of Exchequer it is said, 'The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his property and his family, and others whom he names and describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary evidence to enable us to understand the meaning and application of his words.'

"No doubt in many cases the testator has for the moment forgotten or overlooked material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him, and, therefore, it is bound to execute his expressed intention, even if there is great reason to believe that he has, by blunder, expressed what he did not mean. And the general rule, we believe, is undisputed, that in trying to get at the intention of the testator, we are to take the whole of the will, construe it altogether, and give the words their natural meaning (or, if they have acquired a technical sense, their technical meaning), unless, when applied to the subject-matter which the testator presumably had in his mind, they produce an inconsistency with other parts of the will, or an absurdity or inconvenience so great as to convince the Court that the words could not have been used in their proper signification and to justify the Court in putting on them some other signification which, though less proper, is one which the Court thinks the words will bear. The great difficulty in all cases is in applying these rules to the particular case, for to one mind it may appear that an

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effect produced by construing the words literally is so inconsistent with the rest of the will, or produces an absurdity or inconvenience so great as to justify the Court in putting on them another signification, which to that mind seems a not improper signification of the words, whilst to another mind the effect produced may appear not so inconsistent, absurd, or inconvenient as to justify putting any other signification on the words than their proper one, and the proposed signification may appear a violent construction.

"*Grey* v. *Pearson* (1857), 6 H. L. Cas. 61; 26 L. J. Ch. 473, is an example of this. Lord Cranworth, Lord St. Leonards, and Lord Wensleydale laid down the general rules in terms not substantially differing from each other, but when they came to apply them to the case in hand there was a marked difference of opinion. We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified; yet not adhering slavishly to them, when to do so would obviously defeat the intention which may be collected from the whole will."—*Hoppad* v. *Blake* (1873), L. R. 8 Ex. 160, at pp. 162, 163; 42 L. J. Ex. 101, at pp. 103, 104, Blackburn, J., delivering the judgment of the Exchequer Chamber (Blackburn, Keating, Mellor, Grove, and Honyman, JJ.).

"... astruing the will of the testator . . . . . it is necessary that ... should put ourselves, as far as we can, in the position of the testator, and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed."—*Bathurst* v. *Errington* (July 23, 1877), 2 App. Cas. 698, at p. 706; 46 L. J. Ch. 748, at p. 752, Lord Cairns, L. C.

"In the cases of wills, the testator is speaking of and concerning all his affairs, and therefore evidence is admissible to show all that he knew, and then the Court has to say what is the intention indicated by the words when used with reference to these extrinsic facts, for the same words used in two wills may express one intention when used with reference to the state of one testator's affairs and family, and quite a different one when used with reference to the state of the other testator's affairs and family."—*River War Commissioners* v. *Adamson* (July 27, 1877), 2 App. Cas. 743, at p. 764; 47 L. J. Q. B. 193, at p. 202, Lord Blackburn.

"The general rule as to the construction of wills has often been

laid down, and generally in terms not substantially differing from each other. About thirty years ago there did arise a great difference of opinion amongst the noble and learned lords who then sat in the House of Lords as to the manner in which that rule should be applied. . . . . In *Thellusson* v. *Rendlesham* [(1859), 7 H. L. Cas. 429; 28 L. J. Ch. 948, at p. 966], there was a difference of opinion among the judges who were consulted, but there was none amongst the lords. Lord Cranworth says (p. 494): 'The rule on which the appellant relies is that universally recognized and acted on, namely, that words are to be construed according to their plain ordinary meaning, unless the context shows them to have been used in a different sense, or unless the rule, if acted on, would lead to some manifest absurdity or incongruity; indeed, the latter branch of the rule is, perhaps, involved in the former, for, supposing that the rule, if acted on, would lead to manifest absurdity or incongruity, the context must be considered to show that the words could not have been used in their ordinary sense.'"—*Rhodes* v. *Rhodes* (1882), 7 App. Cas. 192, at pp. 204, 205; 51 L. J. P. C. 53, at p. 58, Lord Blackburn, delivering the judgment of the Judicial Committee.

"I think that, in construing a will, we are to inquire what is the intention of the testator shown by the words of the will, and that we ought to inquire into all relating to the property and state of the family, and, in short, into all the circumstances which the testator would or ought to consider when making his will, and then say, not what was the intention expressed by such words in the abstract, but what is the intention expressed by such words used with reference to such circumstances."—*Bowen* v. *Lewis* (1884), 9 App. Cas. 890, at p. 913; 54 L. J. Q. B. 55, at p. 67, Lord Blackburn.

"In every case the will, and the whole will, must be looked at to see the meaning of the terms used, and the possible application of description. Parol evidence of existing facts and circumstances outside the will is admissible, and, in truth, is in every case necessarily, though informally, admitted in order to apply the terms to that to which they are intended to refer. If the terms of the will itself, or if such evidence of surrounding facts and circumstances considered in connection with the will show an ambiguity to exist—that is to say, if this or that object equally fulfils the description found in the will, in such cases, and as Lord Abinger says in *Doe* v. *Hiscocks* (1839), 5 M. & W. 363, at p. 368; 9 L. J. Ex. 27, at

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p. 29, in such cases only recourse may be had to the declarations of the testatrix, because the problem is otherwise insoluble, and because such recourse under such conditions constitutes no attempt to vary by parol evidence the terms of the will."—*Patton* v. *Ormerod*, [1892] P. 247, at pp. 251, 252; 61 L. J. P. 120, at p. 122, Jenne, P.

"The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 'The Rules of Law respecting the Admission of Extrinsic Evidence in aid of the Interpretation of Wills,' 3rd ed. (1840), pp. 9, 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the will itself. When I say that it has never been contended that a will bearing a definite construction can have another and different construction imposed upon it by extrinsic evidence, I by no means undertake to assert that, in point of fact, this has never been done. Before the publication of Sir James Wigram's treatise there probably were, and subsequently there possibly may have been, instances of the kind. All such instances, however, must be attributable to the result of an unconscious though illegitimate yielding to the almost necessary bias in favour of a particular intention indicated or suggested by extrinsic facts as distinguished from the explanatory effect of such facts on the words of the will under discussion. The danger of this bias is manifest, and has been frequently adverted to—as, for instance, by Lord Thurlow in *Fonnereau* v. *Poyntz* (1785), 1 Bro. C. C. 472, 477, 478, and by Sir Thomas Plumer in *Colpoys* v. *Colpoys* (1822), Jac. 451, 455. The importance of it is well illustrated by the great pains taken by those learned judges, and by Lord Eldon in *Att.-Gen.* v. *Grote*, Wigram, App. II. p. 200, to make it clear that, in the wills before them respectively, there was a sufficient want of exactness in the description of the legacies bequeathed to justify the resort to parol evidence of the state of the property. In *Att.-Gen.* v. *Grote*, Wigram, App. II. p. 201, Lord Eldon insists upon the point which he frequently, in one form or another, adverted to. (See, for instance, *Barksdale* v. *Gilbat* (1818), 1 Swans. 502; 18 R. R. 139)—that individual belief ought not to govern the case: it must be judicial persuasion."—*In re Grainger, Dawson* v. *Higgins*,

[1900] 2 Ch. 756, at pp. 763, 764; 69 L. J. Ch. 789, at p. 792, Rigby, L. J. (cited and approved of by Lord Davey in *Higgins* v. *Dawson*, [1902] A. C. 1, at pp. 9, 10; 71 L. J. Ch. 132, at pp. 137, 138).

"The observations of very learned judges have been quoted to show that you must read all the words in every instrument with reference to the circumstances under which they are uttered or written. In one sense that is quite true. It is quite true that, where you are finding out persons or things—who are persons designated by the will, what are the things left by the will—you may find either the person or thing by proper external evidence of what is referred to."—*Higgins* v. *Dawson*, [1902] A. C. 1, at p. 5; 71 L. J. Ch. 132, at p. 135, Earl of Halsbury, L. C.

"I have often said that to treat language with that violence and to say that you have arrived at the conclusion from external circumstances that the testator would have made a different disposition from what he has done if he had had the whole subject-matter in his mind, and therefore to construe his language differently, is not to construe or to interpret the language which the testator himself has used, but to make a will for him which you think he ought to have made if he had had the whole circumstances present to his mind."—*Higgins* v. *Dawson*, *ibid.* at p. 6; L. J. at p. 135, Earl of Halsbury, L. C.

"It is well settled in my opinion—I am reading from Proposition 3 in Wigram on Extrinsic Evidence (3rd ed. (1840), at p. 42; 5th ed. (1858), at p. 56)—that, 'where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted, are *insensible with reference to extrinsic circumstances*, a Court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, *with reference to these circumstances*, they are capable.'"—*In re Glassington*, [1906] 2 Ch. 305, at p. 313; 75 L. J. Ch. 670, at p. 674, Joyce, J.

"I think there is nothing in that case [*In re Grainger*, [1900] 2 Ch. 756, at p. 763; 69 L. J. Ch. 789, at p. 792] which is at variance with the proposition laid down in Wigram on Extrinsic Evidence (3rd ed. at p. 51; 4th ed. at p. 65), namely: 'For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be

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given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition [and to the circumstances of the testator, and of his family and affairs] for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will.'"—*Ibid.* at p. 314; L. J. at p. 675, 676.

Spirit and Letter.

The spirit may overcome the mere letter of a will.

"In common with all men, I must acknowledge that there are many cases upon the construction of documents in which the spirit is strong enough to overcome the letter—cases in which it is impossible for a reasonable being, upon a careful perusal of an instrument, not to be satisfied from its contents that a literal, a strict, or an ordinary interpretation given to particular passages would disappoint and defeat the intention with which the instrument read as a whole persuades and convinces him that it was framed. A man so convinced is authorized and bound to construe the writing accordingly."—*Key* v. *Key* (1853), 4 D. M. & G. 73, at p. 84; 22 L. J. Ch. 641, at p. 647, Knight Bruce, L. J.

"When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared."—*Toms* v. *Wentworth* (1858), 11 Moo. P. C. 526, at p. 543, the Right Hon. T. Pemberton Leigh, delivering the judgment of the Judicial Committee. (Both the above quotations cited and acted upon by Hall, V.-C., in *Sweeting* v. *Pridaux* (1876), 2 Ch. D. 413, at pp. 415, 416; 45 L. J. Ch. 378, at p. 379, and by North, J., in

Mellor v. *Daintree* (1886), 33 Ch. D. 198, at p. 206; 56 L. J. Ch. 33, at p. 37.)

"Now, no doubt, the mere letter of the will, or any other instrument, is not to be adhered to if a contrary signification can be suggested by the whole context of the instrument. The spirit is to prevail, and the letter is not to be allowed to kill. That I take to be a plain, clear canon of construction."—*In re Redfern* (1877), 6 Ch. D. 133, at p. 136; 47 L. J. Ch. 17, at pp. 18, 19, Bacon, V.-C.

(See also *ante*, p. 520, "Implication.")

The words "so far as the rules of law and equity permit."

"But it is to be observed that the declared intention of the testator is not to join the chattels to the real estate absolutely, but only so far as the rules of law and equity will permit; and, although these words will not correct a gift which in terms infringes the rule against perpetuity, they may be fairly referred to when the construction warranted by the words used is impugned on the score of inconsistency with the intention of the testator."—*Harrington* v. *Harrington* (1868), L. R. 3 Ch. 564, at p. 574; 37 L. J. Ch. 593, at p. 597, Lord Cairns, L. C.

General and Special Intents—Cy-pres Doctrine.

In a will the general or paramount intent prevails over the special or particular intent.

"By that case [*Robinson* v. *Robinson* (1757), 1 Burr. 38] this position is clearly established—That in the construction of a will we must first look to the general intent of the devisor, and give effect to that; and if there be a secondary intent which interferes with it, we are to reconcile the whole as far as we can; but at all events to give effect to the general intention. In that case the special intent was defeated."—*Doe* d. *Bean* v. *Halley* (1798), 8 T. R. 5, at p. 9, Lord Kenyon, C. J.

"But all this doctrine was fully considered by this Court, and afterwards in the House of Lords, in the case of *Strong* v. *Teate* (1769), 2 Burr. 912, where it was determined that the general words in a will may be restrained in cases where it appears that the devisor did not intend to use them in their general sense."—*Roe* d. *Reade* v. *Reade* (1799), 8 T. R. 118, at p. 122, Lord Kenyon, C. J.

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"But terms so inaccurate as these must be construed not merely with regard to their ordinary meaning, but that construction must be adopted that will make the whole will consistent and capable of being executed."—*Whitmore* v. *Trehurne* (1801), 6 Ves. 130, at p. 133, Lord Eldon, L. C.

"A will cannot be construed by merely adverting to a single clause of it. Everything that bears on that part of the subject must be taken together, to discover what the testator intended."—*Crone* v. *Odell* (1811), 1 Ball & Beat. 449, at p. 466, Downes, L. C. J.

"It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will, must give way to a general intent. It is surprising that so much pains should have been taken to establish such a rule, the effect of which is, usually, to enable the first taker to destroy both general and particular intent."—*Jesson and Others* v. *Wright and Others* (1820), 2 Bligh, 1, at p. 49, Lord Redesdale, L. C.

"It appears to be clearly established by the authorities which have been cited, that a particular intent expressed in a will must give way to a general intent."—*Doe* d. *Bagnall* v. *Harvey* (1825), 4 B. & C. 610, at p. 620, Abbott, C. J.

"In the first place, it is said that I am to effectuate this intention by means of the doctrine of *cy-près*. This doctrine, as I understand it, is nothing more than that which prevails in other cases of giving effect to the general intent, but with this difference, that it is not, as in them, carried into effect at the expense of the particular intent. In the common case there is a valid particular intent and there is a valid general intent, and the particular intent not in the view of the Court effectuating all the intentions which they presume the testator to have had, they look to his general intent, and they effect his general intent at the expense of his particular intent. In applying, however, the doctrine of *cy-près*, nothing is sacrificed; for example, in the case of limitations under powers, where there is a good gift of a limited estate to a person an object of the power and then a gift over to his children, who are not objects of the power, effect may be given to the whole intention by giving to the parent an estate of inheritance by means of which the estate will descend to his children. In such a case, no doubt, the general intent is effectuated, but it is done at no expense of the particular intent, because there is no valid particular intent to which effect can be given. So in the case, more closely applying to that now before the Court, of a limitation to an unborn

son for life, with remainder to his unborn children in tail, where, as effect cannot be given to the expressed intention, because successive estates cannot be limited to an unborn person and to his issue, an estate tail is given to the party to whom the limitation was made for life; here, again, the particular intent is not sacrificed, but effect is given to it as a general intent. . . . I apprehend the rule is this, that neither by implication, nor by the doctrine of *cy-près*, can an estate be carried to a class, or a portion of a class, for whom the testator never intended to provide. For persons for whom the testator did intend to provide, a different provision may indeed be made, as was done in the case of *Pitt* v. *Jackson* (1786), 2 Bro. C. C. 51."—*Monypenny* v. *Dering* (1852), 2 D. M. & G. 145, at pp. 172, 173, 174, 175; 22 L. J. Ch. 313, at p. 317, Lord St. Leonards, L. C.

"There is the doctrine usually called *cy-près*. It has been said that that doctrine only applies to executory trusts; but that is not so. In the first place, the doctrine is not properly called *cy-près* at all; it is merely a rule of construction—a rule of construction, that is, by which you sacrifice the particular intent to the general intent, or the subordinate intent to the paramount intent. When you find two intents in a will which are inconsistent with each other, and you therefore cannot carry out both, you give effect to the general or paramount intent. The rule applies just as much to direct devises as to executory trusts—where trustees are directed to convey or do some other act. That the doctrine is a rule of construction is laid down in the most express terms by Lord Romilly in *Parfitt* v. *Hember* [(1867), L. R. 4 Eq. 443, at p. 446]. . . . It may be said that that was only a *dictum* not necessary for the decision of the case, but I will now refer to another case which is an actual decision on the point, namely, *Monypenny* v. *Dering* [(1847), 16 M. & W. 418; 17 L. J. Ex. 81]. That was a case which was sent to a Court of law—the Court of Exchequer—and therefore the judges could only treat the case as one of express and direct legal devise."—*Hampton* v. *Holman* (1877), 5 Ch. D. 183, at pp. 190, 191; 46 L. J. Ch. 248, at p. 250, Jessel, M. R. (followed in *In re Rising*, [1904] 1 Ch. 533; 73 L. J. Ch. 455, by Swinfen Eady, J.).

"In my view the *cy-près* doctrine ought not to be extended, and, that being so, I must hold that there is an intestacy. There have been so many varying expressions of opinion read to me from the judgments of various learned judges that I think I am bound to

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express my own view, although I necessarily differ from some by agreeing with others. I agree with Sir George Jessel when he says [*Hampton* v. *Hampton* (1877), 5 Ch. D. 183, at p. 190; 12 L. J. Ch. 248, at p. 250] that, in his view, *cy-près* is an unfortunate phrase because the doctrine is merely a rule of construction by which you sacrifice the particular intent to the general intent. I do not think that it is an exception to the well-established principle that you first construe the will without reference to any question of perpetuities and then apply the rule, but is rather the alternative stated in *Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532 [headnote]: 'There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will.' Taking that view, and regarding the question as one of construction, I have only to see what is the fair construction of the words of the testator, having regard to the authorities which have gone before. I think they are all summed up by Lord St. Leonards in *Mogyeony* v. *Dering* (1852), 2 D. M. & G. 145, at p. 174; 22 L. J. Ch. 313, at p. 317; and I venture to express my respectful assent to Lord St. Leonards' view as to the general and particular intent; and this disposes of the difficulty of two conflicting intents, because you strike out the particular intent if by that you mean an intent which is contrary to the rule against perpetuities, with the result that on the true construction of the will there is no such intent; there is only the general intent, which is a perfectly lawful one, and so far as possible the Court will give effect to that. I think the rule is accurately stated in Gray on the Rule against Perpetuities, § 643, 1st ed., where he says: 'When land is devised to an unborn person for life, remainder to his children in tail, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail; and when land is devised to an unborn person for life, remainder to his sons in tail male, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail male. This is called the doctrine of *cy-près*.' In *Mogyeony* v. *Dering* (1852), 2 D. M. & G. 145, at p. 174; 22 L. J. Ch. 313, at p. 317, Lord St. Leonards says: 'I apprehend the rule is this, that neither by implication, nor by the doctrine of *cy-près* can an estate be carried to a class, or a portion of a class, for whom the testator never intended to provide.'"—

In re Mortimer, Gray v. *Gray*, [1905] 2 Ch. 502, at pp. 505, 506, 507; 74 L. J. Ch. 745, Farwell, J.

Section V.

TRUE SENSE AND MEANING, HOW ASCERTAINED.

Testator's Meaning of the Words used to be derived from the Will itself.

The Court cannot go into one part of a will to determine the meaning of another part perfect in itself and without ambiguity and not militating with any other provision respecting the same subject-matter.

"A judge in equity is not more at liberty to raise inferences than a Court of law. He must not say what he supposed the testator meant, but what the testator has said."—*Upton* v. *Lord Ferrers* (1801), 5 Ves. 801, at p. 805, Sir R. P. Arden, M. R. (cited by Farwell, J., in *In re Willatts, Willatts* v. *Artley*, [1905] 1 Ch. 378, at p. 385; 74 L. J. Ch. 269, at p. 272).

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"Upon the rules and principles, that I have ever thought it my duty to observe in the administration of justice, I have ever thought it imposed upon me not to make any intendment contrary to the plain and usual sense of the words used; unless from other parts of the will I could plainly see, that the testator could not have intended them to have that extensive operation the words themselves could carry."—*Ex parte The Earl of Ilchester* (1803), 7 Ves. 348, at p. 368, Lord Alvanley, C. J.

"That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus et consequentibus* is one of the most prominent canons of testamentary construction. Yet where between the parts there is no connection by grammatical construction, or by some reference express or implied, and where there is nothing in the will declarative of some common purpose, from which it may be inferred that the testator meant a similar disposition by such different parts; though he may have varied his phrase, or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another *perfect in itself* and *without ambiguity*, and not militating with any other provision respecting the same subject-matter: notwithstanding that a more probable disposition for the testator to have made may be collected from such assisted construction. . . . Where the words of the two devises are different, the more natural conclusion is, that as his expressions are varied, they were altered because his intention on both cases was not the same."—*Right ex dem. Compton* v. *Compton* (1808), 9 East, 267, at pp. 272, 273, Lord Ellenborough, C. J.

"It is a common rule of construction, that if the words of a gift are of themselves plain, distinct and capable of having a legal effect, effect must be given to them, notwithstanding any improbability which may arise from looking at other parts of the will; but on the other hand, if the words are ambiguous in expression or effect, they are not to be rejected for uncertainty, but you must collect, if you can, from the other parts of the will, an indication of what the testator meant by those words, which by themselves appear to be ambiguous."—*Wilson* v. *Eden* (1848), 11 Beav. 289, at p. 296; 17 L. J. Ch. 459, Lord Langdale, M. R.

"I do not mean to represent myself as having any confident opinion that I can thus trace the workings of the testator's mind. Indeed, that is as I conceive scarcely within the province of a Court of justice, whose duty it is not to search for the testator's

meaning, otherwise than by fairly interpreting the words he has used."—*Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68, at p. 91 (cited by Lord Macnaghten in *Foxwell and others* v. *Van Grutten* (1900), 82 L. T. 272, at p. 273).

"As is universally the case when one has to interpret a will, the first thing to do is to ascertain what is the meaning of the will as it stands before applying to it any settled law or any cases which apparently bear directly on the construction. One has to see what the will says"—*In re Pardoe, McLaughlin* v. *Att.-Gen.*, [1906] 2 Ch. 184, at p. 190; 75 L. J. Ch. 455, at p. 457, Kekewich, J.

Particular meaning affixed by testator.

"It may be repetition, or the mere utterance of a truism to say, as I venture nevertheless to do, that if a will, taken as a whole, shows that the testator has used in it any word in a sense and with a meaning different from the ordinary or correct interpretation of the word, and shows also what are the sense and meaning attributed to the word by the testator, it must be construed according to that sense, to that meaning."—*Pride* v. *Fooks* (1858), 3 De G. & J. 252, at p. 266; 28 L. J. Ch. 84, at p. 87, Knight Bruce, L. J.

"It is a canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of his will, if it do not violate the sense."—*Rhodes* v. *Rhodes* (1859), 27 Beav. 413, at p. 417, Sir John Romilly, M. R.

"Before we alter the meaning of words in obedience to a supposed indication of intention of the testator—before we deviate from the direct path in order to follow a light which appears to be held out by the testator—we must take care to be reasonably sure that it is a genuine light, and that we are not following the glare of a will-o'-the-wisp into a morass; and it is necessary, therefore, to consider not merely these words, but the whole of the will, and the surrounding circumstances."—*In re Blower's Trusts* (1871), L. R. 6 Ch. 351, at pp. 353, 354; 42 L. J. Ch. 24, at p. 25, Sir W. M. James, L. J. (cited by Swinfen Eady, J., in *In re Cozens*, [1903] 1 Ch. 138, at p. 142; 72 L. J. Ch. 39, at p. 41).

Taking the testator's will as the dictionary.

"If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the

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meaning of the terms he has used, that is all which the law, as I understand the cases, requires."—*Hall* v. *Cook* (1873), L. R. 6 H. L. 265, at p. 285; 42 L. J. Ch. 702, at p. 716, Lord Cairns.

"Taking, as Lord Cairns puts it [in *Hall* v. *Cook* (1873), L. R. 6 H. L. 265, at p. 285; 42 L. J. Ch. 702, at p. 716], the testator's will as his dictionary, from which I am to find the meaning of the terms he has used, that is the principle on which I am to construe the will.

"What I understand Lord Cairns to lay down is this, that you are to look at the will itself to ascertain the sense in which the testator used the words which you find there, and if, on applying them to the facts of the case, as known to the testator, you find that he attached to them a different meaning from that which is their proper legal sense, you are bound so to construe the will and to give effect to the will, not in its strict legal sense, but in the way in which the testator himself used the words."—*In re Horner* (1887), 37 Ch. D. 695, at p. 704; 57 L. J. Ch. 211, at pp. 214, 215, Stirling, J.

"It is not a canon of construction, but only a concise way of putting a principle of common sense, to say that when a testator has made a dictionary for himself we must look at that to see in what sense he has used words in his will; and it would be doing less than justice to common sense to say that where a testator has qualified the meaning of a word in one part of the will it must not be assumed that in some place where he has not qualified it he did not mean to do so. That phraseology, as to a man making a dictionary for himself in his will, means what it says. If we find from a will, as we do here, that a testator has used a word ['issue'] in a particular sense, we must give it that meaning wherever it occurs in the will."—*In re Birks, Kougon* v. *Birks*, [1900] 1 Ch. 417, at pp. 419, 420; 69 L. J. Ch. 124, at p. 125, Sir F. H. Jeune.

"As I have said, the rule is to adhere to the language and meaning of the instrument, remembering throughout that in adhering to the language you must take the full instrument as written. So far as taking any particular statement or any one passage is concerned, if you can infer anything reasonable from that statement itself, then you ought to do so, and if you can you may compare that reasonable inference with what seems to be manifestly apparent in other parts of the instrument."—*Lau*

Union and Crown Insurance Co. v. *Hill*, [1902] A. C. 263, at p. 265; 71 L. J. Ch. 602, at p. 603, Earl of Halsbury, L. C.

Vocabulary of Ordinary Life.

"I think the rule cannot be laid down better than it was by Lord Eldon, C., in *Church* v. *Mundy* [(1808), 15 Ves. 396, at p. 406], where he says: 'I am strongly influenced towards the opinion that a Court of justice is not, by conjecture, to take out of the effect of general words property which those words are always considered as comprehending. . . . The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary. . . .'"—*Doe* d. *Howell* v. *Thomas* (1840), 1 M. & G. 335, at p. 346, Tindal, C. J. (cited by Knight Bruce in *Midland Counties Railway* v. *Oswin* (1844), 1 Coll. 74, at p. 79; 13 L. J. Ch. 209, at p. 210, and by Lord Esher, M. R., in *Anderson* v. *Anderson*, [1895] 1 Q. B. 749, at p. 753; 64 L. J. Q. B. 457, at p. 458).

"A will may be so worded as to show that, according to a reasonable construction of it, the testator must have intended to use those terms ('goods, chattels, and effects') in a limited and restricted sense, and when this appears, the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction, to show that a rational interpretation of the will requires a departure from that which, ordinarily and *primâ facie*, is the sense and meaning of the words. Such I take to be in substance the rule to be collected from all the authorities."—*Parker* v. *Marchant* (1842), 1 Y. & C. 290, at p. 300; 11 L. J. Ch. 223, at p. 226, Knight Bruce, V.-C. (cited by Stirling, J., in *Re Hammersley* (1899), 81 L. T. 150, at p. 181).

"Now, in construing a will of personal property, the terms that are used in the will are to be construed according to the ordinary acceptation of language in the transactions of mankind."—*Parker* v. *Marchant* (1843), 1 Phil. 356, at p. 360, Lord Lyndhurst, L. C.

"I entirely agree with the remark of Lord Lyndhurst in *Parker* v. *Marchant* (1843), 1 Phil. 356, at p. 360, that, in construing wills as to personal estate, the Court ought to construe the words

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in the ordinary acceptation of mankind."—*Lear* v. *Thomas* (1854), Kay, 369, at p. 375, Sir W. Page Wood, V.-C.

"It may be repetition or the mere utterance of a truism to say, as I venture nevertheless to do, that if a will taken as a whole shows that the testator has used in it any word in a sense and with a meaning different from the ordinary or correct interpretation of the word, and shows also what are the sense and meaning attributed to the word by the testator, it must be construed according to that sense, to that meaning."—*Peck* v. *Eades* (1858), 3 De G. & J. 252, at p. 266; 28 L. J. Ch. 81, at p. 87, Knight Bruce, L. J.

"The primary duty of a court of construction, in the interpretation of wills, is to give to each word employed, if it can with propriety receive it, the natural ordinary meaning which it has in the vocabulary of ordinary life, and not to give to words employed in the vocabulary of ordinary life an artificial, secondary and technical meaning."—*Young* v. *Robertson* (1862), 4 Macq. H. L. Cas. 314, at p. 325, Lord Westbury, L. C. (cited by Lord Gordon in *Taylor* v. *Graham* (1878), 3 App. Cas. 1287, at p. 1293).

"That (the meaning of 'nephew') is a question not of law but of the English dictionary, and, according to my view of the English language, the ordinary meaning of the words, &c."—*Wells* v. *Wells* (1874), L. R. 18 Eq. 504, at p. 506; 43 L. J. Ch. 681, at p. 683, Jessel, M. R.

"Then comes another rule, and that is, that you must not capriciously interfere with the ordinary meaning of the words, and further, that if you do interfere with the ordinary meaning, you must interfere as little as possible."—*Lacon* v. *Lacon* (1877), 7 Ch. D. 255, at p. 260; 47 L. J. Ch. 203, at p. 205, Jessel, M. R.

Primary Meaning.

Give every word its primary and natural signification, unless you find, on reading the whole will, there is reason to hold that the testator used the words in a secondary sense.

Derivations of words do not assist in the administration of justice.

"The first question is, what interpretation are we to put upon the word 'money,' as used by the testator? A great number of cases have been cited, and a great number more might be cited; but, after all, the whole of the cases upon the subject as to the

interpretation of the term 'money' profess to proceed on the general rule of law and equity, that, in interpreting written instruments, you give every word its primary and natural signification, unless from the [illegible] reading the whole will, there is reason to hold that the testator used the term in a secondary sense. Now, no doubt, the correct and primary sense of the word 'money' is cash or coin of the realm. It is not necessary to go into the derivation of the word, for that sort of reasoning would not assist in the administration of justice. But the word 'money,' in the strict signification [illegible] coin of the realm. Still in the common acceptation of [illegible] there is a more extensive meaning given to it. For instance, the word certainly implies bank-notes as well as cash. Every one would speak of bank-notes as money, and there may be many other meanings given to the term. One of the most usual significations is, that personal property which a man possesses, and which he distinguishes from plate, furniture, horses and carriages, and other things of that nature. It is a common thing to say that a man possesses a great deal of money; the meaning of which is, that he has great wealth or a large annual income to spend; but a person would never speak of his plate, furniture, horses, &c. as money. Still, if the term 'money' is used in the sense of personal property, it might be applied even to such articles as plate, furniture, &c. Now, admitting what is the strict meaning of the word, is there anything in this will which can show that the testatrix intended to include stock in the funds?"—*Barrett* v. *White* (1855), 24 L. J. Ch. 724, at p. 726, Kindersley, V.-C.

"Now, every word which has more than one meaning has a primary meaning; and if it has a primary meaning, you want a context to find another."—*Pigg* v. *Clarke* (1876), 3 Ch. D. 672, at p. 674; 45 L. J. Ch. 850, at p. 850, Jessel, M. R.

"The true rule is that laid down by Vice-Chancellor Kindersley in *Low* v. *Smith* (1856), 2 Jur. N. S. 344, where he says, referring to Lord St. Leonards' decision in *De Beauvoir* v. *De Beauvoir* (1852), 3 H. L. Cas. 524, 'There was no peculiarity in this particular question; it was a mere application of what was the ordinary elementary rule of construction, that for the purpose of construing any word in any will that ever was executed, such word must receive its ordinary and primary meaning unless the Court is satisfied that the testator intended to use it in a secondary and less proper sense.' That applies to all wills, and not the less

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so when any particular word used by a testator is a technical word and a word of art, which is less difficult to construe." *Smith v. Butcher* (1878), 10 Ch. D. 113, at pp. 115, 116; 48 L. J. Ch. 136, at pp. 136, 137, Jessel, M. R.

"I do not think that there is any hard and fast rule to be laid down that in construing a will you are always to give to any particular word that is used what is called its primary meaning. A word which is used commonly in the English language in several senses must be interpreted according to that which, having regard to the context and the whole of the provisions of the document which you have to construe, appears to be the sense in which the testator has used it."—*South Hetton v. Jodrell*, 1891, A. C. 304, at p. 306; 61 L. J. Ch. 70, at p. 71, Lord Herschell, cited by Swinfen Eady, J., in *In re Cozens*, [1903] 1 Ch. 138, at p. 142; 72 L. J. Ch. 39, at p. 41).

"The true rule is to determine by the language and context of each will, including the consideration of the whole instrument and any evidence properly admissible, the meaning of the expressions contained in it, and the persons who are entitled to share in the benefits thereby conferred."—*In re Cozens*, [1903] 1 Ch. 138, at p. 143; 72 L. J. Ch. 39, at p. 41, Swinfen Eady, J.

"'Popular sense,' which I may observe is a sense in which I am of opinion, without the assistance of either dictionary or the evidence of commercial or other witnesses, it [the word 'securities'] is applied habitually by those who have to deal with property transferable by the assignment of *indicia* of property, be they commercial men or non-commercial men, lawyers or laymen; and a sense in which it has been used daily in *The Times* since the year 1886, and in divers Acts of Parliament . . . .

"In my judgment, the meaning of a word is relative to the circumstances and occasion and date on which the word is used; and that if a judge is entitled to take into consideration at all the fact that at the date of the will 'securities' is largely used in a sense other than a pledge for an advance of money, or in the particular sense of 'investments in property transferable by the assignment of *indicia*, such as certificates,' it is the duty of the judge to inform his mind, not only by reference to dictionaries of good reputation, but also by evidence of the meaning ordinarily given to such a word amongst those who deal in such property. A rule prohibiting a judge from so doing would be, in my judgment, a most serious limitation of the rule that evidence is

admissible for the purpose of explaining the meaning of the words used by the testator, as distinguished from evidence of the testator's intention, and would be also a serious limitation of the rule that for the purpose of explaining the meaning of the words used by the testator evidence is admissible of the circumstances surrounding the testator at the time of making his will. [See *ante*, p. 526.] I think that evidence is admissible to show that expressions used in the will had acquired an appropriate meaning, either generally, or by local usage, or amongst particular classes; and that, where any doubt arises upon the true sense and meaning of the words themselves or any difficulty as to their application under surrounding circumstances, 'the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party': see the opinions of Parke, B., and Tindal, C. J., in *Shore* v. *Wilson* (1842), 9 Cl. & F. 355, at pp. 555, 556; 5 Scott, 958, at pp. 1028, 1029 [see *ante*, pp. 135-137], and the judgment of Parke, B., in *Richardson* v. *Watson* (1833), 4 B. & Ad. 787, at p. 799. I quite recognize a decision that a word used in a technical sense in a legal instrument must be construed in its strict legal sense, which, in relation to such a document, is its 'primary sense,' although not necessarily its archaic sense or its popular sense at the date of the instrument."—*In re Rayner*, [1904] 1 Ch. 176, at pp. 187, 188, 189; 73 L. J. Ch. 111, at p. 115, Vaughan Williams, L. J.

Technical Words and Expressions.

If technical words are used in a will, by whomsoever they are written, they must be considered as used with their technical meaning, unless the testator in the context shows that he meant to use them in a different sense.

"Where the testator expresses himself in legal words, they are not to be left to follow the intent arising by other words that are doubtful and afford implications only; for when we quit clear and settled rule, which the law sets up for our guide, and follow such intent, we leave certainty for uncertainty."—*Bayshaw* v. *Spencer* (1743), 2 Atk. 570, at p. 575, Lord Hardwicke, L. C.

"If a testator make use of legal phrases, or technical words only, the Courts are bound to understand them in the legal sense. They

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have no right nor power to say, that the testator did not understand the meaning of the words he has used, or to put a construction upon them different from what has been long received, or what is affixed to them by the law. But if a testator use other words, which manifestly indicate what his intention was, and show to a demonstration that he did not mean what the technical words import in the sense which the law has imposed upon them, that intention must prevail, notwithstanding he has used such technical words in other parts of the will."—*Hodgson* v. *Ambrose* (1780), 1 Doug. 336, at p. 341, Buller, J.

"The general rule which is laid down in the books, and on which alone Courts can with any safety proceed in the decision of questions of this kind, is to collect the testator's intention from the words which he has used in his will; and not from conjecture. It is not necessary that any technical or artificial form of words should be used in a will; but we must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used."—*Hay* v. *The Earl of Coventry* (1789), 3 T. R. 83, at p. 85, Lord Kenyon, C. J.

"In *Hodgson* v. *Ambrose* (1780), 1 Doug. 336, at p. 341, I laid down the rule somewhat differently, that where the testator uses only technical phrases, the Court is bound to understand them as such, because the Court cannot say that he did [not] know their meaning; but, if the testator uses other expressions in other parts of the will, which show he did not mean to use those phrases technically, then the intention must prevail."—*Phillips* v. *Garth* (1790), 3 Bro. Cas. Ch. 64, at p. 68, Buller, J.

"It is our duty in construing a will to give effect to the devisor's intention as far as we can consistently with the rules of law; not conjecturing, but expounding his will from the words used. Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be, as Lord King and other judges have said, removing land marks: but if there be no such appropriate meaning to the words used in a will, if the devisor's intention be clear and the words used be sufficient to give effect to it, we ought to construe those words so as to give effect to the intent, and not to doubt on account of other cases which tend only to involve the question in obscurity."—*Lane* v. *Earl Stanhope* (1795), 6 T. R. 345, at p. 352, Lord Kenyon, C. J.

"Every testator ought to be supposed to take legal words in a legal sense, unless, according to the marginal note to the case in

Hobart, there be demonstration plain of an intent to use them in a different sense."—*Buck* v. *Norton* (1797), 1 Bos. & Pull. 53, at p. 57, Eyre, C. J.

"If words of art are used, they are construed according to the technical sense, unless upon the whole will it is plain that the testator did not so intend."—*Thellusson* v. *Woodford* (1799), 4 Ves. 227, at p. 329, Sir Richard Pepper Arden, M. R.

"If by giving to the words which a testator has used their literal and technical effect, inconsistent and absurd conclusions must necessarily follow; and if by understanding such words more largely the whole will would be rendered rational and consistent, the Court which departs from the literal and technical sense of the words does not adopt conjecture as opposed to expressed intention, but has recourse to a sound rule for collecting what is the intention which is really meant to be expressed."—*Vanchamp* v. *Bell* (1822), 6 Mad. 343, at p. 346, Sir John Leach, V.-C.

"The rule of construction is, that technical words, or words of known legal import, must have their legal effect, even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in *Jesson* v. *Wright* [(1820), 2 Bligh, 1, at p. 57]."—*Doe* d. *Gallini* v. *Gallini* (1833), 5 B. & Ad. 621, at p. 640, Denman, C. J. (cited by Lord Macnaghten in *Van Grutten* v. *Foxwell*, [1897] A. C. 658, at p. 672; 66 L. J. Q. B. 745, at p. 753).

"It is a rule in the judicial exposition of wills, that technical words, or words of known legal import, are to be considered as having been used in their technical sense, or according to their strict acceptation, unless the context contain a plain indication to the contrary."—*Doe* d. *Winter* v. *Perratt* (1843), 6 M. & Gr. 314, at p. 342, Parke, B.

"When the legislature uses technical language in its statutes, it is supposed to attach to it its technical meaning, unless the contrary manifestly appears. That is the rule of construction of technical expressions, even when occurring in a will."—*Burton* v. *Reverell* (1847), 16 M. & W. 307, at p. 309; 16 L. J. Ex. 85, at p. 86, Parke, B. (cited by Fry, L. J., in *The Queen* v. *Commissioners of Income Tax* (1888), 22 Q. B. D. 296, at p. 309; 58 L. J. Q. B. 196, at p. 201).

"There may be words in the will which show that the language

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used may have an interpretation different from their ordinary and proper interpretation."—*D'Abadie* v. *Mosely* (1853), 1 Drew. 629, at p. 632; 22 L. J. Ch. 971, at p. 973 Kindersley, V.-C.

"It appears to be clearly established by the authorities, that the Court is bound in the first instance to assume the language that is used to be the testator's own language. This, I apprehend, is beyond all dispute. . . . The words used by a testator in most cases are not, in one sense, his own words. The vast majority of wills is prepared by professional persons; but the testator must be considered to have read over the whole of the words, and the language must be taken to be in all cases his own. It is impossible, upon extrinsic evidence, either to show that the language or words were introduced by other parties, and that the language, therefore, is not to be taken as the language of the testator, or to explain any difficulty upon the face of the will by evidence of that description."—*Bernasconi* v. *Atkinson* (1854), 23 L. J. Ch. 184, at pp. 185, 186, Wood, V.-C.

"In the case of a will, the testator is supposed to have been *inops consilii*, and on that ground a greater latitude is allowed in the construction of legal terms."—*Lewis* v. *Rees* (1856), 3 K. & J. 132, at p. 147; 26 L. J. Ch. 101, at p. 104, Page Wood, V.-C.

"In order to determine the meaning of a will, a Court must read the language of the testator in the sense which he himself appears to have attached to the expressions that he has used, with this qualification, that when a rule of law has affixed a certain determinate meaning to technical expressions, that meaning must be given to them, unless the testator has, by his will, excluded beyond all doubt such construction."—*Towns* v. *Wentworth* (1858), 11 Moore, P. C. 526, at p. 543, the Right Hon. T. Pemberton Leigh, delivering the judgment of the Judicial Committee.

"It is another and most important rule in the construction of the words used in a will, that technical terms, or words of known legal import, must have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to show what that sense is."—*Roddy* v. *Fitzgerald* (1858), 6 H. L. Cas. 823, at p. 877, Lord Wensleydale cited by Martin, B., in *Biddulph* v. *Lees* (1858), E. B. & E. 289, at p. 317; 28 L. J. Q. B. 211, at p. 214; and by Lord Macnaghten in *Van*

Grutten v. *Foxwell*, [1897] A. C. 658, at p. 672; 66 L. J. Q. B. 745, at p. 753).

"If the will is drawn by an illiterate man, by a country schoolmaster, and you find attempts every now and then to use technical words in an absurd and improper sense, you know at once that the testator has not had good counsel, and you give a reasonable construction in order to carry out his intention although it may be obscurely expressed. If a man has his will drawn by a learned and competent person who uses technical words, those technical words become the words of the testator and they are to be construed according to his intention. Well, what is the intention of a man whose will is regularly framed in technical words? Why, that it should receive a technical construction. What is the object of words of science and art except to prevent circumlocution, and to enable those who understand the science or the art at once to comprehend, by one expression, all that is intended? But here, when we come as lawyers to look at a technically drawn will, we are asked, and particularly pressed at the Bar, not to introduce our own mode of thought into this will. That is to ask those who have to decide this case to divest themselves of their knowledge; to request them to unlearn all that they may have learnt of law. But I say this cannot be done, and you ought not so to divest yourself of your knowledge—you have to decide upon a technical will according to the meaning of technical terms. Show me that there is any discrepancy in the words used, and that they do not admit of being taken in their technical and proper sense, then, beyond all doubt, technical words may, in such a case, be corrected by a clear intention shown in the will. Nobody who ever presided in a Court of justice could be more willing than I am to give to words their natural import and force whether they be technical or not. But when I have before me technical words, and I have to address myself to a will technically framed, I cannot help using that knowledge which enables me, at the mere sight of the document, to come to some conclusion as to its meaning; subject to its being altered by further consideration, I inevitably, in spite of myself, come to a conclusion from the knowledge I have of what is meant by the words used; it is language which I understand, I can construe it the moment I see it. To ask me, therefore, not to apply my own mode of thought to this will is to ask me to divest myself of my knowledge of law, and to come to it with a naked mind, and to consider it without those means and advantages of

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which I ought not to divest myself in coming to a decision."—*Thellusson* v. *Rendlesham* (1859), 7 H. L. Cas. 429, at p. 504; 28 L. J. Ch. 948, Lord St. Leonards.

"If technical words are used, by whomsoever they are written, they must be considered as used with their technical meaning, unless the testator in the context shows that he meant to use them in a different sense."—*Ibid.*, at p. 519, Lord Wensleydale.

"Then there is a subsidiary rule, laid down in *Robdy* v. *Fitzgerald* [(1858), 6 H. L. Cas. 823], that technical words shall have their legal effect, unless, from the context, it is shown they bear another meaning."—*Leach* v. *Jay* (1877), 6 Ch. D. 496, at p. 499; 46 L. J. Ch. 499, at p. 501, Jessel, M. R.

"The rule is to adopt the legal and technical meaning of the word, unless it is controlled by the context, as I stated in *Leach* v. *Jay* [(1877), 6 Ch. D. 496, at p. 499; 46 L. J. Ch. 499, at p. 501]."—*Smith* v. *Butcher* (1878), 10 Ch. D. 113, at p. 114; 48 L. J. Ch. 136, Jessel, M. R.

"As regards our duty when wills come before us for construction, it is obvious to say that it is in each case to consider the words of the will. I say that, for the purpose of calling attention to the argument that in the absence of any rule of law laid down or established by cases, we are at liberty to construe wills as ordinary intelligent persons would do. There is a fallacy in this. We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. . . . We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shown, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it."—*Ralph* v. *Carrick* (1879), 11 Ch. D. 873, at p. 878; 48 L. J. Ch. 801, at p. 804, Cotton, L. J.

"Now, the true rule for construing a will is, that if a rule has been laid down fixing in the absence of any expressed intention the meaning of a word, then that meaning is to be given to it unless there is something in the context to vary the meaning, and if no such definite rule has been laid down, then the words are to be taken in their natural sense."—*In re Benn* (1885), 29 Ch. D. 839, at p. 844, Cotton, L. J.

"I do not say that a testator who writes his own will, and is not a lawyer, is in all cases to be held to have rightly apprehended

the meaning of technical words which he may have used on the occasion of making his will; but I think it is plain that a testator who uses words which have an intelligible conventional meaning is not to be held as having used the words with any other meaning, unless the context of the instrument shows that he intended to do so."—*Hamilton* v. *Ritchie*, [1894] A. C. 310, at p. 313, Lord Watson.

"Where the testator uses technical words, I must give them their due effect, unless I find that in the mouth of the testator they have some other meaning."—*Kirby-Smith* v. *Parnell*, [1903] 1 Ch. 483, at p. 490; 72 L. J. Ch. 468, at p. 470, Buckley, J.

"Technical words are to receive their proper technical meaning in the absence of context importing that they are to be construed otherwise: see *Leach* v. *Jay* (1877), 6 Ch. D. 496, at p. 499; 46 L. J. Ch. 499, at p 501."—*In re Fraser*, *Loether* v. *Fraser*, [1904] 1 Ch. 111, at p. 117; 73 L. J. Ch. 98, at p. 101, Byrne, J.

"In *Bernasconi* v. *Atkinson* (1854), 10 Hare, 345, at p. 348; 23 L. J. Ch. 184, at p. 186, Wood, V.-C., lays it down that we are always bound to assume the language of the will to be the language of the testator. If so it cannot, I think, be wrong to credit the testator with that knowledge of the law which the draftsman of the will evidently possessed."—*In re Dayrell*, *Hastie* v. *Dayrell*, [1904] 2 Ch 496, at p. 499; 73 L. J. Ch. 795, at p. 796, Joyce, J.

General and Special Words.

Doctrine of Ejusdem Generis—Noscitur a sociis.

General words in a will must be taken to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary.

"The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary."—*Church* v. *Mundy* (1808), 15 Ves. 396, at p. 406, Lord Eldon (cited by Knight Bruce, V.-C., in *Parker* v. *Marchant* (1842), 1 Y. & C. 290, at p. 300; 11 L. J. Ch. 223, at p. 226; and by Knight Bruce, V.-C., in *Midland Counties Rail. Co.* v. *Oswin* (1844), 1 Coll. 74, at p. 79; 13 L. J. Ch. 209, at p. 210).

"The words 'goods, chattels, and effects,' which the bequest contended to be residuary contains, or any of them, are terms that

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in their proper sense and nature are sufficiently large to include and pass the absolute interest in the whole personal estate. But a will may be so worded as to show that, according to a reasonable construction of it, the testator must have intended to use those terms in a limited and restricted sense; and when this appears, the intention so collected must have effect given to it. It is, however, incumbent on those who contend for the limited construction to show that a rational interpretation of the will requires a departure from that which ordinarily and *primâ facie* is the sense and meaning of the words."—*Parker* v. *Marchant* (1842), 1 Y. & C. 290, at p. 300; 11 L. J. Ch. 223, at p. 226, Knight Bruce, V.-C.

"The words are, 'all my furniture, plate, linen, and other effects that may be in my possession at the time of my death.' It is alleged that the words 'other effects' are to be cut down so as to mean that which is something like furniture, plate or linen. But the answer is, that the words of a will ought to have their natural meaning given to them unless there is some contrary intention appearing in the will. The mere fact that the testatrix enumerates some items before the words 'and other effects,' does not alter the proper meaning of those words."—*Hodgson* v. *Jex* (1876), 2 Ch. D. 122, at p. 123; 45 L. J. Ch. 388, at p. 389, Jessel, M. R.

"Another well-established rule of construction would have applied, namely, that where you find a general gift in the will, followed by a particular gift which would from its nature be included in the general gift, you read the particular gift as being an exception from the general gift."—*Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, at p. 513; 45 L. J. Ch. 554, at p. 563, Jessel, M. R.

"It is safer to adhere to the general rule that clear words of gift must have their full effect unless a clear intention is shown to cut them down."—*King* v. *George* (1877), 5 Ch. D. 627, at p. 629; 46 L. J. Ch. 670, at p. 672, James, L. J.

Relative Words.

Semper proximo antecedenti refertur.—Co. Lit. 30b.

Ad proximum antecedens fiat relatio, nisi impediatur sententia.—Nov. Max. 9th ed. p. 4.

Words of reference are in general referred to that to which the context appears properly to attract it, to the last sensible antecedent.

"The grammatical rule of referring qualifying words to the last of the several antecedents is not even supposed by grammarians themselves to apply when the general intent of a writer or speaker would be defeated by such a confined application of them. Reason and common sense revolt at the idea of overlooking the plain intent which is disclosed in the context, namely, that they should be applicable to such classes as require them, and, as to the others, to consider them as surplusage. If words admit of more constructions than one, that which will support the legal intention of the testator is in all cases to be adopted."—*Thellusson* v. *Woodford* (1805), 1 B. & P. N. R. 359, at pp. 392, 393, Macdonald, L. C. B.

(See also "Relative Words," *ante*, pp. 66 and 315.)

Words Capable of a Two-fold Interpretation.

Where words are capable of a two-fold interpretation, such interpretation should be received as tends to make the will good.

"Where words are capable of a two-fold construction, even in the case of a deed (and much more, of a will), it is just and reasonable that such construction should be received as tends to make it good."—*Atkinson* v. *Hutchinson* (1734), 3 P. Wms. 258, at p. 260, Lord Talbot, L. C.

"It is a rule that, where words are capable of a two-fold construction, even in the case of a deed, and much more in the case of a will, such a construction shall be received as tends to make it good."—*Thellusson* v. *Woodford* (1799), 4 Ves. 227, at p. 312, Lawrence, J.

"I apprehend that, if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select the meaning of the word which will carry out the intention and objects of the testator."—*Whicker* v.

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Home (1858), 7 H. L. Cas. 124, at p. 154; 28 L. J. Ch. 396, at p. 399, Lord Chelmsford, L. C.

"If the clause in question is capable of two constructions, one of which would render it void upon a ground which the testator throughout his will seems to have been anxiously guarding against, and the other of which is reconcilable with all his previously expressed intentions, there can be no doubt which of them ought to be adopted."—*Martelli* v. *Holloway* (1872), L. R. 5 H. L. 532, at p. 548; 42 L. J. Ch. 26, at p. 33, Lord Chelmsford.

"Our law gives full liberty of testamentary disposition, and testators avail themselves of this liberty to the full. Courts are therefore venturing on dangerous ground when they leave the actual wording of the document and permit themselves to speculate on what is a probable disposition in a will. It is, of course, possible that some disposition in a will may be so inconsistent with the rest of the will, or with the surrounding circumstances at the date of the will, that the Court may be led to hold that there is in its expression an error, either in the nature of a clerical mistake, or of the use of a word or expression in an improper and non-natural sense. Where it is a question of choice between two possible interpretations, one of which would have the preference in the absence of indications to the contrary, such considerations may ultimately turn the scale in favour of the other. But where the normal meaning of the words offers no difficulty, it is, in my opinion, not legitimate to allow the probability of a particular disposition to affect the mind of the Court, unless, perhaps, in a case so extreme that the language of the disposition, as it would ordinarily be interpreted, makes it of so extravagant and fantastic a nature that the Court is forced to conclude, as it might be forced to do in the case of any other document, that the true intention of the testator is not represented by the ordinary interpretation of the language he has used."—*In re Bodey*, [1907] 1 Ch. 132, at p. 145; 76 L. J. Ch. 101, at pp. 108, 109, Fletcher Moulton, L. J.

Exception showing the Latitude of a Testator's Expression.

"A conclusive ground for giving to equivocal words their larger signification, occurs where the bequest contains an exception of certain things, which such bequest, according to its restricted con-

struction, would not comprise; the testator having in such a case afforded a key or explanation to his own ambiguous language, by showing that he considered that the bequest would, without the exception, have included the excepted articles."—Jarman on Wills, 5th ed., p. 711.

Same Words in Different Parts.

The same words in different parts of a will should be given the same meaning.

"Where the same words occur in different parts of the same will, the rule is, that you are to give them the same meaning in the different parts; and if it turns out that they are used in one place where it is impossible that they can be used as words of limitation, this affords ground for concluding, that when the testator uses them again, he is using them in the sense as before."—*Doe* d. *Wright* v. *Jesson* (1816), 5 M. & S. 95, at p. 99, Bayley, J.

"It is a well-settled rule of construction, and one to which, from its soundness, I shall always strictly adhere, never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary."—*Ridgeway* v. *Munkittrick* (1841), 1 Dr. & War. 84, at p. 93, Sir E. B. Sugden, C.

"It is a canon of construction, that where a testator has affixed a particular meaning to a word in one part of his will, it shall be construed as having the same meaning in all other parts of his will, if it do not violate the sense."—*Rhodes* v. *Rhodes* (1859), 27 Beav. 413, at p. 417, Sir John Romilly, M. R.

"I do not know whether it is law, or a canon of construction, but it is good sense to say that whenever in a deed or will, or other document, you find that a word in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear."—*In re Birks*, *Kenyon* v. *Birks*, [1900] 1 Ch. 417, at p. 418; 69 L. J. Ch. 124, at p. 125, Lindley, M. R.

"It is not a canon of construction, but only a concise way of putting a principle of common sense, to say that when a testator has made a dictionary for himself, we must look at that to see in what sense he has used words in his will; and it would be doing

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less than justice to common sense to say that where a testator has qualified the meaning of a word in one part of the will it must not be presumed that in some place where he has not qualified it he did not mean to do so. That phraseology, as to a man making a dictionary for himself in his will, means what it says. If we find from a will, as we do here, that a testator has used a word ['issue'] in a particular sense, we must give it that meaning wherever it occurs in the will. It is the same thing as if a foreign word were used—a case of which I have known. In such a case we have to get at the meaning of the word in English from an ordinary dictionary, and then whenever it occurs, give it that English meaning. Of course the dictionary must be clear; and if we cannot make out what the testator meant, then we have not got the dictionary."—*Ibid.* at pp. 119, 120; L. J. at p. 125, Sir F. H. Jeune.

"That was the view of the full Court, citing and relying upon what was said by Lord St. Leonards in *Edgeway* v. *Monkettrick* (1841), 1 Dr. & War. 81, at p. 93: 'It is a well-settled rule of construction,' said his lordship, 'never to put a different construction on the same word, where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary.' That *dictum*, asserted perhaps too positively as a general rule of construction, does not help one much in construing such a will as this. What is a clear intention? That which is clear to one man is not always clear to another. A sounder, or at any rate a safer, rule is to be found in the observations of Knight Bruce, V.-C., on the meaning of this very word 'issue.' 'Before I can restrain that word,' said the Vice-Chancellor [Sir J. L. Knight Bruce], in *Head* v. *Randall* (1843), 2 Y. & C. 231, at p. 235, 'from its legal and proper import, I must be satisfied that the contents of the will demonstrate the testator to have intended to use it in a restricted sense'; and then he goes on to observe that the language of Lord Eldon applied to property in *Church* v. *Mundy* (1808), 15 Ves. 396, at p. 406, might well be applied to persons in a case like that before him. Lord Eldon's words were these: 'The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary.'" —*Edgcumbe* v. *Archer*, *In re Brooke*, [1903] A. C. 379, at pp. 384, 385; 72 L. J. P. C. 85, at p. 87. Lord Macnaghten, delivering the judgment of the Privy Council.

Transposing Words.

"The priority or posteriority of words in a will is not at all regarded, but that the whole will must be taken together to find out the intent of the testator."—*Brice* v. *Smith* (1737), Willes, 1, at p. 3, Willes, C. J.

"Lord Hardwicke lays down the rule for the construction of wills thus: that the words are often transposed to make sense of a will, otherwise insensible, and to make it take some effect rather than be totally void; but in no case, where the words are plain and sensible, is a transposition made in order to create a different meaning and construction, much less to let in different devisees and legatees."—*Chambers* v. *Brailsford* (1816), 19 Ves. 652, Lord Eldon, L. C.

Inconsistency—Repugnancy.

Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est.—Co. Litt. 112 b.

If any two parts of a will are totally inconsistent or repugnant the latter part shall prevail.

A distinct disposition made by a will cannot be revoked by a codicil except through the medium and use of words equally clear and distinct.

"The will, upon which this suit arises, is almost incomprehensible, and perfectly inconsistent with itself. The question is only, which of the testator's meanings it is my duty to adopt. The rule with regard to cases of this sort is, if upon a general view of the will I can collect the general intention, or any one particular object, and there are expressions in the will in some degree militating with it, if I plainly see, those expressions are inserted by mistake, I may reject them. But I cannot reject words, unless it is perfectly clear, they were inserted by mistake; and if two parts of the will are totally irreconcilable, I know of no rule but by taking the subsequent words as an indication of a subsequent intention. The Court is in a dilemma; and cannot act at all, unless they do that."—*Sims* v. *Doughty* (1800), 5 Ves. 243, at pp. 246, 247, Sir Richard Pepper Arden, M. R.

"If two parts of a will are totally inconsistent, and cannot possibly be reconciled, the proper rule, as I thought upon that

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occasion [*Sims* v. *Doughty* (1800), 5 Ves. 243], and still think, is, that the latter shall prevail."—*Constantine* v. *Constantine* (1801), 6 Ves. 100, at p. 102, Sir W. Grant, M. R.

"The general rule is, that if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail."—*Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109, at p. 113, Mansfield, C. J.

"The doctrine, prevailing in all times as to wills, that, where there is a subsequent limitation, inconsistent with a former one, and an estate created afterwards, that does by necessary implication in that sense cut down the effect of the former limitation."—*Wykham* v. *Wykham* (1811), 18 Ves. 395, at p. 421, Lord Eldon, L. C.

"The rule has often been cited, though very [illegible] ground of judicial determination, which requires us to give effect to the last of two repugnant clauses in a will, though in a deed the first shall prevail. It is indeed as old as the time of Lord Coke, who states it in the first Institute [Co. Litt. 112 b] . . . Lord Coke's doctrine is a sound one. . . . It must then be admitted that the great weight of authority, both of Lord Coke and of the modern decisions, is in favour of regarding a subsequent gift in a will as revoking a prior one to which it is repugnant, and not rendering it all void for uncertainty."—*Sherratt* v. *Bentley* (1834), 2 M. & K. 149, at pp. 161—165, Lord Lyndhurst, L. C.

"Where two provisions of a will are totally irreconcilable, so that they cannot possibly stand together, and there is nothing in the context or general scope of the will which leads to a different conclusion, the last shall be considered as indicating a subsequent intention, and prevail; *cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est*, Co. Litt. 112 b. It was argued, indeed, that this last-mentioned doctrine applied only to separate clauses; but it is not so, for it has been adopted where there are inconsistent expressions in the same clause, as in *Doe* d. *Leicester* v. *Biggs* (1809), 2 Taunt. 109."—*Morrall* v. *Sutton* (1845), 1 Ph. 533, at p. 537; 14 L. J. Ch. 266, at p. 269, Parke, B.

"I think it may be taken as clearly established, that this rule [that the latter clause or phrase is to be preferred, the former rejected] must not be acted on so as to clash with another paramount rule, which is, that, before all things, we must look for the intention of the testator as we find it expressed and clearly implied in the general tenour of the will; and when we have found that

on evidence satisfactory in kind and degree, to that we must sacrifice the inconsistent clause or words, whether standing first or last, indifferently; and this rests upon good reason; for although, when there are repugnant dispositions, and nothing leads clearly to a preference of one, or rejection of the other, convenience is strongly in favour of some rule, however arbitrary, yet the foundation of this rule, as of every other established for the interpretation of wills, obviously is, that it was supposed to be the safest guide under the circumstances, to the last intention of the testator. To consider it merely arbitrary, would be unnecessarily to suppose an anomaly in the canons by which wills are interpreted."—*Morrall* v. *Sutton* (1845), 1 Ph. 533, at pp. 545, 546; 14 L. J. Ch. 266, at p. 272, Coleridge, J.

"My lords, the principle to be applied to the construction of these dispositions, apparently inconsistent, the one occurring in the will and the other in the codicil, are not in dispute between the parties to this litigation; and at this time they could not be in dispute. The principle is perfectly clear, that where you have a distinct disposition made by a will, that disposition cannot be revoked by a codicil except through the medium and use of words equally clear and distinct."—*Kellett* v. *Kellett* (1868), L. R. 3 H. L. 160, at p. 167, Lord Cairns, L. C. (cited by Romer, J., in *In re Wilcock*, [1898] 1 Ch. 95, at p. 98; 67 L. J. Ch. 154, at p. 155).

"If I were compelled to resort to the rule of thumb, as I sometimes call it, that where there are two inconsistent clauses the latter shall prevail, that would give the applicant what she asks for. But I think the case may be decided without resorting to that extreme rule."—*In re Bygater*, *Bygater* v. *Clarke* (1881), 18 Ch. D. 17, at pp. 19, 20, Jessel, M. R.

An absolute gift cannot afterwards be cut down except by something which, with reasonable certainty, indicates the intention of the testator to cut it down.

"Undoubtedly, where an absolute estate is given to a person, whether in realty or in personalty, any attempt to deprive that person of the right of dealing with it is inofficious, inoperative and useless. But in my opinion this rule is only a rule of construction—not a compound rule of construction, but a rule of construction which must be dealt with with reference to the other provisions and expressions contained in the will. Being a rule of construction, it is to be followed only when the testator has not expressed his

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own intention—has not given any other guide to the Court which has to consider his will. Therefore, when there has already been given an absolute gift, it is not a question whether the restrictions upon that are inoperative and inofficious, but the Court must look to the whole will in order to see how far the rule of construction can apply, or whether the testator has expressed an intention which prevents the rule of construction from being applied in dealing with his will."—*In re Conrad, Conrad* v. *Larkman* (1887), 57 L. T. 285, at p. 287, Cotton, L. J.

"As pointed out in *Gompertz* v. *Gompertz* (1846), 2 Ph. 107; 16 L. J. Ch. 23; and also in *Lassence* v. *Tierney* (1849), 1 Mac. & G. 551, and again by Pearson, J., in *In re Richards* (1883), 50 L. T. 22, it is clear that if there is an absolute gift by will, and then a clause (whether in a subsequent part of the will or by codicil) not merely modifying the enjoyment by the legatee but diminishing the estate originally given to him, then the absolute gift has in effect been cut down; and the Court can only give effect to it so diminished."—*In re Wilcock*, [1898] 1 Ch. 95, at p. 98; 67 L. J. Ch. 154, at pp. 155, 156, Romer, J.

"It is clear that if a gift is made in terms to a person absolutely, that can only be reduced to a more limited interest by clear words cutting down the first estate. There is a principle also which one must observe—represented in a class of cases like *Constable* v. *Bull* (1849), 3 De G. & Sm. 411; 18 L. J. Ch. 392—that, although the words are absolute in the first instance, you may find subsequently occurring words sufficiently strong to cut down the first apparent absolute interest to a life interest. Then there have been a great many decisions—although I do not propose to refer to more than one of them—in cases in which the testator has given an absolute interest in the first instance and has superadded words indicating that the person taking that interest is to have a power of disposition, and then has followed that up by purporting to give what shall remain, or what may not have been disposed of by the first taker. After all, in all these cases it is a question of construction; but the law requires that if there is an absolute gift in the first instance, you must have clear words to cut down that estate."—*In re Jones, Richards* v. *Jones*, [1898] 1 Ch. 438, at p. 441; 67 L. J. Ch. 211, at p. 212, Byrne, J.

"It is settled law that if you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any

other reason, then the absolute gift takes effect so far as the trusts have failed to the exclusion of the residuary legatee or next of kin as the case may be."—*Hancock v. Watson*, [1902] A. C. 14, at p. 22; 71 L. J. Ch. 149, at p. 153, Lord Davey.

"Where there is a clear gift in a will, it cannot afterwards be cut down except by something which, with reasonable certainty, indicates the intention of the testator to cut it down [Jarman on Wills, 5th ed., p. 443]; and if a gift over is fairly capable of being construed in two ways, and one construction will be consistent with the maintenance of the vested interests which have been clearly given in the first instance, the Court will struggle to adopt that construction. So far has this been carried that in the case of a gift to A. for life and after his death to his children, with a gift over if A. dies without leaving children, the word 'leaving' will be construed 'having' or 'having had,' in order not to defeat the prior vested interests: Hawkins on Wills, p. 217, and *Techarne* v. *Layton* (1875), L. R. 10 Q. B. 459; 44 L. J. Q. B. 202, in the Exchequer Chamber, and see in particular the judgment of Amphlett, B., in that case."—*In re Roberts, Perrival* v. *Roberts*, [1903] 2 Ch. 200, at p. 204; 72 L. J. Ch. 597, at pp. 600, 601, Joyce, J.

"There is one principle which is never departed from in the construction of wills, and that is, that a clear gift is not to be cut down by subsequent words of doubtful import (see 1 Jarman, 5th ed., p. 495)."—*In re Segelcke*, [1906] 2 Ch. 301, at p. 305; 75 L. J. Ch. 494, at p. 495, Joyce, J.

Imposition of Obligations.

Precatory Trusts.

Equitable obligations, whether trusts or conditions, can be imposed by any language which is clear enough to show an intention to impose an obligation and is definite enough to enable the Courts to ascertain what the precise obligation is and in whose favour it is to be performed.

If property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation.

"There can be no doubt that equitable obligations, whether trusts or conditions, can be imposed by any language which is

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clear enough to show an intention to impose an obligation, and is definite enough to enable the Court to ascertain what the precise obligation is and in whose favour it is to be performed. There is also abundant authority for saying that, if property is left to a person in confidence that he will dispose of it in a particular way as to which there is no ambiguity, such words are amply sufficient to impose an obligation. Nothing can be plainer than Lord Eldon's statement to this effect in *Wright* v. *Atkyns* (1823), T. & R. 157. The books are full of cases decided in accordance with this doctrine: see *Shorelton* v. *Shorelton* (1863), 32 Beav. 143; *Curnick* v. *Tucker* (1874), L. R. 17 Eq. 320; *Le Marchant* v. *Le Marchant* (1874), L. R. 18 Eq. 414, in all of which the devise or bequest was to the devisee or legatee absolutely. See also other cases cited in Lewin on Trusts, 9th ed. p. 137. But still in each case the whole will must be looked at, and unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist. Yet, moreover, in some of the older cases obligations were inferred from language which in modern times would be thought insufficient to justify such an inference" (cited by Stirling, L. J., in *In re Oldfield*, [1904] 1 Ch. 549, at pp. 555, 556; 73 L. J. Ch. 433, at p. 435).

"It would, however, be an entire mistake to suppose that the old doctrine of precatory trusts is abolished. Trusts, *i.e.*, equitable obligations to deal with property in a particular way, can be imposed by any language which is clear enough to show an intention to impose them. The term 'precatory' only has reference to forms of expression. Not only in wills but in daily life an expression may be imperative in its meaning, although couched in language which is not imperative in form. A request is often a polite form of command. A trust is really nothing except a confidence reposed by one person in another, and enforceable in a Court of equity. In one sense it is true to say that a trust of property cannot be created by a person who is not entitled to that property. But there is no difficulty in disposing of one's own property upon condition express or implied that the person who takes it shall do something himself, *e.g.*, shall dispose of his property in a particular way indicated by the owner of the property which he accepts. Moreover, a condition of this kind is enforceable in equity, and need not amount to a common law condition—*i.e.*, a condition involving a forfeiture of the property taken subject to the condition—if that condition is not performed.

Instances of conditions enforceable in equity will be found in *Messenger* v. *Andrews* (1828), 4 Russ. 478; *In re Skingley* (1851), 3 Mac. & G. 221; 20 L. J. Ch. 142; *Wright* v. *Wilkin* (1860), 2 B. & S. 232; 31 L. J. Q. B. 196. The whole equitable doctrine of election, when a testator disposes of property not his own, is based upon the principle that a Court of equity will enforce performance of implied conditions on which property is given and accepted."—*In re Williams*, [1897] 2 Ch. 12, at pp. 18, 19; 66 L. J. Ch. 485, at pp. 487, 488, Lindley, L. J.

Absolute Gift "in Confidence."

"Lord St. Leonards, in his work on the Law of Property, published in 1849, wrote as follows (see p. 375): 'The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that, if a testator really means his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle.' The more modern authorities, from *Lambe* v. *Eames* (1871), L. R. 6 Ch. 597; 40 L. J. Ch. 447, to *In re Hamilton*, [1895] 2 Ch. 370; 64 L. J. Ch. 799, show how strongly the tendency now is to recognize this sensible rule."—*In re Williams*, [1897] 2 Ch. 12, at p. 21; 66 L. J. Ch. 485, at pp. 488, 489, Lindley, L. J. (cited by Kekewich, J., in *In re Hanbury*, [1904] 1 Ch. 415, at p. 419).

Executory Trusts.

Where the testator has directed something to be done, and has not himself completed the devise, the Court looks to see what was the testator's intention.

"Wherever the assistance of the trustees, which is ultimately the assistance of this Court [Chancery], is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention, that

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the Court should model the limitations. But where the trusts and limitations are already expressly declared, the Court has no authority to interfere and make them different from what they would be at law."—*Austen* v. *Taylor* (1759), 1 Eden, 361, at p. 368, Lord Northington, L. K.

"Where there is an executory trust, where the testator has directed something to be done, and has not himself, according to the sense in which the Court uses these words, completed the devise in question, the Court has been in the habit of looking to see what was his intention; and if what he has done amounts to an imperfection with respect to the execution of that intention, the Court inquires what it is itself to do, and it will mould what remains to be done, so as to carry that intention into execution."—*Jervoise* v. *Duke of Northumberland* (1820), 1 J. & W. 559, at p. 570, Lord Eldon.

"The first observation I make is, that it [the expression in question] is what has been sometimes called an executory trust. A true executory trust is, perhaps, a little more narrow, as where a conveyance has been directed to be executed by a testator, but it is called an executory trust, and, perhaps, not incorrectly, where, instead of expressing exactly what he means, that is, filling up the terms of the trust, he tells the trustees to do their best to carry out his intention. In that way it is executory, that if he has not put into words the precise nature of the limitations, he has said in effect: 'Now these are my intentions; do your best to carry them out,' or he has used the words here, you shall hold the property on such trusts as will best correspond with something else."—*Miles* v. *Harford* (1879), 12 Ch. D. 691, at p. 699, Jessel, M. R.

Rejecting Words.

Words in a will that cannot by any possibility have a rational interpretation given them may be rejected.

"Though the Court can construe and expound the words of a testator's will, yet they cannot strike them out of it entirely."—*Southcot* v. *Watson* (1745), 3 Atk. 226, at p. 233, Lord Hardwicke, L. C.

"The rule is, that words are not to be rejected, unless you cannot by any possibility give them a rational construction."—

Chambers v. *Brailsford* (1816), 19 Ves. 652, at p. 654, Lord Eldon, L. C.

"I cannot, however, reject from a will any word, unless I see that the meaning to be given to that word is contrary to some intention plainly expressed in other parts of the will."—*Doe* v. *Rawding* (1819), 2 B. & Ald. 441, at p. 448, Abbott, C. J.

"Another undoubted rule of construction is that every part of that which the testator meant by the words he has used, should be carried into effect as far as the law will permit, but no further, and that no part should be rejected, except what the law makes it necessary to reject."—*Doe* d. *Gallini* v. *Gallini* (1833), 5 B. & Ad. 621, at p. 641, Denman, C. J.

"If the general intention of the testator can be collected upon the whole will, particular terms used which are inconsistent with that intention may be rejected, as introduced by mistake or ignorance on the part of the testator, as to the force of the words used."—*Sherratt* v. *Bentley* (1833), 2 My. & K. 149, at p. 157, Sir John Leach, M. R., and Lord Brougham, at p. 165.

Discarding, modifying or implying expressions.

"When the main purpose and intention of the testator are ascertained to the satisfaction of the Court, if particular expressions are found in the will which are inconsistent with such intention, though not sufficient to control it, or which indicate an intention which the law will not permit to take effect, such expressions must be discarded or modified; and, on the other hand, if the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will sufficiently declared."—*Toomes* v. *Wentworth* (1858), 11 Moore, P. C. 526, at p. 543, the Right Hon. T. Pemberton Leigh, delivering the judgment of the Judicial Committee (cited by Martin, B., in *Biddulph* v. *Lees* (1858), E. B. & E. 289, at p. 317; 28 L. J. Q. B. 211, at p. 214, and cited and acted on by Hall, V.-C., in *Sweeting* v. *Prideaux* (1876), 2 Ch. D. 413, at pp. 415, 416; 45 L. J. Ch. 378, at p. 379; and by North, J., in *Mellor* v. *Daintree* (1886), 33 Ch. D. 198, at p. 206; 56 L. J. Ch. 33, at p. 37).

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"Again, all lawyers know that if the contents of a will show that a word has been undesignedly omitted, or undesignedly inserted, and demonstrate what addition by construction, or what rejection by construction, will fulfil the intention with which the document was written, the addition or rejection will by construction be made."—*Pride* v. *Fooks* (1858), 3 De G. & J. 252, at pp. 266, 267; 28 L. J. Ch. 81, at p. 87, Knight Bruce, L. J.

"It is clear that words and passages in a will, which are irreconcileable with the general context, may be rejected, whatever may be the local position which they happen to occupy; for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein."—Jarman on Wills, 5th ed., p. 444 [in note (*g*). See per K. Bruce], *Pride* v. *Fooks* (1858), 3 De G. & J. 252, at pp. 266, 267; 28 L. J. Ch. 81, at p. 87.

"But these (the words 'or other person') may well have been inserted by some blundering attorney's clerk adding the words 'or other person' to make the clause read as he thought right. It is quite impossible to suppose that the testator or the real author of the document could have imagined that the chattels would vest absolutely in any of the testator's children or in any person made tenant for life, and the clause so read, that is, as to confine the sons mentioned to sons who were or were made tenants for life, would be useless and absurd nonsense. . . . I cannot entertain any doubt that this clause of defeasance was not originally penned as it now stands in the will."—*In re Dagrell, Hastie* v. *Dagrell*, [1904] 2 Ch. 496, at pp. 499, 500; 73 L. J. Ch. 795, at p. 796, Joyce, J.

"The testator has referred to the children as being six in number when only one was living. That was a mistake or blunder, and it arose, or might have arisen, either from ignorance on the part of the testator or forgetfulness, or from some misunderstanding between him and the solicitor who drew this codicil. . . . The rule is that, where there is a gift to children described as consisting of a specified number less than the number in existence at the date of the will, the Court can reject the specified number on the ground of mistake and hold that the others are entitled. That being the rule when the specified number is less

than the number in existence, why cannot the Court, when there is a gift to children describing them as consisting of a specified number greater than the number in existence, reject the specified number on the same ground and say that only the children in existence are to be held to be entitled? I know of no reason why that should not be the rule to be applied, unless it be for the purpose of making the testator die intestate as to a great portion of his estate, which he certainly did not intend to do."—*In re Sharp, Maddison* v. *Gill*, [1908] 1 Ch. 372, at pp. 377, 378; 77 L. J. Ch. 251, at p. 253, Joyce, J.

Superfluous Words.

"Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning only because those words are superfluous."—*Giles* v. *Melsom* (1873), L. R. 6 H. L. 24, at p. 33; 42 L. J. C. P. 122, at p. 125, Lord Selborne, L. C.

"There is no presumption that each word used should change the meaning of the sentence. A word may be inserted for the sake of emphasis or for greater clearness, or descriptively, or because it occurs to the writer as suitable to the idea he is expressing, and this, without any thought whether it is or is not absolutely necessary to the expression of his meaning. The objection to an interpretation on the ground that it would make a word or phrase surplusage has weight only when the presence of such word or phrase would be unusual or unaccountable if it were not specially inserted for the purpose of altering the meaning of the sentence. The mere fact that you could omit it without change of meaning has in itself no weight. There is no presumption that human beings use the irreducible minimum of words to effect their purpose."—*In re Boden*, [1907] 1 Ch. 132, at p. 143; 76 L. J. Ch 101, at p. 107, Fletcher Moulton, L. J.

Changing Words.

Where the context shows that a mistake has been made in a word by using one word for another, the mistake may be corrected.

"It was admitted by the defendant's counsel that the word 'or' may be construed 'and'; as, suppose a devise of land to A. or his heirs, it would be a devise in fee."—*Read* v. *Snell* (1743), 2 Atk. 642, at p. 645, Lord Hardwicke (cited by Hall, V.-C., in *Wingfield* v.

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Wingfield (1878, 9 Ch. D. 658, at p. 663; 47 L. J. Ch. 768, at p. 771).

"In the present instance the clause under consideration, read as the respondents adverse to the appellants would have it read, is not merely startling or ridiculous: the case has that ingredient, and also something more. The other parts of the will show evidently and explain that, in the passage in question, the word 'fourth' was written inadvertently, and without meaning, or in sheer mistake by a mere error of the pen."—*Hart* v. *Tulk* (1852), 2 D. M. & G. 300, at p. 314, Lord Justice Knight Bruce.

"I am bound to say that the later authorities lean more strongly than the earlier ones to the strict construction of words, although, in cases where it is necessary to do so in order to render a will intelligible, or where a clear and necessary inference can be drawn from the terms of the will, the Court will not hesitate to construe the words 'survivors or survivor' as 'others or other.'"—*Re Corbett's Trusts* (1860), John. 591, at p. 596, Page Wood, V.-C. (cited by Baggallay, J. A., in *Wake* v. *Varah* (1876), 2 Ch. D. 348, at p. 353; 45 L. J. Ch. 533, at p. 535).

"I think the rule is that you must construe the word 'survivor' as 'other' whenever you see the testator meant to use it in that sense."—*In re Arnold's Trusts* (1870), L. R. 10 Eq. 252, at p. 257; 39 L. J. Ch. 875, at p. 877, Malins, V.-C.

"It was contended that the word 'or' should be read 'and'; but in all the cases where the Court has so read the word it was plain from the context that the wrong word had been used. There is nothing in the context here to show that 'or' is the wrong word."—*Holland* v. *Wood* (1870), L. R. 11 Eq. 91, at p. 96, Stuart, V.-C.

"Now, it is the rule of construction that words must be read so as to effect the intention of the parties, and there is no word more flexible than 'survivor.' It is a doubtful word, used very often without being understood, and frequently it is obvious from the context that it must have been intended to mean 'other,' and not 'survivor.'"—*In re Palmer's Settlement Trusts* (1875), L. R. 19 Eq. 320, at p. 325; 44 L. J. Ch. 247, at p. 249, Malins, V.-C.

"You will find it said in some cases that 'or' means 'and'; but 'or' never does mean 'and,' unless there is a context which shows it is used for 'and' by mistake. The instance I have given is this. Suppose a testator said, 'I give the black cow on which I usually ride to A. B.,' and he usually rode on a black horse: of course,

the horse would pass, but I do not think that any annotator of cases would put in the marginal note the 'cow' means 'horse.' You correct the wrong word used by the testator by the context; when you find it was an animal on which he daily rode, you would say he meant a horse, he would not ride a cow in this country. It is not that the word has a different meaning from that which it usually bears, but the context shows the testator has by mistake used one word for another. I apply this illustration to show the difference in treating the words 'children' and 'issue.' The word 'children' has, both in law and common parlance, only one meaning, though you may by a context show it is improperly used; that it is written by mistake for descendants or something else. But the word 'issue' has two meanings: it may mean 'descendants,' and it may mean 'children,' the common use of the word in ordinary parlance being 'children,' though in legal parlance its proper meaning is 'descendants.' You require a context of a different character to show that the testator has made a mistake in writing one word for another from what you do when you wish to ascertain which of two meanings that the word properly bears is to be affixed to it."—*Morgan* v. *Thomas* (1882), 9 Q. B. D. 643, at pp. 645, 646; 51 L. J. Q. B. 556, at p. 557, Jessel, M. R.

Omission supplied.

Where there are two modes of reading a will, one of which destroys and the other preserves the will, the rule ut res magis valeat quam pereat *is applied.*

Words, clauses, conditions, provisoes, stipulations, and limitations may be supplied or rejected in a will when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention.

No word, clause, condition, proviso, stipulation or limitation can be corrected, interpolated, or rejected unless the context renders it necessary.

"I do not depart from the principle of *Mellish* v. *Mellish* [(1798), 4 Ves. 45], viz., that a mistake cannot be corrected, or an omission supplied, unless it is perfectly clear, by fair inference from the whole will, that there is such mistake or omission."—*Phillipps* v. *Chamberlaine* (1798), 4 Ves. 51, at p. 57, Sir Richard P. Arden, M. R.

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"There are two modes of reading an instrument; where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense, which I trust is common to both sides of Westminster Hall) that you should rather lean towards that construction which preserves than towards that which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense, and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely and easily do it, that which he *per incuriam* omitted, and that which instead of destroying preserves the instrument, which instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention."—*Langston* v. *Langston* (1831), 2 Cl. & Fin. 194, at p. 243, Lord Brougham, L. C.

"Again, all lawyers know that if the contents of a will show that a word has been undesignedly omitted, or undesignedly inserted, and demonstrate what addition by construction, or what rejection by construction, will fulfil the intention with which the document was written, the addition or rejection will by construction be made."—*Pride* v. *Fooks* (1858), 3 De G. & J. 252, at p. 266; 28 L. J. Ch. 81, at p. 87, Knight Bruce, L. J.

"The will must be expressed in writing, and that writing is only to be considered. It is now, I believe, universally admitted, that in construing that writing, the rule is to read it in the ordinary grammatical sense of the words, unless some obvious absurdity, or some repugnance or inconsistency with the declared intentions of the writer, to be extracted from the whole instrument, should follow from so reading it. Then the sense may be modified, extended or abridged, so as to avoid those consequences, but no further. . . . Quite consistently with this rule, words and limitations may be supplied or rejected when warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention,

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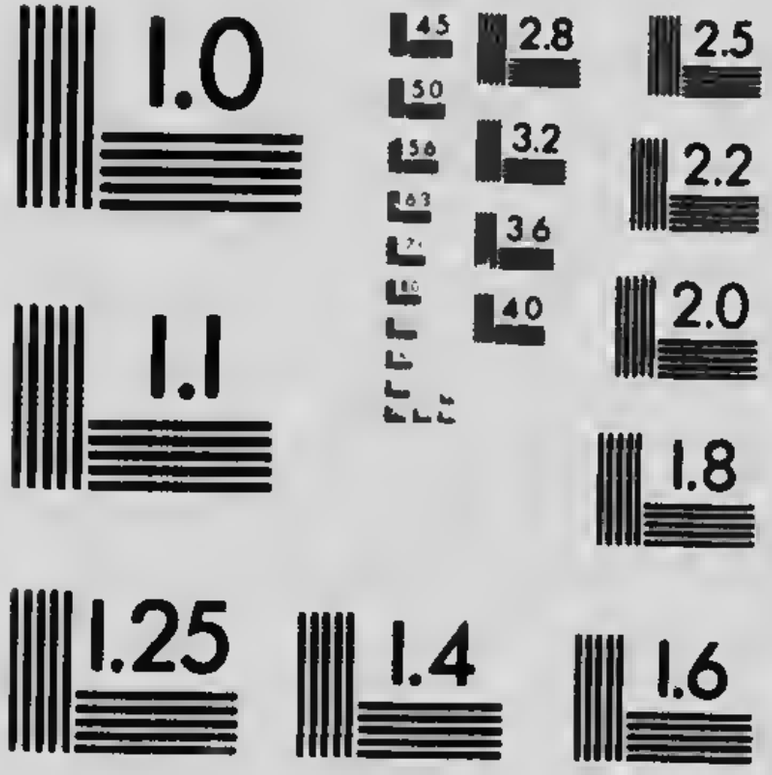

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however reasonable, in opposition to the plain and obvious sense of the instrument."—*Abbott* v. *Middleton* (1858), 7 H. L. Cas. 68, at p. 114; 28 L. J. Ch. 100, at pp. 114, 115, Lord Wensleydale.

"It appears to me that much of the doubt and difficulty would be removed by applying to this question those ordinary rules and principles which are generally applied in the construction of wills. One of those rules is that the Court ought not to interpolate in a testator's will any clause or stipulation, unless the context renders it absolutely necessary to do so. The Court has no right to do this on the ground that it considers it probable that if it had occurred to the testator he would have so directed."—*Lanphier* v. *Buck* (1865), 2 Dr. & Sm. 484, at p. 493; 34 L. J. Ch. 650, at pp. 654, 655, Kindersley, V.-C.

"I think that upon a reasonable construction of the words which the testator has used, the words which are suggested by the statement of claim ought to be read as if they were inserted in the will. If I were to do otherwise I should be going against the canon of construction, that I am to gather the meaning of the testator from the words in which he has expressed his meaning. I am not to be deterred by any accidental omission from putting the true signification on the will, and I am not to substitute what some blundering attorney's clerk or law stationer has written in this will, and treat that blunder as if it was the intention of the testator. I do not hesitate in the slightest degree, therefore, to adopt the rule which Vice-Chancellor Hall expressed in *Sweeting* v. *Prideaux* [(1876), 2 Ch. D. 413; 45 L. J. Ch. 378], that the testator must necessarily have meant what the mere letter of the will does not express."—*In re Redfern* (1877), 6 Ch. D. 133, at pp. 137, 138; 47 L. J. Ch. 17, at p. 19, Bacon, V.-C.

(See also *In the goods of Bradley* (1883), 8 P. D. 215; 52 L. J. P. 101; *Mellor* v. *Daintree* (1886), 33 Ch. D. 198; 56 L. J. Ch. 33.)

"There is a maxim to which I hold, perhaps, as strongly as any one, that, if possible, you should construe a will *ut res magis valeat quam pereat*."—*Von Brockdorff* v. *Malcolm* (1885), 30 Ch. D. 172, at p. 179; 55 L. J. Ch. 121, at p. 124, Pearson, J.

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Caprice.

If the words of a will admit of two interpretations, that interpretation is to be adopted which avoids the conclusion that the testator used the words capriciously.

"I take the law on this subject to have been expressed with much accuracy and felicity by Lord Cranworth, than whom no judge more consistently adhered to sound and strict principles of construction in the interpretation of wills. In the case of *Abbott* v. *Middleton*, before this House [(1858), 7 H. L. C. 68, at p. 89; 28 L. J. Ch. 110, at p. 112], Lord Cranworth speaks thus: 'Where, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious, or the most grammatically accurate. But if the words used are unambiguous, they cannot be departed from merely because they lead to consequences which we consider capricious, or even harsh and unreasonable."—*Gordon* v. *Gordon* (1871), L. R. 5 H. L. 254, at p. 284, Lord Cairns (cited by Stirling, L. J., in *In re Whitmore*, [1902] 2 Ch. 66, at pp. 70, 71; 71 L. J. 673, at p. 675; and *In re Rayner*, [1904] 1 Ch. 176 at p. 191; 73 L. J. Ch. 111, at pp. 116, 117).

"The rule upon this subject [upon what principle the Court is to determine which of two ambiguous significations is to be adopted] was happily expressed by Lord Cranworth, in the case of *Abbott* v. *Middleton* [(1858), 7 H. L. Cas. 68, at p. 89], in this House, in words which have been more than once referred to, 'Where by acting on one interpretation of the words used, &c.' [see last quotation]."—*Bathurst* v. *Errington* (1877), 2 App. Cas. 698, at p. 709; 46 L. J. Ch. 748, at p. 754, Lord Cairns, L. C.

"I take it that no rule of construction is better settled than that, when two meanings are open to a judge, and the one is reasonable and sensible, and the other, though not absolutely unreasonable in the sense of supposing that the testator must have been a lunatic, yet is extremely unlikely, he ought to select that meaning which is consonant to ordinary reason, and not liable to the imputation

of excessive caprice.' —*Selby* v. *Whittaker* (1877), 6 Ch. D. 239, at p. 248; 47 L. J. Ch. 121, at p. 124, Jessel, M. R.

"The rule of Court is this—that if we find language in a will which is capable of being used in what I may call a primary and secondary sense, and if we find that the primary meaning, if applied, gives a construction which would lead to the conclusion that the person using it is acting capriciously, and without intelligible motive, and contrary to the ordinary mode in which men generally act in similar cases, then we may adopt the second; and *à fortiori*, it follows that, if by adhering to the primary sense of the words we come to the conclusion that the testator is acting in the ordinary mode in which men generally act in similar cases and his will is intelligible and devoid of caprice, it is the duty of the Court to adhere to that primary signification."—*Locke* v. *Dunlop* (1888), 39 Ch. D. 387, at p. 393; 56 L. J. Ch. 697, at p. 701, Stirling, J.

Uncertainty.

A will should not be held void for uncertainty unless it is utterly impossible to put a meaning upon it.

"The modern doctrine is not to hold a will void for uncertainty unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not, as was said in one case, to repose on the easy pillow of saying that the whole is void for uncertainty."—*In re Roberts* (1881), 19 Ch. D. 520, at p. 529, Jessel, M. R. (adopted by Farwell, J., in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1900] 2 Ch. 352, at p. 360; 69 L. J. Ch. 850, at p. 854).

"I think this question may be decided upon a very simple proposition. In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving someone else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow."—*Grimond* v. *Grimond*, [1905] A. C. 124, at p. 126; 74 L. J. P. C.

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35, at p. 36, Earl of Halsbury, L. C. (cited in *In re Pardoe*, [1906] 2 Ch. 184, at p. 192; 75 L. J. Ch. 455, at p. 458, Kekewich, J.).

Misdescription—Misnomer.

Falsa demonstratio non nocet.—6 T. R. 676.

Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.—Bac. Max. Reg. 13.

Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationem.—Bac. Max. Reg. 24.

"Though falsity of addition or demonstration doth not hurt where you give a thing a proper name; yet, nevertheless, if it stand doubtful upon the words, whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former name, the law will never intend error or falsehood . . . . if I have some land wherein all these demonstrations are true, and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true."—Bac. Max. Reg. 13 (Lord Bacon's Works, by Spedding and Heath, Vol. 7, pp. 361, 362).

"And even in cases where you give a thing a proper name, Lord Bacon says, in his 13th maxim, that 'the falsity of addition or demonstration doth not hurt; yet nevertheless if it stand *doubtful* upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will not intend error or falsehood.'"—*Doe* d. *Harris* v. *Greathed* (1806), 8 E. 91, at p. 104.

"One of these r... [established rules of construction] is, '*Falsa demonstratio non nocet*': another is, '*Non accipi debent verba in demonstrationem falsam, quæ competant in limitationem veram.*' The first rule means, that, if there be an adequate and sufficient description, with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only. The other rule means that, if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of

former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass those lands wherein the circumstances are true."—*Morrell* v. *Fisher* (1849), 4 Ex. 591, at p. 604; 19 L. J. Ex. 273, at p. 277, Alderson, B. ["They [Baron Alderson's] are really the words of Lord Bacon in discussing his thirteenth maxim [see *supra*; at least, that is how I understand it."—*In re Brocket, Dawes* v. *Miller*, [1908] 1 Ch. 180, at p. 190, Joyce, J.]

"There is a maxim that the name shall prevail against an error of demonstration; but then you must first show that there is an error of demonstration, and, until you have shown that, the rule *veritas nominis tollit errorem demonstrationis* does not apply. I think that there is no presumption in favour of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the Bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed."—*Drake* v. *Drake* (1860), 8 H. L. C. 172, at p. 179; 29 L. J. Ch. 850, Lord Campbell, L. C.

"The principle was clearly explained and applied in *Morrell* v. *Fisher* [(1849), 4 Ex. 591, at p. 604; 19 L. J. Ex. 273, at p. 277], where the Court says: 'There are two rules, "*falsa demonstratio non nocet*" and "*non accipi debant verba in demonstrationem falsam, quæ competunt in limitationem rerum.*"' The first rule means, that, if there be an adequate and sufficient description with convenient certainty of what was meant to pass, a subsequent erroneous addition will not vitiate it. The characteristic of cases within the rule is, that the description, as far as it is false, applies to no subject at all, and so far as it is true, applies to one only. The other rule means, that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true and part false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true."—*Webber* v. *Stanley* (1864), 16 C. B. N. S. 698, at p. 755; 33 L. J. C. P. 217, at p. 221, Erle, C. J., delivering the judgment of the Court (Erle, C. J., Williams, J., Willes, J., and Keating, J.). (Cited by Joyce, J., in *In re Brocket, Dawes* v. *Miller*, [1908] 1 Ch. 185, at pp. 189, 190.)

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"It is unnecessary to enter into an examination of the authorities, for they are consistent, from the time of Lord Bacon to the decision in the case of *Webber* v. *Stanley* [(1864), 16 C. B. N. S. 698, 752; 33 L. J. C. P. 217], where Erle, C. J., laid down the law with a clearness and authority which cannot be strengthened or added to. The rule which they establish is, that where words can be applied so as to operate on a subject-matter, and limit the other terms employed in its description, or, in other words, where there is a subject-matter to which they all apply, it is not possible to reject any of those terms as a *falsa demonstratio*. This is expressed in Lord Bacon's maxim, '*non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram.*'"—*Smith* v. *Ridgway* (1866), L. R. 1 Ex. 331, at p. 332; 35 L. J. Ex. 198, at p. 199, Willes, J.

"These are cases of great nicety, and I should not at all dispute the principle laid down in *Webber* v. *Stanley* (1864), 16 C. B. N. S. 698; 33 L. J. C. P. 217, nor the maxim [*Non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram*] which Mr. Cookson has cited. It is perfectly certain that if all the terms of description fit some particular property, you cannot enlarge them by extrinsic evidence so as to include anything which any part of those terms does not accurately fit. On the other hand, I apprehend that if the words of description when examined do not fit with accuracy, and if there must be some modification of some part of them in order to place a sensible construction on the will, then the whole thing must be looked at fairly in order to see what are the leading words of description, and what is the subordinate matter, and for this purpose evidence of extrinsic facts may be regarded."—*Hardwick* v. *Hardwick* (1873), L. R. 16 Eq. 168, at p. 175; 42 L. J. Ch. 636, at p. 639, Lord Selborne, L. C. (cited by Joyce, J., in *In re Brocket*, *Dawes* v. *Miller*, [1908] 1 Ch. 180, at pp. 189, 190).

"I do not know that the principle can be better put than it is in Jarman on Wills, 5th ed. 742, where it is said the rule means 'that where the description is made up of more than one part, and one part is true, but the other false, there if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise.'"—*Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, at pp. 311, 312; 68 L. J. Ch. 563, at p. 564, Lindley, M. R.

"It is a rule, however, that, where the description is made up of

more than one part, and one part is true, but the other false, then, if the part which is true describes the subject or object of the gift with sufficient certainty, the untrue part will be rejected, and will not vitiate the gift: Jarman on Wills, 5th ed., at p. 742, cited and approved by Lindley, M. R., in *Cowen* v. *Truefitt, Ltd.*, [1899] 2 Ch. 309, at pp. 311, 312; 68 L. J. Ch. 563, at p. 564."—*Anderson* v. *Berkley*, [1902] 1 Ch. 936, at p. 940; 71 L. J. Ch. 444, at p. 446, Joyce, J.

(See also *ante*, p. 191, "Deeds; Misdescription—Misnomer.")

Ambiguities.

When is a Will Ambiguous?

A will is ambiguous only when, after full consideration, it is determined judicially that no interpretation can be given to it.

"It must be borne in mind that a will is not ambiguous by reason only that it is difficult of construction. If it is finally held to bear a particular construction, that must govern its legal meaning, notwithstanding any difficulty that the Courts may have felt in arriving judicially at the construction. It is only ambiguous when, after full consideration, it is determined judicially that no interpretation can be given to it."—*In re Grainger*, *Dawson* v. *Higgins*, [1900] 2 Ch. 756, at p. 764; 69 L. J. Ch. 789, at p. 793, Rigby, L. J. (cited and approved of by Lord Davey in *Higgins* v. *Dawson*, [1902] A. C. 1, at p. 10; 71 L. J. Ch. 132, at p. 138).

Latent or Patent.

Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.—Bac. Max. Reg. 25 (Spedding, Vol. 7, p. 385).

In every case of ambiguity in a will, whether latent or patent, parol evidence is admissible to show the state of the testator's family or property.

Where the ambiguity in a will is raised by some extrinsic matter parol evidence is admissible to explain what is ambiguous.

Where the will on the face of it is ambiguous, parol evidence is, as a general rule, inadmissible to explain it. It must, if possible, be removed by interpretation and not by averment.

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If a will, upon the face of it and independently of extrinsic evidence, ought to bear a definite interpretation, that interpretation cannot be varied by evidence dehors *the will.*

When the person or thing is designated, on the face of the will, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it is no objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument.

"The rule as to the reception of parol evidence to explain a will is perfectly clear. In every case of ambiguity, whether latent or patent, parol evidence is admissible to show the state of the testator's family or property; but the cases in which parol evidence is admissible to show the person intended to be designated by the testator are those of latent ambiguity mentioned by Sir J. Wigram, where there are two or more persons, who answer other descriptions in the will, each of whom, standing alone, would be entitled to take."—*Stringer* v. *Gardiner* (1859), 27 Beav. 35, at p. 38; 28 L. J. Ch. 758, at p. 759, Sir John Romilly, M. R.

"The distinction between a latent ambiguity and a patent ambiguity is well put in Starkie on Evidence, 3rd ed. Vol. 3, p. 755 [4th ed., p. 652]: 'An important distinction has already been adverted to between ambiguities which are *apparent* on the face of an instrument, and those which arise merely extrinsically in the *application* of an instrument of clear and definite intrinsic meaning to doubtful subject-matter. An ambiguity apparent on reading an instrument is termed *ambiguitas patens*; that which arises merely upon its application, *ambiguitas latens*. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence, the maxim being, *ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur*. On the other hand, it is a settled rule that such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument.' Afterwards, at p. 788 [4th ed., p. 679], he says: 'In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter, the existence of which is also matter of proof. A difficulty in this case occurs, where, although

the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it is not equally applicable to several distinct objects.'"—*Grant* v. *Grant* (1870), L. R. 5 C. P. 727, at pp. 732, 733; 39 L. J. C. P. 272, at p. 274, Martin, B.

"The former wills are legitimate evidence not of the testator's intentions, but of his state of mind, and to show what he knew of the Scoles family. I have not the slightest doubt that not only according to the authorities, but also according to common sense, when we find a description which will not accurately apply to anybody, and the alternatives are either that it means nothing and the gift fails, or that we must try and find out whom it was meant to describe, we ought to admit evidence of the testator's knowledge to help us in finding out who was meant."—*In re Walker, White* v. *Scoles* (1899), 68 L. J. Ch. 526, at pp. 527, 528, Lindley, M. R.

Latent.

"It has been a long-established rule that where there is a latent ambiguity in a will the parties may go into extrinsic evidence to render that certain which, without the aid of such evidence, is uncertain."—*Thomas* v. *Thomas* (1796), 6 T. R. 671, at p. 676, Lord Kenyon, C. J.

"Where there is a latent ambiguity, that is, where it seems certain enough upon the will, but the ambiguity is raised by some extrinsic matter, there parol evidence may be received in order to explain that which is made doubtful by parol."—*Doe* v. *Lyford* (1816), 4 M. & S. 550, at p. 557, Le Blanc, J.

"Where, on the other hand, the words of the will in themselves are plain and unambiguous, but they become ambiguous by the circumstance that there are two persons to each of whom the description applies, then parol evidence may be admitted also to remove the ambiguity so created; and that rule is a reasonable one."—*Clayton* v. *Lord Nugent* (1844), 13 M. & W. 200, at p. 206; 13 L. J. Ex. 363, at p. 368, Alderson, B.

Patent.

"Now, the rule is clear that if there be a patent ambiguity, that is, one which appears upon the will itself, it must be deter-

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...ined on the will, and parol evidence cannot be admitted to explain it."—*Doe* v. *Lyford* (1816), 4 M. & S. 550, at p. 556, per Blanc, J.

"The evidence here is not to produce a construction against the direct and natural meaning of the words, not to control a provision which was distinct and accurately described, but because there is an ambiguity upon the face of the instrument: because an indefinite expression is used capable of being satisfied in more ways than one: and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation would assist us in judging what was her meaning by that indefinite expression."—*Smith* v. *Doe* d. *Jersey* (1824), 2 Brod. & Bing. 473, at p. 553, Bayley, J.

"In the case of a patent ambiguity, that is one apparent on the face of the instrument, as a general rule, a reference to matter *dehors* the instrument is forbidden. It must, if possible, be removed by construction and not by averment. But in many cases this is impracticable; where the terms used are wholly indefinite and equivocal, and carry on the face of them no certain or explicit meaning, and the instrument furnishes no materials by which the ambiguity thus arising can be removed; if in such cases the Court were to reject the only mode by which the meaning could be ascertained, viz., the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities both in law and equity. When the person or thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument.

"To show how mistaken the idea is, that extrinsic evidence is never to be received in cases of patent ambiguity, we may refer to a case in the House of Lords unquestionably of that description,

when the evidence was admitted. I mean the case of *Smith* v. *Doe* d. *Jersey* [(1821), 2 Brod. & Bing. 473, at p. 553]."—*Colpoys* v. *Colpoys* (1822), Jacob, 451, at pp. 463, 464, Sir Thomas Plumer, M. R.

"There is but one case in which it appears that this sort of evidence of intention [*i.e.*, evidence of the testator's actual intentions] can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of the name, North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' *i.e.*, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by the general words he has used, which, in the ordinary sense, may properly bear that construction. It appears to us that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will."—*Doe* d. *Hiscocks* v. *Hiscocks* (1839), 5 M. & W. 363, at pp. 368, 369; 9 L. J. Ex. N. S. 27, at p. 30, Lord Abinger, C. B.

"This, therefore, is a case of a *patent* ambiguity, in which, according to all the authorities on this subject, parol evidence to explain the meaning of the will cannot legally be admitted."—*Clayton* v. *Lord Nugent* (1844), 13 M. & W. 200, at p. 206; 13 L. J. Ex. 363, at p. 365, Alderson, B.

"It will be found laid down as a rule, that the only case in which evidence can be admitted to show the intention of the testator, is where the description of the matter bequeathed, or of the legatee, is applicable to two things or to two persons, where, as Lord Coke says, the evidence 'stands well with the words of the will.'"—*Bernasconi* v. *Atkinson* (1854), 10 Hare, 345, at p. 348; 23 L. J. Ex. Ch. 184, at p. 185, Wood, V.-C.

"A second rule may be thus stated: if the description contained

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in the will be not strictly applicable to any matter or person, the matter of the legacy, or the person of the legatee can not be ascertained by any parol evidence of the intention of the testator; but the Courts have a right to ascertain all the facts which were known to the testator at the time he made his will, or (as it has been expressed) to place themselves in the testator's position, in order to ascertain whether there exists any person or thing to which the description can be reasonably and with sufficient certainty applied—the presumption necessarily being, that the testator intended some existing matter or person."—*Ibid.*

"Then arises a third class of cases, in which the description, taken in its natural and literal sense, is not applicable strictly to any person or to any subject-matter, but upon which there may be either a popular or any other sense, and from the mode in which the testator has been in the habit of using the particular expression with regard to particular persons or things, where there may be a right to ascertain all the circumstances which surrounded the testator at the time of making his will; and where the Court is bound, if possible, to attach some sense and intention to the devise or bequest in a will not expressed in words sufficiently apt to be an exact description of the subject or person intended, and which might, on the whole, lead the Court to a reasonable conclusion as to who is the person or the subject intended."—*Bernasconi* v. *Atkinson* (1854), 25 L. J. Ch. 184, at p. 186, Wood, V.-C.

"The only case in which evidence of this kind [evidence of statements of the testator, as to whom he intended to benefit, or supposed he had benefited, by his will] can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or to two things. . . . There is a class of evidence which in this case, as in all cases of testamentary dispositions, is clearly receivable. The Court has a right to ascertain all the facts which were known to the testator at the time he made his will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied. I may refer, as well-known authorities for these propositions, to the cases of *Doe* v. *Hiscocks* (1839), 5 M. & W. 363; 9 L. J. Ex. N. S. 27; *Bernasconi* v. *Atkinson* (1854), 10 Hare, 345; 23 L. J. Ch. 184; and *Drake* v. *Drake* (1860), 8 H. L. C.

172; 29 L. J. Ch. 850."—*Charter* v. *Charter* (1874), 7 H. L. 364, at p. 377; 43 L. J. P. 73, at p. 80, Lord Cairns, L. C. (cited by Malins, V.-C., in *In re Wolverton Mortgaged Estates* (1877), 7 Ch. D. 197, at p. 198; 47 L. J. Ch. 127, at p. 128; by Hannen, J., in *In the goods of Blake* (1881), 6 P. D. 217, at p. 218; and by Jenne, P., in *In the goods of Chappell*, [1894] P. 98, at p. 100; 63 L. J. P. 95, at p. 96).

"The first question which I have to determine is, whether parol evidence is admissible to any, and if any, to what extent, in order to assist the Court to ascertain the meaning of the testator as expressed in his will. I have said *as expressed in his will*, because it is clearly settled by law that the Court is not entitled to inquire into the intention of the testator apart from the language which he has used. The whole of the testator's will must be in writing, and the Court is therefore confined to putting an interpretation on words actually used by him; or, as the rule is expressed by Sir J. Wigram (paragraph 6): 'The judgment of a Court in expounding a will should be simply declaratory of what is in the instrument.' In considering, therefore, whether a particular person or thing has been sufficiently indicated by a testator, there must be some words to which the required meaning may be attached. A complete blank cannot be filled up by parol testimony, however strong. Thus a legacy to Mr. —— cannot have any effect given to it: *Baylis* v. *Attorney-General* (1741), 2 Atk. 239; nor a legacy to Lady ——: *Hunt* v. *Hoet* (1791), 3 Bro. C. C. 311. But if there are any words to which a reasonable meaning may be attached, parol evidence may be resorted to to show what that meaning is. Thus a legacy to a person described by an initial, as to Mrs. C., admits of explanation as by showing that the testator was accustomed to speak of a particular person by the initial of her name: *Abbott* v. *Massie* (1796), 3 Ves. 18; *Clayton* v. *Lord Nugent* (1844), 13 M. & W. 200, at p. 207. And where a blank was left for the Christian name parol evidence has been admitted to show who was intended: *Price* v. *Page* (1799), 4 Ves. 679. . . . . I have dealt with the case thus far on the supposition that evidence of testator's declarations of intention are not admissible. In the case of *Charter* v. *Charter* (1874), L. R. 7 H. L. 364, at p. 377; 43 L. J. P. 73, at p. 80, the Lord Chancellor (Lord Cairns) says: 'The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons or two things.'

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Sir J. Wigram states the proposition thus (prop. 7, par. 194): 'The only cases in which evidence to prove intention is admissible are those in which the description in the will is unambiguous in its application to each of several subjects.' If these expositions of the law are to be taken without any qualification, evidence of the testator's expressed intention could not be given in this case, for there is here only *one* known subject to which the testator's language can apply."—*In the goods of De Rosaz* (1877), 2 P. D. 66, at pp. 68—71; 46 L. J. P. 6, at p. 8, Sir J. Hannen, President (cited by Sir Gorell Barnes, President, in *In the Estate of Hubbuck*, [1905] P. 129, at pp. 133, 134; 74 L. J. P. 58, at p. 60).

Recourse may be had to the codicil of a will to clear up the ambiguity in the will.

"If there were an obviously erroneous recital of the will in the codicil, that would not alter the construction of the will: see *Skerratt* v. *Oakley* (1798), 7 T. R. 492; 4 R. R. 504; but if the recital in the codicil be not obviously erroneous, I have no doubt that I may refer to the codicil to clear up an ambiguity in the will. The principal authority for this is *Darley* v. *Martin* (1853), 13 C. B. 683; 22 L. J. C. P. 249. There Jervis, C. J., in delivering the considered judgment of the Court of Common Pleas, says (at p. 690): 'And as to the effect of the codicil, it was argued, that an erroneous reference in a codicil to the disposition of the will cannot constitute a new bequest in opposition to the will; and *Skerratt* v. *Oakley* (1798), 7 T. R. 492, was relied on. But it appears to us that the argument with respect to the effect of the codicil, when rightly considered, is not that the will is at all revoked or varied by the codicil; but rather, that, the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil; and that, accordingly, the gift over in the will, in default of such issue, being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense, because, in the codicil, he refers to it as if it were a gift over in default of his daughter's leaving no issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death. The argument, thus viewed, appears to be well founded.' But the authorities do not rest there, for Kindersley, V.-C., than whom a more careful or accurate judge never existed, did the same thing in *Grover* v. *Raper* (1856), 5 W. R. 134. In

that case there was an ambiguity in the words of the will; and the Vice-Chancellor, after expressing the inclination of his opinion as to the meaning of the will, said that the codicil, however, put the matter beyond all doubt. I think, therefore, that, following the considered judgment of the Court of Common Pleas in *Darley* v. *Martin* (1853), 13 C. B. 683; 22 L. J. C. P. 249, and this decision of Kindersley, V.-C., I may have recourse to the codicil to clear up the ambiguity in the will."—*In re Venn, Lindon* v. *Ingram*, [1904] 2 Ch. 52, at pp. 55, 56; 73 L. J. Ch. 507, at pp. 508, 509, Joyce, J.

(See also *ante*, pp. 83, 134, 135.)

Section VI.

SPECIAL MATTERS.

Subsequent Acts.

The Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 23. "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid [sects. 18 and 20] shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

Vesting.

The law favours early vesting.

"It may be stated as a general rule, that where a testator creates a particular estate, and then goes on to dispose of the ulterior

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interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the latter devise, will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands to A for life, and after his decease to B. in fee, the respective estates of A. and B. (between whom the entire fee simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being, that the estate of the one is in possession, and that of the other in remainder."—Jurman on Wills, 5th ed., pp. 756, 757.

"Whilst estates remain contingent, those in whom they are at a future time to be vested have no interest in the estates or the rents and profits of such estates. Such estates must descend to the heir, if they are not given to any person to hold until the events happen on which they are to become vested. This point is too clear to require any observation; indeed, it was not disputed at the bar. Testators who create contingent estates often forget to make any provision for the preservation of their estates, and for the disposition of the rents and profits in the intermediate period between their deaths and the vesting of their estates. In such cases, the estates descend to the heirs, who, knowing that they are to enjoy them only for a short period, and that they have obtained the possession of them from the inattention of, and not from the bounty of, the testator, or from the mistake of the professional man who drew the will, will make the most that they can of them during the time that they remain theirs, regardless of any injury that the estates may suffer from their conduct. The rights of the different members of families not being ascertained while estates remain contingent, such families continue in an unsettled state, which is often productive of inconvenience, and sometimes of injury to them. If the parents attaining a certain age be a condition precedent to the vesting estates by the death of their parents, before they are of that age, children lose estates which were intended for them, and which their relation to the testator may give them the strongest claim to."—*Duffield* v. *Duffield* (1829), 3 Bli. N. S. 260, at pp. 330, 331; 1 Dow & Cl. N. S. 268, at pp. 310, 311, Best, C. J.

"I find it decided by a continuous stream of authority, interrupted a little, possibly, by some decisions of Sir John Leach, that, where there is a limitation by will to one for life, and, after

his decease, then to the next of kin of the testator, those who are to take under the designation 'next of kin' are the persons who answer that description at the death of the testator, and not those who answer the description at the death of the tenant for life. . . . The vesting takes place immediately on the death of the testator, but, during the interval between that event and the period fixed for distribution, the shares so vested are liable to be divested, as regards the quantum of interest, in proportion as new individuals are introduced into the class. . . . The next rule . . . is, that the mere circumstance that the person to whom such previous life interest is bequeathed by the will is also a member of the class who answered to the description of next of kin of the testator at the time of the testator's death, does not prevent the first rule from applying."—*Wharton* v. *Barker* (1858), 4 K. & J. 483, at pp. 488, 489, Page Wood, V.-C.

"If real or personal estate be given to A. for life, and after his decease to the children of B., all the children in existence at the testator's death take vested interests, subject to being partially divested in favour of children subsequently coming into existence during the life of A. Thus the objects among whom such real or personal estate becomes ultimately distributable are the children who may be living at the period of distribution and the representatives of such as may have died before that period, having survived the testator."—*In re Roberts*, *Percival* v. *Roberts*, [1903] 2 Ch. 200, at p. 202; 72 L. J. Ch. 597, at pp. 598, 599, Joyce, J.

"In a case of ambiguity or doubt, that construction is to be favoured which will allow of the child who takes a vested interest making such provision as is usual for his own family; and for this I rely upon what is called the rule in *Howgrave* v. *Cartier* (1814), 3 V. & B. 79, at p. 85, as explained in *In re Hamlet* (1888), 39 Ch. D. 426; 58 L. J. Ch. 242, especially in the judgment of Cotton, L. J."—*In re Roberts*, *Percival* v. *Roberts*, [1903] 2 Ch. 200, at p. 204; 72 L. J. Ch. 597, at p. 599, Joyce, J.

"In Jarman on Wills, 5th ed., p. 762, it is said: 'It is quite clear that a devise to A. *if* or *when* he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only.' So in Hawkins on Wills, p. 240: 'A devise to A. *when* he shall attain a given age, standing alone, and unpreceded by any intermediate interest, would probably be contingent,' and Mr. Theobald (Theobald on Wills, 5th ed., p. 496; 6th ed., p. 550) refers to the opinion of

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Mr. Fearne to the same effect."—*In re Francis*, [1905] 2 Ch. 295, at p. 300; 74 L. J. Ch. 487, at p. 490, Swinfen Eady, J.

"The general rule where the will or other instrument is silent as to the period of vesting is that the gift is vested immediately on the donee coming into existence or on the instrument coming into operation (whichever last happens), if the enjoyment is postponed merely for the convenience of the estate or to allow of an intervening or limited interest, but if the postponement of enjoyment is for reasons personal to the donee, the gift will be contingent. But in determining the period of vesting it is always considered a material circumstance if the legacy be severed from the rest of the estate."—*In re Contarior, Contarior* v. *Shea*, [1907] 1 Ch. 470, at p. 472; 76 L. J. Ch. 296, at p. 297, Joyce, J.

Implications.

Necessary or Possible.

Necessary implications arise whe. there is no room for doubt that it was the intention of the testator.

An implication, if only possible, ought not to be made to disinherit the heir-at-law.

"In a will estates are often given by implication. But I shall take this difference concerning estates that pass by implication, though it be by will. An estate given by implication of a will, if it be to the disinheriting of the heir-at-law, is not good, if such implication be only constructive and possible, but not a necessary implication. I mean by a possible implication, when it may be intended that the testator did purpose, and had an intention to devise his land to A.; but it may also be as reasonably intended, that he had no such purpose or intention to devise it to A. But I call that a devise by necessary implication to A. when A. must have the thing devised, or none else can have it. And therefore if the implication be only possible, and not necessary, the testator's intent ought not to be construed to disinherit the heir, in thwarting the dispose which the law makes of the land, leaving it to descend, where the intention of the testator is not apparently, and not ambignously to the contrary."—*Gardner* v. *Sheldon* (1555), Vaugh. 259, at p. 262, Vaughan, C. J. (cited with approval by

Farwell, J., in *In re Willatts*, *Willatts* v. *Artley*, [1905] 1 Ch. 378, at pp. 381, 382; 74 L. J. Ch. 269, at p. 270).

"There is hardly any case where implication is of necessity; but it is called 'necessary,' because the Court finds it so to answer the intention of the devisor."—*Corytou* v. *Helyar* (1745), 2 Cox, 340, at p. 348, Lord Hardwicke (cited by Knight Bruce, L. J., in *Windus* v. *Windus* (1856), 6 D. M. & G. 549, at p. 554).

"A necessary implication is that implication arising upon the words the testator has made use of, which clearly satisfies the Court what was his meaning. It is put in opposition to conjecture. Conjecture is, when you suppose what would have been the testator's meaning if he had had the whole case before him; and what, if he had thought of such an event, he would have said upon it. That is a conjecture; but for implication, you must find out his meaning, whether expressed or implied, from his words. If they have an express meaning, and he has made use of inaccurate words, you must construe his words; if they are words of sense, or declarations which are no ways accurate in legal phrase, you must see clearly what is th testator's meaning; and, if the testator's meaning is doubtful, if a Court of justice cannot say they are satisfied his intention was so, the whole will be void for uncertainty. Necessary implication, therefore, is that which leaves no room to doubt. It is not implication upon conjecture: you are not to conjecture what he would have done in an event he never thought of; that will not do, though many cases have been determined with a view to such an event."—*Jones* v. *Morgan* (1773), Fearne, C. R. App. No. III. (10th ed. (1844), Vol. 1, 577, at p. 589), Lord Mansfield, C. J.

"Implication may be founded upon two grounds. It may either arise from an elliptical form of expression, which involves and implies something else as contemplated by the person using the expression, or the implication may be founded upon the form of gift, or upon a direction to do something which cannot be carried into effect without, of necessity, involving something else in order to give effect to that direction, or something else which is a consequence necessarily resulting from that direction."—*Parker* v. *Tootal* (1865), 11 H. L. Cas. 143, at p. 161; 34 L. J. Ex. 198, at p. 203, Lord Westbury, L. C.

"I am not fond of raising estates by implication, if it can be avoided. It too often happens, I am afraid, that that is a disguised

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way of making a will instead of interpreting it."—*Ibid.*, at pp. 168, 169; L. J., at p. 206, Lord Cranworth.

Effect upon Executory Gift of failure of Prior Gift.

"The principle contended for by the counsel for the legatees is a principle with which we are all familiar—which is as old, at all events, as the case of *Jones* v. *Westcomb* (1711), 1 Eq. C. Ab. 245, c. 9, and which is very well summed up by Mr. Jarman in his book on Wills (4th ed., vol. ii. ch. 1; 5th ed., p. 1642), where he says this: 'Sometimes, however, an executory gift is made to take effect in defeasance of a prior gift, *i.e.*, to arise on an event which determines the interest of the prior devisee or legatee, and it happens that the prior gift fails *ab initio*, either by reason of its object (if non-existing at the date of the will) never coming into existence, or by reason of such object (if a person *in esse*) dying in the testator's lifetime. It then becomes a question whether the executory gift takes effect, the testator not having in terms provided for the event which has happened, although there cannot be a shadow of doubt that, if asked whether, in case of the prior gift failing altogether for want of an object, he meant the ulterior gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication.' Now, as an illustration of that, one may put such a case as this: a gift to A. for life determinable on some particular events, and then a gift over to B. on her death or some other event, which determines the estate. That has been held to apply on the determination of the life estate from any of the specified events. It being in the case supposed manifestly the intention of the testator that, subject to the provision given to A., the rest was to go to B., and B.'s enjoyment was postponed simply for the benefit of A., there being a defect in the language but not defect in the intention—the intention being seen to be exhaustive and to apply to all possible cases, when A. ceases to have any interest in the property. That is the theory. To me it is intelligible, it commends itself to one's good sense."—*In re Tredwell, Jeffray* v. *Tredwell*, [1891] 2 Ch. 640, at pp. 654, 655; 60 L. J. Ch. 657, at p. 662, Lindley, L. J.

Gifts to a Class.

"It appears to be settled that the same rules are applicable to the case of realty and personalty for the purpose of fixing the period, when the persons to take under a class name are to be ascertained, though the reasons for the rules in the case of personalty, which it is desirable to distribute as soon as possible, do not apply to realty."—Theobald's Law of Wills, 3rd ed., p. 229.

"Where a time of payment was pointed out, as where a legacy is given to all the children of A., when they shall attain twenty-one, it was too late to say that the time so pointed out shall regulate among what children the distribution shall be made. It must be among the children *in esse* at the time the eldest attains such age. He [Lord Loughborough] said he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children."—*Andrews* v. *Partington* (1791), 3 Bro. C. C. 401, at p. 404, Lord Loughborough, L. C.

"To induce the Court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. I must make a new will for the testator if I split into portions his general bequest as to the class, and say that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests what he never intended them to be, viz., a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests in each instance to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."—*Leake* v. *Robinson* (1817), 2 Mer. 363, at p. 390, Sir William Grant, M. R.

"Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, and not the less so because there is a discretion conferred

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on the trustees to apply less than the whole income for that purpose."—*For* v. *For* (1875), L. R. 19 Eq. 286, at pp. 290, 291, Sir G. Jessel, M. R.

"The authorities seem to me to amount to this: that, where, upon looking at the whole will, the testator must be considered to have made it upon the basis or footing of adopting or taking a certain time as the period of distribution or division, the Court must, taking that period, construe the will accordingly, although possibly it is not the period for the actual distribution of the fund; but for the purposes of the will it must be taken to be so; therefore, the class living at the period take."—*In re Emmet's Estate* (Nov. 29th, 1879, 1880), 13 Ch. D. 484, at p. 489; 49 L. J. Ch. 31, at p. 23, Hall, V.-C.

"The present appeal is from a decision of Vice-Chancellor Hall on the construction of a will, which appears to me as clearly and well drawn as any will need be. Under that will any layman would understand that all the children of George Nelson Emmet, at whatever time they were born, would become entitled, and in the absence of authority so should I. There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when the share becomes payable."—*In re Emmet's Estate* (Jan. 21st, 1880), 13 Ch. D. 484, at p. 490; 49 L. J. Ch. 295, at p. 295, Jessel, M. R.

"A gift is said to be to a 'class' of persons, when it is to all those who shall come within the category or description defined by a general or collective formula, and who, if they take at all, are to take one divisible subject in certain proportionate shares; and the rule is, that the vice of remoteness affects the class as a whole, if it may affect an unascertained member of its members. That was really the point decided in the case of *Leake* v. *Robinson* (1817), 2 Mer. 363, at p. 390."—*Pearks* v. *Moseley* (July 5th, 1880),

5 App. Cas. 714, at p. 723; 50 L. J. Ch. 57, at pp. 61, 62, Lord Selborne, L. C.

"The rule in question depends upon no principle whatever, but is simply a rule of convenience, and no doubt the judges before whom it has come have felt that in many cases it pressed very hardly, because it excludes children intended by the testator to take. But the exclusion is simply, as it is said, in order to arrive at a result which is less inconvenient than extending the period during which the class is to be formed. But, in the present case, where there is an accumulation directed, and no one can, therefore, enter into the actual enjoyment of his share until the period of accumulation has come to an end, I do not see that there is any consideration of convenience, or of lesser inconvenience, which obliges me to shut up the class until the period of accumulation comes to an end. So far as I can judge from the expressions used by the judges in other cases, they seem to be of opinion that the period which closes the class is the period when the first member of the class becomes entitled to the actual possession or enjoyment of his share. I hold, therefore, that all the children born during the period of accumulation can take."—*Watson* v. *Young* (1885), 28 Ch. D. 436, at pp. 445, 446; 54 L. J. Ch. 502, at p. 506, Pearson, J.

"I take it that is a well-known canon of construction that when there is a gift to a class, as soon as the gift is divisible and there are members of the class entitled to receive their shares, the class cannot be added to. This is thus expressed by Page Wood, V.-C., in *Re Smith* (1862), 2 J. & H. 594, at p. 601: 'As long as a fund is in hand, the general rule is that new members of the class may be let in. The time when the money is distributable is the time for ascertaining the class, after which no more can be let in. Children born after the fund becomes divisible are not entitled to share.' That is a well-established rule, and is not to be departed from in this case."—*In re Bedson's Trusts* (1885), 28 Ch. D. 523, at pp. 526, 527; 54 L. J. Ch. 644, at p. 646, Cotton, L. J.

"The result is that you may have to take a testator's death as the time when the class is ascertained; but if there is a life estate which prevents the distribution of the fund till the life estate is over, then you look to the period of distribution, which is, in that case, the determination of the life estate, and then you find, not who the persons who will take are, but you fix the maximum number of which the class can consist, and then divide the shares,

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as far as they are divisible, upon that footing. If there are six children living, one of whom has attained twenty-one, it will get its one-sixth; if another attains twenty-one, it will get its sixth afterwards; if a third dies under twenty-one it does not take a share, and the fund will be divisible into fifths, and the first two who have had their sixth shares would be found entitled each to one-fifth of another sixth, and so on. In the case of a life estate, the period of distribution is usually the death of the tenant for life, but the period of distribution is not necessarily the determination of the life estate. The period at which the fund has to be distributed is the time that actually has to be taken."—*In re Knapp's Settlement*, [1895] 1 Ch. 91, at pp. 96, 97; 64 L. J. Ch. 112, at p. 114, North, J.

"Where the Court, as a matter of construction, arrives at the conclusion that a particular class of persons is to be benefited according to the intention of the testator, if there has been an inaccurate enumeration of the persons composing that class, the Court will reject the enumeration. I think the principle of the cases goes no further than that."—*In re Stephenson, Donaldson* v. *Bamber*, [1897] 1 Ch. 75, at p. 81; 66 L. J. Ch. 93, at p. 95, Lord Russell of Killowen, L. C. J.

"Now, the rule laid down in *Andrews* v. *Partington* (1791), 3 Bro. C. C. 401, has been repeatedly stated to be a rule merely of convenience. When the rule is adopted the solution arrived at is the result of an endeavour by the Court to reconcile two apparently inconsistent directions—the one that the whole class of children shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained. The Court has cut that knot by closing the class at the date at which the first child is to take. But, as I shall show from decided cases, the rule is never applied unless it is necessary. Where it is unnecessary to resort to it, you give effect to the disposition as it is, and directly you find, as you do in this case, that there is a direction to accumulate after the date at which the eldest child attains twenty-one—that is to say, where the fund to be divided is a fund to be aggregated and accumulated after that date, so that the divisible fund is not known at that date—you are driven to the conclusion that the child who first attains twenty-one cannot have that which is apparently given to him at that date because the sum to be divided is not then known. Therefore, where you find a direction to accumulate to a later date, the rule in *Andrews* v. *Partington*

(1791), 3 Bro. C. C. 404, does not apply."—*In re Stephens*, [1904] 1 Ch. 322, at p. 328; 73 L. J. Ch. 3, at p. 6, Buckley, J.

Law of Remoteness.

"The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that in dealing with words which are obscure and ambiguous, weight, even in a question of remoteness, may not sometimes be given to the consideration that it is better to effectuate than to destroy the intention; but I do say that, if the construction of the words is one about which a Court would have no doubt, though there was no law of remoteness, that construction cannot be altered, or wrested to something different, for the purpose of escaping from the consequences of that law."—*Pearks* v. *Moseley* (1880), 5 App. Cas. 714, at p. 719; 50 L. J. Ch. 57, at p. 59, Lord Selborne, L. C. (cited by Stirling, J., in *In re Mervin*, *Mervin* v. *Crossman*, [1891] 3 Ch. 197, at pp. 200, 201; 60 L. J. Ch. 671, at p. 673; and in *In re Bowen*, *Lloyd Phillips* v. *Davis*, [1893] 2 Ch. 491, at p. 496; 62 L. J. Ch. 681, at p. 684).

Rule against Perpetuities.

"We are not at liberty to misconstrue the will in order to avoid an intestacy resulting from the application of that rule [against perpetuities], any more than in cases in which gifts are bad under the Charitable Uses Act. We must construe the will and ascertain its meaning."—*In re Turney*, [1899] 2 Ch. 739, at p. 744; 69 L. J. Ch. 1, at pp. 3, 4, Lindley, M. R.

"I agree, especially in the view that, when it is possible so to construe a will as not to render a material part of it void by an application of the rule against perpetuities, it is desirable to do so. Of course, as the Master of the Rolls has said, the Court has no right to misconstrue a will with that object, but, if the language of a will is ambiguous, it is right to lean rather to a construction which will undoubtedly carry out the intention of the testator, in

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the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear."—*Ibid.*, at p. 747; L. J., at p. 5, Sir F. H. Jeune.

Section VII.

SPECIAL MATTERS CONTINUED.

Disinheriting.

The heir-at-law is not disinherited by a devise unless there be express words or necessary implication.

"The rule of law is, that an heir-at-law shall not be disinherited by a devise, unless there be express words, or the intent of the devisor be manifest and apparent."—*Roe* d. *Fulham* v. *Wickett* (1741), Willes, 303, at p. 309, Willes, C. J.

"To defeat the heir, it must appear to be the clear intention of the testatrix, collected from the will, either by express words, or necessary implication, that the devisee should take."—*Doe* v. *Wilkinson* (1788), 2 T. R. 209, at p. 213, Grose, J.

"And one rule is clear, that the heir-at-law is not to be dis-

inherited unless the devisor's intention to disherit him can be collected from the words of the will."—*Dean* d. *Moore* v. *Mellor* (1794), 5 T. R. 559, at pp. 563, 564, Grose, J.

"The rule of law being, that the intent of the testator to disinherit his heir-at-law must be clear and plainly appear in his will, otherwise his heir shall not be disinherited."—*Trent* v. *Hanning* (1806), 7 East, 97, at p. 106, Lawrence, J.

"The rule of law is peremptory, that the heir shall not be disinherited unless by plain and cogent inference arising from the words of the will."—*Doe* v. *Dring* (1814), 2 M. & S. 448, at p. 454, Lord Ellenborough, C. J.

Devises.

General.

General devise of land includes customary copyholds and leasehold estates.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 26. "A devise of the land of the testator, or of the land of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

General devise of real estate includes real estate over which the testator has a general power of appointment.

General bequest of personal estate includes personal property over which the testator has a general power of appointment.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 27. "A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case

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may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

"The enactment [1 Vict. c. 26, s. 27] was intended to get rid of the difference between property and power, and to make it unnecessary in framing a will to refer to the instrument creating the power or to the actual subject of the power."—*In re Wilkinson* (1869), L. R. 4 Ch. 587, at pp. 589, 590, Sir C. J. Selwyn, L. J.

"I will next inquire what is the effect of sect. 27 [Wills Act, 1837]. It is to be observed that, throughout, the language of the section is addressed to bequests of a general description, not to bequests of particular property."—*In re Greaves' Settlement Trusts* (1883), 23 Ch. D. 313, at p. 318; 52 L. J. Ch. 753, at p. 755, Fry, J.

"According to its natural construction, this section [27 of the Wills Act, 1837] appears to me to pre-suppose the existence of some real estate, or some personal estate, as the case may be, which is at the time subject to a general power of appointment, and which, though not the testator's property, is at his disposition under a general power. A general gift of property described as his own will then, under the section, operate to dispose of the subject-matter of the power by way of appointment. In short, the statute alters the law as to the sufficiency of general words of gift to operate as words of appointment—or rather the presumption that they are intended so to operate—in the case of property which is at the time absolutely at the testator's disposal. But I cannot think that the language of the section naturally extends to the creation of property at the expense of another, or to the imposition of an otherwise non-existent charge upon the property of another, or to the conversion *pro tanto* of the real estate of another into a money-charge which, if and when charged, will be personal estate which the testator will have power to appoint in any manner he may think proper, but which has no existence at all unless and until the testator creates it. It seems to me that

we are asked to presume the intention to create a subject-matter, in the shape of personal estate, in order that the Wills Act may operate upon it, and that this is an extension of the Act which its language does not justify, and which goes beyond the usual and natural intention of testators to which the Act desired to give effect."—*In re Wallinger's Estate*, [1898] 1 I. R. 139, at pp. 148, 149, FitzGibbon, L. J. (quoted and adopted as expressing exactly that which seems to be the effect of the section by Buckley, J., in *In re Salvin*, *Marshall* v. *Wolseley*, [1906] 2 Ch. 459, at pp. 464, 465; 75 L. J. Ch. 825, at p. 829).

"As I understand it, sect. 27 of the Wills Act is a rule of construction. It is a section requiring you, when reading a will, to attribute to its language a meaning which, but for that section, it would not bear. It is a rule of construction applicable to documents as to which this Court is the Court of construction."—*In re D'Este's Settlement Trusts*, *Poulter* v. *D'Este*, [1903] 1 Ch. 898, at p. 903; 72 L. J. Ch. 305, at p. 307, Buckley, J.

"Sect. 27 of the Wills Act [1 Vict. c. 26] is divided into two parts, the first relating to real estate and the second to personal estate. A general devise of real estate is to be construed to include any real estate which the testator has power to appoint in any manner he may think proper, and a bequest of personal estate is to be construed to include any personal estate which he has power to appoint in any manner he may think proper."—*In re Salvin*, *Marshall* v. *Wolseley*, [1906] 2 Ch. 459, at p. 464; 75 L. J. Ch. 825, at p. 827, Buckley, J.

"It has been often said, and is now a platitude, that the object of the section [27 of Wills Act, 1837] was to abolish the distinction between property and a general power over property, because an ordinary man considers in the latter case that the property is his own."—*In re Jacob*, *Mortimer* v. *Mortimer*, [1907] 1 Ch. 445, at p. 449; 76 L. J. Ch. 217, at p. 219, Parker, J.

Devise without words of limitation.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 28. "Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will."

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Limitation of a Trust.

"In limitations of a trust either of real or personal estate to be determined in this Court, the construction ought to be made according to the construction of limitations of a legal estate; with this distinction, unless the intent of testator or author of the trust plainly appears to the contrary."—*Garth* v. *Baldwin* (1755), 2 Ves. Sen. 646, at p. 655, Lord Hardwicke, L. C.

Words importing a Want or Failure of Issue.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 29. "In any devise or bequest of real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise: Provided, that this Act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue."

Devise to Trustee or Executor.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 30. "Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication."

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 31. "Where any real estate shall be devised to a trustee without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied."

"The 31st section [of the Wills Act, 1837] is probably another drafting of the 30th, and the same observations apply to that. I believe the real history of the two sections is, that they are two drafts dealing with the same subject, though both remain in the Act of Parliament."—*Freme* v. *Clement* (1881), 18 Ch. D. 499, at p. 514; 50 L. J. Ch. 801, at pp. 808, 809, Jessel, M. R.

Devisee of Estate Tail dying in Testator's Lifetime.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect 32. "Where any person to whom any real estate shall be devised for an estate tail or an estate in *quasi* entail, shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise 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."

Devise or Bequest to Children or Issue dying in Testator's Lifetime.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 33. "Where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had

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happened immediately after the death of the testator, unless a contrary intention shall appear by the will."

Conditional Legacies.

Absolute Gift—Gift over on Death.

"There is, in my judgment, no doubt that, when a gift is made to a person in terms absolute, and that is followed by a gift over, in the event of the death of that person *sub modo* (that is to say, without issue or subject to any other limitation which makes the death a contingency), the effect of the gift over is *primâ facie* to prevent the first taker from taking absolutely, to convert the interest of the first taker into one subject to the contingent devise or bequest over. In such a case there is no reason to confine the meaning of the word 'death' to death during the lifetime of the testator or death during the life of the tenant for life. The only reason, or the main reason, why that is done in certain cases is, that the testator has spoken of death which is certain as a contingency, but when the testator has spoken of death *sub modo*, that being contingent, there is no need to render it contingent by introducing any limitation."—*In re Haygrard, Creery* v. *Lingwood* (1882), 19 Ch. D. 470, at p. 472; 51 L. J. Ch. 513, at p. 514, Fry, J.

Children "en ventre."

"A long series of cases has established that, for purposes of succession to property on an intestacy and for many purposes connected with wills and their construction, a child *en ventre sa mère* at a particular time, who is subsequently born alive, is to be considered as 'living' or 'born' at that time . . . . *primâ facie*, in the absence of sufficiently weighty considerations to the contrary, for the purpose of devolution of property in connection with intestacies or wills, no distinction ought to be drawn between a child born at a particular time and a child at that time *en ventre sa mère* and subsequently born alive. In particular, I think, with regard to wills, that they ought to be construed and given effect to without making any such distinction, unless the context requires a distinction to be ma[illegible]—*Villar* v. *Gilbey*, [1906] 1 Ch. 583, at pp. 590, 592; 75 L[illegible]. 308, at pp. [illegible], 312, Romer, L. J.

Doctrine of Lapse.

"I think that the cases of *Williamson* v. *Naylor* (1838), 3 Y. & C. 208; *Phillips* v. *Phillips* (1844), 3 Hare, 281; 13 L. J. Ch. 445; and *In re Sowerby's Trust* (1856), 2 K. & J. 630, have established the rule that, if the Court finds, upon the construction of the will, that the testator clearly intended not to give a mere bounty to the legatee, but to discharge what he regarded as a moral obligation, whether it were legally binding or not, and if that obligation still exists at the testator's death, there is no necessary failure of the testator's object merely because the legatee dies in his lifetime; and therefore death in such a case does not cause a lapse."—*Stevens* v. *King*, [1904] 2 Ch. 30, at p. 33; 73 L. J. Ch. 535, at p. 536, Farwell, J.

Connection of Independent Devises.

"The tendency of modern decisions (and good sense requires it) is to read the different clauses in a will referentially to each other, unless they are clearly independent."—*Ford* v. *Ford* (1848), 6 Hare, 486, at p. 492, Wigram, V.-C.

"Now, the general rule on this subject is well stated in Mr. Jarman's work on Wills. 'Several independent devises, not grammatically connected or united by the expression of a common purpose, must be construed separately, and without relation to each other, although it may be conjectured from similarity of relationship or other such circumstances that the testator had the same intention in regard to both. There must be an apparent design to connect them.' I have referred to the authorities which he cites, and they justify the terms in which the rule is expressed."—*In re Johnston, Cockerell* v. *Earl of Essex* (1884), 26 Ch. D. 538, at p. 545; 53 L. J. Ch. 645, at pp. 647, 648, Chitty, J.

Residuary Devise includes Lapsed and Void Devises.

Wills Act, 1837 (7 Wm. IV. & 1 Vict. c. 26).

Sect. 25. "Unless a contrary intention shall appear by the will, such real estate or interest as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the

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testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

Revocation.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 19. "No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 20. "No will or codicil or any part thereof shall be revoked otherwise than as aforesaid [by marriage, sect. 18], or by another will or codicil executed in manner hereinbefore required [sect. 9], or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed [sect. 9], 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."

"In dealing with the authorities I will first read a passage from Williams on Executors, 7th ed., Vol. 1, p. 162; 9th ed., Vol. 1, p. 138, because that passage in its entirety, and in particular the final clause of it, has been most emphatically and judicially affirmed. It was affirmed by Sir James Wilde (afterwards Lord Penzance) in *Lemage* v. *Goodban* (1865), L. R. 1 P. & M. 57, at p. 62; 35 L. J. P. 28, at p. 30, and by Sir James Hannen in *In the goods of Petchell* (1874), L. R. 3 P. & M. 153, at p. 156; 43 L. J. P. 22, at p. 24. The passage in Williams on Executors is as follows: 'The mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly, or in effect, revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that "no man can die with two testaments," yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are incon-

sistent.' "—*Townsend* v. *Moore*, [1905] P. 66, at pp. 77, 78; 74 L. J. P. 17, at p. 22, Vaughan Williams, L. J. [See also *Simpson* v. *Foxon*, [1907] P. 54, at p. 57; 76 L. J. P. 7, Sir Gorell Barnes, P.]

Extrinsic Evidence.

"Sir James Hannen there [in *Jenner* v. *Effinch* (1879), 5 P. D. 106, at p. 111; 49 L. J. P. 25, at p. 26] said: 'By the Wills Act (1 Vict. c. 26, s. 20) it is enacted that "no will or codicil or any part thereof shall be revoked otherwise than aforesaid (*i.e.*, by marriage) or by another will or codicil executed in manner hereinbefore required." This leaves untouched the question what will, being duly executed, will revoke an earlier one. I think it clear that no express words of revocation are necessary. The authorities appear now to establish that revocation by implication is sufficient. On this point I refer to what I said in *Dempsey* v. *Lawson* (1877), 2 P. 98; 46 L. J. P. D. 23.' Summed up in the report of *Jenner* v. *Effinch* (1879), 5 P. D. 106, at p. 111; 49 L. J. P. 25, at p. 27: 'The question what instruments are to be admitted to probate, as together or separately constituting the testator's last will, is solely for the Court of Probate, as it was formerly for the Ecclesiastical Court. In considering this question the Prerogative Court did in some circumstances admit parol evidence with respect to the factum of the instrument in order to investigate *quo animo* the act was done by the testator. The subject was fully discussed in *Thorne* v. *Rooke* (1841), 2 Curt. 799, and he came to the conclusion that where there is something on the face of the instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to the previous will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions. In the case before him the learned judge thought there was no such doubt or ambiguity, but the case of *Methuen* v. *Methuen* (1817), 2 Phillim. 416, commented on and not disapproved of by Sir H. Jenner, may be referred to as showing what doubt arising on the face of the instrument, and taken in connection with the facts known to the testator, will be sufficient to justify the admission of external evidence. There the testator, having made one codicil, under which his wife and daughters took certain benefits, after the marriage of one of the daughters made a codicil in which, after reciting that he had made a provis[illegible] for

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this daughter, proceeded to make dispositions in favour of the wife and daughters differing from those in the first codicil. There was nothing making it absolutely impossible that the testator meant their disposition to be cumulative, but, as Sir H. Jenner points out, it did appear that if both the codicils had been acted upon "the property of the deceased would not have been equal to the payment of all the legacies that had been given." It was upon this state of facts that Sir J. Nicholl said: "The first instrument remains uncancelled and there are no revocatory words in the second. It is contended that the Court has no power to inquire further, but the same rules do not apply in a case relating to the factum of the will which would apply if the inquiry were concerning the construction of it. In the Court of Probate the whole question is one of intention. The *animus testandi* and the *animus revocandi* are completely open to investigation in this Court. It is admitted that if there is doubt on the face of the instrument the Court may admit parol evidence." That is an authority that in cases of doubt external evidence is admissible."—*In the Estate of Ann Faith Bryan*, [1907] P. 125, at pp. 130, 131, 132; 76 L. J. P. 30, at pp. 33, 34, Sir Gorell Barnes, President.

Alterations.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 21. "No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

Unattested alterations and interlineations must, in the absence of evidence, or as a general rule, be presumed to have been made after execution.

"*Cooper* v. *Bockett* (1844—6), 4 Moo. P. C. 419, decided that as a general rule, in the absence of evidence, unattested alterations and interlineations must be presumed to have been made after execution. I think that in this case, however, I am not bound to draw that presumption. For I conceive that the Court is not precluded by the absence of direct evidence of the fact from considering the nature of the interlineation and the internal evidence, if any, furnished by the document itself."—*In the goods of Cadge* (1868), L. R. 1 P. & D. 543, at p. 545; 37 L. J. P. 15, at p. 46, Sir J. P. Wilde.

The onus lies on the party who seeks to derive an advantage from an alteration in a will to show that the alteration was made before the execution of the will.

"In the absence of evidence there is, in general, a presumption that all alterations made in a will were made after its execution. The authority for this is *Cooper* v. *Bockett* (1844—6), 4 Moo. P. C. 419. But the rule is somewhat differently expressed by the late Lord Chancellor, then Sir W. P. Wood, in *Williams* v. *Ashton* (1860), 1 J. & H. 115. He there [at p. 118] said, 'I do not think that it is quite a correct mode of stating the rule of law to say that alterations in a will are presumed to have been made at one time or another. The correct view is that the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed. I do not consider that the Court is bound to say that it will presume such alterations to have been made, either before or after execution. With regard to a will I do not see any necessary presumption of the kind.' The onus, therefore, lies on those who assert the alteration to show that it was made before the execution of the will. Stated, however, as the rule generally is, that there is a presumption that alterations on the face of a will were made after its execution, this presumption may be rebutted by evidence of declarations made before and not after the execution. *Doe* d. *Shallcross* v. *Palmer* (1851), 16 Q. B. 747; 20 L. J. Q. B. 367."

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—*In the goods of Sykes* (1873), L. R. 3 P. & D. 26, at p. 27; 42 L. J. P. 17, at p. 17, Sir J. Hannen.

Revival.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 22. "No will or codicil or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required [sect. 9] and showing an intention to revive the same; and when any will or codicil which shall be partly revoked and afterwards wholly revoked shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

Republication.

"It seems to me, then, that in order that republication may be implied, something must be found in the second testamentary instrument from which the inference can be drawn that, when making and executing it, the testator 'considered the will as his will.'"—*In re Smith, Bilke* v. *Roper* (1890), 45 Ch. D. 632, at p. 639; 60 L. J. Ch. 57, at p. 60, Stirling, J.

Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26).

Sect. 34. "Every will re-executed or republished or revived by any codicil shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

Incorporation of Instruments.

Where there is a reference in a duly executed testamentary document to an ascertainable existing unattested written instrument, parol evidence is admissible to incorporate the latter in the former.

"The rule of law is that an instrument, properly attested, in order to incorporate another instrument, not attested, must describe it so as to be a manifestation of what the paper is which is meant

to be incorporated; in such a way that the Court can be under no mistake."—*Smart* v. *Prujean* (1801), 6 Ves. 560, at p. 565, Lord Eldon (cited by Cozens-Hardy, M. R., in *University College of North Wales* v. *Taylor*, [1908] P. 140, at p. 144; 77 L. J. P. 20, at p. 22).

"A reference in a will may be in such terms as to exclude parol testimony, as where it is to papers not yet written, or where the description is so vague as to be incapable of being applied to any instrument in particular, but the authorities seem clearly to establish that where there is a reference to any written document as then existing in such terms that it is capable of being ascertained, parol evidence is admissible to ascertain it."—*Allen* v. *Maddock* (1858), 11 Moo. P. C. 427, at p. 454, Lord Kingsdown, delivering the opinion of the Privy Council.

"The result of the authorities, both before and since the late Act (Wills Act, 1837), appears to be, that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified."—*Allen* v. *Maddock* (1858), 11 Moo. P. C. 427, at p. 461, Lord Kingsdown, delivering the opinion of the Privy Council.

"It seems to me that it has been established that if a testator, in a testamentary paper duly executed, refers to an existing unattested paper, the instrument so referred to becomes part of his will; in other words, it is incorporated into it; but it is clear that, in order that the informal document should be incorporated in the validly-executed document, the latter must refer to the former as a written instrument then existing—that is, at the time of execution—in such terms that it may be ascertained. A leading case upon this subject is *Allen* v. *Maddock* (1858), 11 Moo. P. C. 427, and it is desirable also to refer to *In the goods of Mary Sunderland* (1866), L. R. 1 P. & M. 198; 35 L. J. P. 82."—*In the goods of Smart*, [1902] P. 238, at p. 240; 71 L. J. P. 123, at p. 124, Gorell Barnes, J.

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SECTION VIII.

CONDITIONS.

Conditions Precedent and Subsequent.

The same words in a will make a condition precedent or subsequent according to the nature of the intent of the testator.

Where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void. Conditions subsequent which operate to annul previous gifts, are not looked upon favourably.

Where a vested estate is to be defeated by a condition or a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine.

Where the language of the will and the intention of the testator admit of it devises "upon condition" are to be considered as imposing a trust and not as conditions which take the estate out of the devisee if he does not comply with them.

If the intention of the testator as evidenced by the words he has used is more consistent with the inference that he intended the condition to be a condition subsequent rather than a condition precedent, then, if the words are capable of admitting both interpretations the Court ought to hold the condition to be a condition subsequent.

Conditions "malum in se" or "malum prohibitum" or impossible.

"All conditions annexed to estates, being compulsory to compel a man to do anything that is in its nature good or indifferent, or being restrictive to restrain or forbid the doing of anything which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any statute, or the like, all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawful act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void."—Shep. Touch., p. 132 (cited in part by Swinfen Eady, J., in *In re Beard*, [1908] 1 Ch. 383, at p. 386; 77 L. J. Ch. 265, at p. 266).

"All conditions annexed to estates that contain in them matter

at the time of making of them impossible to be done, are void. . . . And in these cases also if the condition be subsequent, the condition is void only, and the estate is absolute; and if the condition be precedent, the condition and the estate both are void; for an estate can neither commence nor increase upon an impossible condition. And if the thing to be done by the condition be possible at the time of the making of the condition, and do afterwards by the act of God become impossible; the condition is become void, and the estate absolute."—*Ibid.*, pp. 132, 133.

"In case of a feoffment in fee with a condition subsequent that it is impossible, the state of the feoffee is absolute; but if the condition precedent be impossible, no state or interest shall grow thereupon, and to illustrate these by examples you shall understand. If a man be bound in an obligation, &c., with condition that if the obligor do go from the Church of St. Peter in Westminster to the Church of St. Peter in Rome within three hours, that then the obligation shall be void. The condition is void and impossible, and the obligation standeth good. And so it is if a feoffment be made upon condition that the feoffee shall go as is aforesaid, the state of the feoffee is absolute, and the condition impossible and void. . . . . But it is commonly holden that if the condition of a bond, &c. be against law, that the bond itself is void. But herein the law distinguisheth between a condition against law for the doing of any act that is *malum in se* and a condition against law that concerneth not anything that is *malum in se*), but therefore is against law, because it is either repugnant to the State or against some maxim or rule in law. And therefore the common opinion is to be understood of conditions against law for the doing of some act that is *malum in se*, and yet therein also the law distinguisheth. As if a man be bound upon condition that he shall kill I. S. the bond is void. But if a man make a feoffment upon condition that the feoffee shall kill I. S. the estate is absolute and the condition void."—*Co. Litt.* 206 b.

"I know of no words that either in a will or deed necessarily make a condition precedent, but the same words will either make a condition precedent or subsequent, according to the nature of the thing and the intent of the parties. If, therefore, a man devise one thing in lieu and consideration of another, or agree to do anything or pay a sum of money in consideration of a thing to be done, in these cases that which is the consideration is looked upon as a condition precedent."—*Acherley* v. *Vernon* (1739), Willes, 153, at pp. 156—8.

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Condition Repugnant to Gift.

"I have looked into the cases that have been mentioned, and find it laid down as a rule long ago established that where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void."—*Bradley* v. *Peixoto* (1797), 3 Ves. 323, at p. 325, Lord Alvanley.

Possible and Impossible Conditions.

"If a condition be, to do a thing which by no means can be done, it shall be said to be an impossible condition; as, to go from London to Rome in three hours. To assign a commission of bankrupt; for the commission cannot be assigned. But if the condition be improbable, and out of his power to do, yet it shall not be said to be impossible. As, if the condition be, that a married man shall marry such a woman; for it is possible that his present wife may die before him and the other woman . . . . So, though it be out of human power; as that it shall rain to-morrow; for it is possible."—Com. Dig. tit. Condition, D. 2 (cited by Lord Cranworth, V.-C., in *Egerton* v. *Earl Brownlow* (1851), 4 Sim. N. S. 464, at pp. 498, 499; 20 L. J. Ch. 645, at p. 652).

"When the condition is extreme, that is to say, either necessary or impossible, such condition hindereth not the legatary, but that he may recover the legacy; but that impossibility is with this limitation When the condition is not impossible at first, but becomes impossible afterwards, for then it is not void, but makes the disposition void . . . . These rules annexed to conditional legacies seem established on great authority, and founded on good sense. For if I annex a condition to a legacy, impossible at the time of imposing it, the legacy can never take effect, consequently it is repugnant, as if I give A. 100*l. si mare clauserit, si cælum digito attigerit*; but if I give a legacy upon a possible event, that is not repugnant to the nature of the gift, but only goes in restriction of the testator's benevolence; and no person has a right to impose a measure upon the testator's generosity, or to say that the condition imposed is whimsical or capricious."—*Lowther* v. *Cavendish* (1758), 1 Eden, 99, at pp. 116, 117, Lord Northington, L. C.

A condition against public policy or the policy of the law is illegal and void.

"This doctrine of the public good or the public safety, or what is sometimes called 'public policy,' being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public good, and on that alone; and the name and authority of nearly all the great lawyers (whose decisions and opinions have been extensively reported) will be found associated with this doctrine in some shape or other. It is distinctly laid down by Coke [66a], '*nihil quod est inconveniens est licitum.*' It is above a hundred years ago that Lord Hardwicke, in *The Earl of Chesterfield* v. *Janssen* (1750), 1 Atk. 301, at p. 352, thus expressed himself in giving judgment, alluding to marriage-brokage bonds. The Court 'relieves for the sake of the public as a general mischief.' May I venture to ask your lordships whether peerage-brokage bonds would be entitled to greater favour? Lord Hardwicke continues: 'So in bargains to procure offices, neither of the parties is defrauded or unapprized of the terms, but it serves to introduce unworthy objects into publick offices: and therefore, for the sake of the publick, the bargain is rescinded.' And again: 'Political arguments in the fullest sense of the word, as they concern the government of a nation, must [be], and have always been of great weight in the consideration of this Court, and though there may be no *dolus malus* in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said that it regards the public utility.' So in *Lawton* v. *Lawton* (1743), 3 Atk. 13, at p. 16, the same eminent judge said: 'These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.'"—*Egerton* v. *Earl Brownlow* (1853), 4 H. L. Ca. 1, at pp. 144, 145; 23 L. J. Ch. 348, at p. 385, Lord Lyndhurst, L. C. B.

"The conclusions to which I have arrived, from the decided cases and the principles they involve, are that all matters relating to the public welfare, all acts of the legislature or the executive, must be decided and determined upon their own merits only."—*Ibid.*, pp. 149, 150; L. J., at p. 385.

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Conditions Subsequent.

"I know, by the authorities which have been referred to, that conditions which were intended to defeat an estate have defeated an estate in contingency just as much as a vested estate; that they are odious, as it is said, in law, and as it is also said, by equally high authorities, the Institutes and *Sheppard's* Touchstone, that they must be submitted to strict construction; that is, you are not to give a favourable construction to a proviso the object of which is to defeat an estate already created; but that, if that estate is to be defeated, it must be so by clear and express terms, within the limits of the instrument creating it"—*Egerton* v. *Earl Brownlow* (1853), 4 H. L. Cas. 1, at p. 208; 23 L. J. Ch. 348, at p. 405, Lord St. Leonards (referred to by Fry, J., in *In re Viscount Exmouth* (1883), 23 Ch. D. 158, at pp. 164, 165; 52 L. J. Ch. 420, at p. 422).

"There is no doubt that, generally speaking, conditions subsequent which operate to annul previous gifts, are not looked upon favourably."—*Dunne* v. *Dunne* (1855), 3 Sm. & Giff. 22, at p. 27, Sir J. Stuart, V.-C.

"I consider that, from the earliest times, one of the cardinal rules on the subject has been that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."—*Clavering* v. *Ellison* (1859), 7 H. L. Cas. 707, at p. 725; 29 L. J. Ch. 761, at p. 765, Lord Cranworth (cited by Fry, J., in *In re Viscount Exmouth* (1883), 23 Ch. D. 158, at p. 165; 52 L. J. Ch. 420, at p. 422).

"We have the authority of Lord St. Leonards, the highest, perhaps, of the present day with regard to the law of real property, for saying that the tendency in modern times has been to depart from the strict interpretation adopted in earlier periods of our law, when these matters were considered only with reference to the common law; and that, where the language of the will and the intention of the testator admit of it, these devises 'upon condition' are to be considered as imposing a trust, and not as conditions which take the estate out of the devisee if he does not comply with them: 1 Sugden on Powers, 7th ed. 122."—*Wright* v. *Wilkin*

'1860), 2 B. & S. 232, at p 252; 31 L. J. Q. B. 7, at p. 9, Cockburn, C. J.

"Lord Macclesfield, when Chief Justice of the Queen's Bench, in the celebrated case of *Mitchel* v. *Reynolds* (1711), 1 P. Wms. 181, described very clearly what are conditions which shall be considered to be invalid; and (at p. 189) he said: 'All the instances of conditions against law in a proper sense are reducible under one of these heads:—1st. Either to do something that is *malum in se* or *malum prohibitum*. 2ndly. To omit the doing of something that is a duty. 3rdly. To encourage such crimes and omissions. Such conditions as these the law will always and without any regard to circumstances defeat, being concerned to remove all temptations and inducements to those crimes.'"—*Wilkinson* v. *Wilkinson* (1871), L. R. 12 Eq. 604, at p. 608; 40 L. J. Ch. 242, at p. 244, Sir John Stuart, V.-C.

"Certain passages in some of the authorities which speak of some impossible conditions as not being enough to defeat a gift, even when they are in form precedent; the real meaning of which is that a condition may be expressed with relation to some matters which are of such a nature that there is no condition at all unless those matters exist."—*Yates* v. *University College, London* (1873), L. R. 8 Ch. 454, at p. 461, Lord Selborne.

"Jarman on Wills [4th ed., Vol. 2, p. 12; 5th ed., p. 852] states the law, adopted from the Civil Law, to be that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute just as if the condition had been subsequent; but that, where it is illegal as involving *malum in se*, the Civil agrees with the Common Law in holding the gift and condition void. This law is recognized in Williams on Executors (6th ed., p. 1174; 8th ed., pp. 1269, 1270; 9th ed., pp. 1127, 1128)."—*In re Moore, Trafford* v. *Maconochie* (1888), 39 Ch. D. 116, at p. 122; 57 L. J. Ch. 320, at p. 323, Kay, J.

"In one sense the rule rejecting certain conditions, which is borrowed from the Civil Law, is a rule of construction. That is, when you find a legacy coupled with an invalid condition, the will is to be construed as if the condition was not there. But, obviously, it must first be determined whether there is a conditional legacy; and the construction for the purpose is independent of and must precede the application of the rule."—*In re*

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Moore, Trafford v. *Maconochie* (1888), 39 Ch. D. 116, at p. 125; 57 L. J. Ch. 321, at p. 325, Kay, J.

"The rule is thus stated by Mr. Jarman (4th ed., Vol. 2, p. 12; 5th ed., pp. 852, 853): 'But with respect to legacies out of personal estate, the Civil Law, which in this respect has been adopted by Courts of Equity, differs in some respects from the Common Law in its treatment of conditions precedent; the rule of the Civil Law being that where a condition precedent is originally impossible, or is made so by the act or default of the testator, or is illegal as involving *malum prohibitum*, the bequest is absolute, just as if the condition had been subsequent. But where the performance of the condition is the sole motive of the bequest, or its impossibility was unknown to the testator, or the condition which was possible in its creation has since become impossible by the act of God, or where it is illegal as involving *malum in se*, in these cases the Civil agrees with the Common Law in holding both gift and condition void.' According to English law, if a condition subsequent which is to defeat an estate is against the policy of the law, the gift is absolute, but if the illegal condition is precedent there is no gift."—*In re Moore, Trafford* v. *Maconochie* (1888), 39 Ch. D. 116, at pp. 128, 129; 57 L. J. Ch. 936, at p. 937, Cotton, L. J.

"Upon the authorities cited to us, it seems to me to be clear law that, in a devise of real estate with a condition, where the intention of the testator, as evidenced by the words he has used, is more consistent with the inference that he intended the condition to be a condition subsequent rather than a condition precedent, then, if the words are capable of admitting both constructions, the Court ought to hold the condition to be a condition subsequent."—*In re Greenwood, Goodhart* v. *Woodhead*, [1903] 1 Ch. 749, at p. 755; 72 L. J. Ch. 281, at p. 283, Collins, M. R.

"As it is a condition subsequent and impossible, the result is that it is not a condition with which he [the devisee] is bound to comply in order to retain the estate."—*In re Croxon*, [1904] 1 Ch. 252, at p. 259; 73 L. J. Ch. 170, at p. 172, Kekewich, J.

"The phrase most frequently used in argument was 'public policy,' but, following the example of many eminent judges, I prefer 'the policy of the law.'"—*In re Hope Johnstone*, [1904] 1 Ch. 470, at p. 474; 73 L. J. Ch. 321, at p. 322, Kekewich, J.

"Policy of the law ought not, I think, to be pressed into the service of highly improbable contingencies. In this I am supported

by the opinions of many of the judges who advised the House of Lords in *Egerton* v. *Earl Brownlow* (1853), 4 H. L. C. 1; 23 L. J. Ch. 348. The House decided the particular case before them adversely to the opinions of the majority of the judges, but those opinions are nevertheless entitled to great weight in the consideration of the question what is against the policy of the law, and of the application of the principle to special facts."—*In re Hope Johnstone*, [1904] 1 Ch. 470, at pp. 478, 479; 73 L. J. Ch. 321, at p. 324, Kekewich, J.

"When questions arise as to conditions or provisions being void as being against the public good or against public policy, great caution is necessary in considering them; at different times very different views have been ascertained as to what is injurious to the public."—*In re Beard*, [1908] 1 Ch. 383, at p. 386; 77 L. J. Ch. 265, at p. 266, Swinfen Eady, J.

Period for Performance of Condition.

"Upon consideration of the authorities, I have come to the conclusion that if a condition be one to be performed by the devisee personally, not at a particular time, but in effect at any time he pleases, and not requiring the intervention or concurrence of any other person, no period being expressly allowed or limited for its performance which may possibly outlast the life of the devisee (as, *e.g.*, twelve months after coming into possession and the like), the period for the performance of the condition is naturally and necessarily the life of the devisee and no longer, and the condition is not complied with, in fact is broken, if the devisee dies without having performed it."—*In re Greenwood*, *Goodhart* v. *Woodhead*, [1902] 2 Ch. 198, at pp. 204, 205; 71 L. J. Ch. 579, at p. 583, Joyce, J.

Substituted Legacies.

"Being a substituted legacy, it is therefore *primâ facie* subject to the same incidents and conditions as the original legacy. This rule of construction is established by a long line of authorities."—*In re Joseph*, *Pain* v. *Joseph*, [1908] 1 Ch. 599, at p. 602; 77 L. J. Ch. 309, at p. 311, Eve, J.

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APPENDIX.

INTERPRETATION ACT, 1889.

[52 & 53 Vict. c. 63]

ARRANGEMENT OF SECTIONS.

Re-enactment of existing Rules.

New General Rules of Construction.

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INTERPRETATION ACT, 1889.

(52 & 53 Vict. c. 63.)

An Act for consolidating Enactments relating to the Construction of Acts of Parliament and for further shortening the Language used in Acts of Parliament. [30th August 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Re-enactment of existing Rules.

Rules as to gender and number.

1.—(1) In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, unless the contrary intention appears,—

(*a*) words importing the masculine gender shall include females; and

(*b*) words in the singular shall include the plural, and words in the plural shall include the singular.

(2) The s[illegible]les shall be observed in the construction of every enactment r[illegible] to an offence punishable on indictment or on summary conviction, when the enactment is contained in an Act passed in or before the year one thousand eight hundred and fifty.

Application of penal Acts to bodies corporate.

2.—(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.

(2) Where under any Act, whether passed before or after the commencement of this Act, any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where that body is the party aggrieved.

Meanings of certain words in Acts since 1850.

3. In every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely—

The expression "month" shall mean calendar month:

The expression "land" shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure:

The expressions "oath" and "affidavit" shall, in the case of persons for the time being allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression "swear" shall, in the like case, include affirm and declare.

Meaning of "county" in past Acts.

4. In every Act passed after the year one thousand eight hundred and fifty and before the commencement of this Act the expression "county" shall, unless the contrary intention appears, be construed as including a county of a city and a county of a town.

Meaning of "parish."

5. In every Act passed after the year one thousand eight hundred and sixty-six, whether before or after the commencement of this Act, the expression "parish" shall, unless the contrary intention appears, mean, as respects England and Wales, a place for which a separate poor rate is or can be made, or for which a separate overseer is or can be appointed.

Meaning of "county court."

6. In this Act, and in every Act and Order of Council passed or made after the year one thousand eight hundred and forty-six, whether before or after the commencement of this Act, the expression "county court" shall, unless the contrary intention appears, mean as respects England and Wales a court under the County Courts Act, 1888.

51 & 52 Vict. c. 43.

Meaning of "sheriff clerk," &c. in Scotch Acts.

7. In every Act relating to Scotland, whether passed before or after the commencement of this Act, unless the contrary intention appears,

The expression "sheriff clerk" shall include steward clerk;

The expressions "shire," "sheriffdom," and "county" shall include any stewartry in Scotland.

Sections to be substantive enactments.

8. Every section of an Act shall have effect as a substantive enactment without introductory words.

Acts to be public Acts.

9. Every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, shall be a public Act and shall be judicially noticed as such, unless the contrary is expressly provided by the Act

Amendment or repeal of Acts in same session.

10. Any Act may be altered, amended, or repealed in the same session of Parliament.

Effect of repeal in Acts passed since 1850.

11.—(1) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.

(2) Where an Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, repeals wholly or partially any former enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into operation.

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New General Rules of Construction

Official designations in past and future Acts.

12. In this Act, and in every other Act whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely: –

(1) The expression "the Lord Chancellor" shall, except when used with reference to Ireland only, mean the Lord High Chancellor of Great Britain for the time being, and when used with reference to Ireland only, shall mean the Lord Chancellor of Ireland for the time being.

(2) The expression "the Treasury" shall mean the Lord High Treasurer for the time being or the Commissioners for the time being of Her Majesty's Treasury.

(3) The expression "Secretary of State" shall mean one of Her Majesty's Principal Secretaries of State for the time being.

(4) The expression "the Admiralty" shall mean the Lord High Admiral of the United Kingdom for the time being, or the Commissioners for the time being for executing the office of Lord High Admiral of the United Kingdom.

(5) The expression "the Privy Council" shall except when used with reference to Ireland only, mean the Lords and others for the time being of Her Majesty's Most Honourable Privy Council, and when used with reference to Ireland only, shall mean the Privy Council of Ireland for the time being.

(6) The expression "the Education Department" shall mean the Lords of the Committee for the time being of the Privy Council appointed for education.

(7) The expression "the Scotch Education Department" shall mean the Lords of the Committee for the time being of the Privy Council appointed for education in Scotland.

(8) The expression "the Board of Trade" shall mean the Lords of the Committee for the time being of the Privy Council appointed for the consideration of matters relating to trade and foreign plantations.

(9) The expression "Lord Lieutenant," when used with reference to Ireland, shall mean the Lord Lieutenant of Ireland or other Chief Governors or Governor of Ireland for the time being.

(10) The expression "Chief Secretary," when used with reference to Ireland, shall mean the Chief Secretary to the Lord Lieutenant for the time being.

(11) The expression "Postmaster General" shall mean Her Majesty's Postmaster General for the time being.

(12) The expression "Commissioners of Woods" or "Commissioners of Woods and Forests" shall mean the Commissioners of Her Majesty's Woods, Forests, and Land Revenues for the time being.

(13) The expression "Commissioners of Works" shall mean the Commissioners of Her Majesty's Works and Public Buildings for the time being.

(14) The expression "Charity Commissioners" shall mean the Charity Commissioners for England and Wales for the time being.

(15) The expression "Ecclesiastical Commissioners" shall mean the Ecclesiastical Commissioners for England for the time being.

(16) The expression "Queen Anne's Bounty" shall mean the Governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy.

(17) The expression "National Debt Commissioners" shall mean the Commissioners for the time being for the Reduction of the National Debt.

(18) The expression "the Bank of England" shall mean, as circumstances require, the Governor and Company of the Bank of England or the bank of the Governor and Company of the Bank of England.

(19) The expression "the Bank of Ireland" shall mean, as circumstances require, the Governor and Company of the Bank of Ireland or the bank of the Governor and Company of the Bank of Ireland.

(20) The expression "consular officer" shall include consul-general, consul, vice-consul, consular agent, and any person for the time authorised to discharge the duties of consul-general, consul, or vice-consul.

Judicial definitions in past and future Acts.

13 In this Act and in every other Act whether passed before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "Supreme Court," when used with reference to England or Ireland, shall mean the Supreme Court of Judicature in England or Ireland, as the case may be, or either branch thereof.

(2) The expression "Court of Appeal," when used with reference to England or Ireland, shall mean Her Majesty's Court of Appeal in England or Ireland, as the case may be.

(3) The expression "High Court," when used with reference to England or Ireland, shall mean Her Majesty's High Court of Justice in England or Ireland, as the case may be.

(4) The expression "court of assize" shall, as respects England, Wales, and Ireland, mean a court of assize, a court of oyer and terminer, and a court of gaol delivery, or any of them, and shall, as respects England and Wales, include the Central Criminal Court.

(5) The expression "assizes," as respects England, Wales, and Ireland, shall mean the courts of assize usually held in every year, and shall include the sessions of the Central Criminal Court, but shall not include any court of assize held by virtue of any special commission, or, as respects Ireland, any court held by virtue of the powers conferred by section sixty-three of the Supreme Court of Judicature Act (Ireland), 1877.

40 & 41 Vict. c. 57.

(6) The expression "the Summary Jurisdiction Act, 1848," shall mean the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled "An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders."

(7) The expression "the Summary Jurisdiction (England) Acts" and the expression "the Summary Jurisdiction (English) Acts" shall respectively mean the Summary Jurisdiction Act, 1848, and

11 & 12 Vict. c. 43.

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the Summary Jurisdiction Act, 1879, and any Act, past or future, amending those Acts or either of them. 42 & 43 Vict. c. 49.

(8) The expression "the Summary Jurisdiction (Scotland) Acts" shall mean the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and any Act, past or future, amending those Acts or either of them. 27 & 28 Vict. c. 53. 44 & 45 Vict. c. 33.

(9) The expression "the Summary Jurisdiction (Ireland) Acts" shall mean, as respects the Dublin Metropolitan Police District, the Acts regulating the powers and duties of justices of the peace or of the police of that district, and as respects any other part of Ireland, the Petty Sessions (Ireland) Act, 1851, and any Act, past or future, amending the same. 14 & 15 Vict. c. 93.

(10) The expression "the Summary Jurisdiction Acts" when used in relation to England or Wales shall mean the Summary Jurisdiction (England) Acts, and when used in relation to Scotland the Summary Jurisdiction (Scotland) Acts, and when used in relation to Ireland the Summary Jurisdiction (Ireland) Acts.

(11) The expression "court of summary jurisdiction" shall mean any justice or justices of the peace, or other magistrate, by whatever name called, to whom jurisdiction is given by, or who is authorised to act under, the Summary Jurisdiction Acts, whether in England, Wales, or Ireland, and whether acting under the Summary Jurisdiction Acts or any of them, or under any other Act, or by virtue of his commission, or under the common law.

(12) The expression "petty sessional court" shall, as respects England or Wales, mean a court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court-house, and shall include the Lord Mayor of the city of London, and any alderman of that city, and any metropolitan or borough police magistrate or other stipendiary magistrate when sitting in a court-house or place at which he is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

(13) The expression "petty sessional court-house" shall, as respects England or Wales, mean a court-house or other place at which justices are accustomed to assemble for holding special or petty sessions, or which is for the time being appointed as a substitute for such a court-house or place, and where the justices are accustomed to assemble for either special or petty sessions at more than one court-house or place in a petty sessional division, shall mean any such court-house or place. The expression shall also include any court-house or place at which the Lord Mayor of the city of London or any alderman of that city, or any metropolitan or borough police magistrate or other stipendiary magistrate is authorised by law to do alone any act authorised to be done by more than one justice of the peace.

(14) The expression "court of quarter sessions" shall mean the justices of any county, riding, parts, division, or liberty of a county, or of any county of a city, or county of a town, in general or quarter sessions assembled, and shall include the court of the recorder of a municipal borough having a separate court of quarter sessions.

Meaning of "rules of court."

14. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression "rules of court" when used in relation to any court shall mean rules made

by the authority having for the time being power to make rules or orders regulating the practice and procedure of such court, and as regards Scotland shall include acts of adjournal and acts of sederunt.

The power of the said authority to make rules of court as above defined shall include a power to make rules of court for the purpose of any Act passed after the commencement of this Act, and directing or authorising anything to be done by rules of court.

Meaning of borough.

15. In this Act and in every Act passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "municipal borough" shall mean, as respects England and Wales, any place for the time being subject to the Municipal Corporations Act, 1882, and any reference to the mayor, aldermen, and burgesses of a borough shall include a reference to the mayor, aldermen, and citizens of a city, and any reference to the powers, duties, liabilities or property of the council of a borough shall be construed as a reference to the powers, duties, liabilities, or property of the mayor, aldermen, and burgesses of the borough acting by the council.

45 & 46 Vict. c. 50.

(2) The expression "municipal borough" shall mean, as respects Ireland, any place for the time being subject to the Act of the session of the third and fourth years of the reign of her present Majesty, chapter one hundred and eight, intituled "An Act for the regulation of municipal corporations in Ireland."

(3) The expression "parliamentary borough" shall mean any borough, burgh, place or combination of places returning a member or members to serve in Parliament, and not being either a county or division of a county, or a university, or a combination of universities.

(4) The expression "borough" when used in relation to local government shall mean a municipal borough as above defined, and when used in relation to parliamentary elections or the registration of parliamentary electors shall mean a parliamentary borough as above defined.

Meaning of guardians and union.

16. In this Act and in every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "board of guardians" shall, as respects England and Wales, mean a board of guardians elected under the Poor Law Amendment Act, 1834, and the Acts amending the same, and shall include a board of guardians or other body of persons performing under any local Act the like functions to a board of guardians under the Poor Law Amendment Act, 1834.

4 & 5 Will. 4. c. 76.

(2) The expression "poor law union" shall, as respects England and Wales, mean any parish or union of parishes for which there is a separate board of guardians.

(3) The expression "board of guardians" shall, as respects Ireland, mean a board of guardians elected under the Act of the Session of the first and second years of the reign of her present Majesty, chapter fifty-six, intituled "An Act for the more effectual

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relief of the destitute poor in Ireland," and the Acts amending the same, and shall include any body of persons appointed by the Local Government Board for Ireland to carry into execution the provisions of those Acts.

(4) The expression "poor law union" shall, as respects Ireland, mean any townland or place or union, or townlands or places, for which there is a separate board of guardians.

Definitions relating to elections.

17. In every Act passed after the commencement of this Act the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "parliamentary election" shall mean the election of a member or members to serve in Parliament for a county or division of a county, or parliamentary borough or division of a parliamentary borough, or for a university or combination of universities.

(2) The expression "parliamentary register of electors" shall mean a register of persons entitled to vote at any parliamentary election.

(3) The expression "local government register of electors" shall mean as respects an administrative county in England or Wales other than a county borough, the county register, and as respects a county borough or other municipal borough, the burgess roll.

Geographical and colonial definitions in future Acts.

18. In this Act, and in every Act passed after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—

(1) The expression "British Islands" shall mean the United Kingdom, the Channel Islands, and the Isle of Man.

(2) The expression "British possession" shall mean any part of Her Majesty's dominions exclusive of the United Kingdom, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one British possession.

(3) The expression "colony" shall mean any part of Her Majesty's dominions exclusive of the British Islands, and of British India, and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall, for the purposes of this definition, be deemed to be one colony.

(4) The expression "British India" shall mean all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any governor or other officer subordinate to the Governor-General of India.

(5) The expression "India" shall mean British India together with any territories of any native prince or chief under the suzerainty of Her Majesty exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General of India.

(6) The expression "Governor" shall, as respects Canada and India, mean the Governor-General, and include any person who for the time being has the powers of the Governor-General, and as respects any other British possession, shall include the officer for the time being administering the government of that possession.

(7) The expression "colonial legislature" and the expression "legislature," when used with reference to a British possession, shall respectively mean the authority, other than the Imperial Parliament or Her Majesty the Queen in Council, competent to make laws for a British possession.

Meaning of "person" in future Acts.

19. In this Act and in every Act passed after the commencement of this Act the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.

Meaning of "writing" in past and future Acts.

20. In this Act and in every other Act whether passed before or after the commencement of this Act expressions referring to writing shall, unless the contrary intention appears, be construed as including references to printing, lithography, photography, and other modes of representing or reproducing words in a visible form.

Meaning of "statutory declaration" in past and future Acts.
5 & 6 Will. 4, c. 62.

21. In this Act, and in every other Act whether passed before or after the commencement of this Act, the expression "statutory declaration" shall, unless the contrary intention appears, mean a declaration made by virtue of the Statutory Declarations Act, 1835.

Meaning of "financial year" in future Acts.

22. In this Act and in every Act passed after the commencement of this Act the expression "financial year" shall, unless the contrary intention appears, mean as respects any matters relating to the Consolidated Fund or moneys provided by Parliament, or to the Exchequer, or to Imperial taxes or finance, the twelve months ending the thirty-first day of March.

Definition of Lands Clauses Acts.
8 & 9 Vict. c. 18.
23 & 24 Vict. c. 106.
32 & 33 Vict. c. 18.
46 & 47 Vict. c. 15.
8 & 9 Vict. c. 19.
23 & 24 Vict. c. 106.

23. In any Act passed after the commencement of this Act, unless the contrary intention appears,—

The expression "Lands Clauses Acts" shall mean—

(*a*) as respects England and Wales, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Lands Clauses Consolidation Act, 1869, and the Lands Clauses (Umpire) Act, 1883, and any Acts for the time being in force amending the same; and

(*b*) as respects Scotland, the Lands Clauses Consolidation (Scotland) Act, 1845, and the Lands Clauses Consolidation Acts Amendment Act, 1860, and any Acts for the time being in force amending the same; and

8 & 9 Vict. c. 18.
23 & 24 Vict. c. 106.
14 & 15 Vict. c. 70.
23 & 24 Vict. c. 97.
27 & 28 Vict. c. 71.
31 & 32 Vict. c. 70.

(*c*) as respects Ireland, the Lands Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Acts Amendment Act, 1860, the Railways Act (Ireland), 1851, the Railways Act (Ireland), 1860, the Railways Act (Ireland), 1864, and the Railways Traverse Act, and any Acts for the time being in force amending the same.

Meaning of Irish Valuation Acts.

24. In any Act passed before or after the commencement of this Act the expression "Irish Valuation Acts" shall mean the Acts relating to the valuation of rateable property in Ireland.

Meaning of "ordnance map."

25. In this Act and in every other Act, whether passed before or after the commencement of this Act, the expression "ordnance

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map" shall, unless the contrary intention appears, mean a map made under the powers conferred by the Survey Great Britain Acts, 1841 to 1870, or by the Survey (Ireland) Acts, 1825 to 1870, and the Acts amending the same respectively.

Meaning of service by post.

26. Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve," or the expression "give" or "send" or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Meaning of "committed for trial."

27. In every Act passed after the commencement of this Act, the expression "committed for trial" used in relation to any person shall, unless the contrary intention appears, mean, as respects England and Wales, committed to prison with the view of being tried before a judge and jury, whether the person is committed in pursuance of section twenty-two or of section twenty-five of the Indictable Offences Act, 1848, or is committed by a court, judge, coroner, or other authority having power to commit a person to any prison with a view to his trial, and shall include a person who is admitted to bail upon a recognizance to appear and take his trial before a judge and jury.

11 & 12 Vict. c. 42.

Meanings of "sheriff," "felony," and "misdemeanour," in future Scotch Acts.

28. In this Act and in every Act passed after the commencement of this Act, unless the contrary intention appears—

The expression "sheriff" shall, as respects Scotland, include a sheriff substitute.

The expression "felony" shall, as respects Scotland, mean a high crime and offence:

The expression "misdemeanour" shall, as respects Scotland, mean an offence.

Meaning of "county court" in future Irish Acts.

29. In every Act passed after the commencement of this Act, unless the contrary intention appears, the expression "county court" shall, as respects Ireland, mean a civil bill court within the meaning of the County Officers and Courts (Ireland) Act, 1877.

40 & 41 Vict. c. 56.

References to the Crown.

30. In this Act, and in every other Act whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown.

Construction of statutory rules, &c.

31. Where any Act, whether passed before or after the commencement of this Act, confers power to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, expressions used in the instrument, if it is made after the commencement of this Act, shall, unless the contrary intention appears, have the same respective meanings as in the Act conferring the power.

Construction of provisions as to exercise of powers and duties.

32.—(1) Where an Act passed after the commencement of this Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where an Act passed after the commencement of this Act confers a power or imposes a duty on the holder of an office, as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office.

(3) Where an Act passed after the commencement of this Act confers a power to make any rules, regulations, or byelaws, the power shall, unless the contrary intention appears, be construed as including a power, exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or byelaws.

Provisions as to offences under two or more laws.

33. Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence.

Measurement of distances.

34. In the measurement of any distance for the purposes of any Act passed after the commencement of this Act, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

Citation of Acts.

35.—(1) In any Act, instrument, or document, an Act may be cited by reference to the short title, if any, of the Act, either with or without a reference to the chapter, or by reference to the regnal year in which the Act was passed, and where there are more statutes or sessions than one in the same regnal year, by reference to the statute or the session, as the case may require, and where there are more chapters than one, by reference to the chapter, and any enactment may be cited by reference to the section or sub-section of the Act in which the enactment is contained.

(2) Where any Act passed after the commencement of this Act contains such reference as aforesaid, the reference shall, unless a contrary intention appears, be read as referring, in the case of statutes included in any revised edition of the statutes purporting to be printed by authority, to that edition, and in the case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendence or authority of Her Majesty's Stationery Office.

(3) In any Act passed after the commencement of this Act a description or citation of a portion of another Act shall, unless the contrary intention appears, be construed as including the word, section, or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

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"Commencement."

36.—(1) In this Act, and in every Act passed either before or after the commencement of this Act, the expression "commencement," when used with reference to an Act, shall mean the time at which the Act comes into operation.

(2) Where an Act passed after the commencement of this Act, or any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws made, granted, or issued, under a power conferred by any such Act, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

Exercise of statutory powers between passing and commencement of Act.

37. Where an Act passed after the commencement of this Act is not to come into operation immediately on the passing thereof, and confers power to make any appointment, to make, grant, or issue any instrument, that is to say, any Order in Council, order, warrant, scheme, letters patent, rules, regulations, or byelaws, to give notices, to prescribe forms, or to do any other thing for the purposes of the Act, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Act, so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof, subject to this restriction, that any instrument made under the power shall not, unless the contrary intention appears in the Act, or the contrary is necessary for bringing the Act into operation, come into operation until the Act comes into operation.

Effect of repeal in future Acts.

38.—(1) Where this Act or any Act passed after the commencement of this Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed, shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not—

(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or

(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed; or

(*d*) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed; or

(*e*) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid:

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repealing Act had not been passed.

Supplemental.

Definition of "Act" in this Act.

39. In this Act the expression "Act" shall include a local and personal Act and a private Act.

Saving for past Acts.

40. The provisions of this Act respecting the construction of Acts passed after the commencement of this Act shall not affect the construction of any Act passed before the commencement of this Act, although it is continued or amended by an Act passed after such commencement.

Repeal.

41. The Acts described in the Schedule to this Act are hereby repealed to the extent appearing in the third column of the Schedule.

Commencement of Act.

42. This Act shall come into operation on the first day of January one thousand eight hundred and ninety.

Short title.

43. This Act may be cited as the Interpretation Act, 1889.

SCHEDULE.

Section 41.

Enactments Repealed.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
7 & 8 Geo. 4, c. 28..	An Act for further improving the administration of justice in criminal cases in England.	Section fourteen.
9 Geo. 4, c. 54	An Act for improving the administration of justice in criminal cases in Ireland.	Section thirty-five.
7 Will. 4 & 1 Vict c. 39.	An Act to interpret the word "sheriff," "sheriff clerk," "shire," "sheriffdom," and "county," occurring in Acts of Parliament relating to Scotland.	The whole Act.
13 & 14 Vict. c. 21..	An Act for shortening the language used in Acts of Parliament.	The whole Act.
29 & 30 Vict. c. 113.	The Poor Law Amendment Act of 1866.	Section eighteen, from the beginning to "can be appointed, and."
42 & 43 Vict. c. 49..	The Summary Jurisdiction Act, 1879	In section twenty the sub-sections numbered (3) and (6).
		Section fifty.
47 & 48 Vict. c. 43..	The Summary Jurisdiction Act, 1884.	Section seven.
51 & 52 Vict. c. 43..	The County Courts Act, 1888 ..	Section one hundred and eighty-seven, from the beginning to "is meant, and."

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LORD BROUGHAM'S ACT, 1850.

(13 & 14 Vict. c. 21.)

An Act for shortening the Language used in Acts of Parliament. [10th June 1850.]

Be it declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that every Act to be passed after the commencement of this Act may be altered, amended, or repealed in the same session of Parliament, any law or usage to the contrary notwithstanding. (See section 10 of the Interpretation Act, 1889, *ante*, p. 626.)

Acts of Parliament may be altered, &c. in the same session.

II. *Be it enacted, That all Acts shall be divided into sections, if there be more enactments than one, which sections shall be deemed to be substantive enactments, without any introductory words.* (See section 8 of the Interpretation Act, 1889, *ante*, p. 626.)

Acts of Parliament to be divided into sections, without introductory words.

III. *Be it enacted, That in any Act, when any former Act is referred to, it shall be sufficient, if such Act was made before the seventh year of Henry the Seventh, to cite the year of the king's reign in which it was made, and where there are more statutes than one in the same year the statute, and where there are more chapters than one the chapter; and if such Act referred to was made after the fourth year of Henry the Seventh, to cite the year of the reign, and where there are more statutes or sessions than one in the same year the statute or the session (as the case may require), and where there are more chapters or sections than one the chapter or section or chapter and section (as the case may require), without reciting the title of such Act, or the provisions of such section, so referred to; and the reference in all cases shall be made according to the copies of statutes printed by the Queen's printer, or to the copies thereof contained in the reports of the Commissioners of Public Records: Provided that where it is only intended to amend or repeal any portion only of such section it shall be necessary still either to recite such portion or to set forth the matter or thing intended to be amended or repealed.* (See section 35 of the Interpretation Act, 1889, *ante*, p. 634.)

Where any Act is referred to it shall be sufficient to cite the year, reign, statute or session, chapter, and section, &c.

Reference to be according to copies printed by Queen's printers, &c.

Proviso as to amendment or repeal of part of section only.

IV. *Be it enacted, That in all Acts words importing the masculine gender shall be deemed and taken to include females, and the singular to include the plural, and the plural the singular, unless the contrary as to gender or number is expressly provided; and the word "month" to*

Interpretation of certain words in all Acts.

mean calendar month, unless words be added showing lunar month to be intended; and "county" shall be held to mean also county of a town or of a city, unless such extended meaning is expressly excluded by words; and the word "land" shall include messuages, tenements, and hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure; and the words "oath," "sworn," and "affidavit" shall include affirmation, declaration, affirming, and declaring, in the case of persons by law allowed to declare or affirm instead of swearing. (See sections 1 to 4 inclusive of the Interpretation Act, 1889, *ante*, pp. 625, 626.)

Repealed Acts not to be revived by repeal of repealing Act without words of revivor.

V. *Be it enacted, that where any Act repealing in whole or in part any former Act is itself repealed, such last repeal shall not revive the Act or provisions before repealed, unless words be added reviving such Act or provisions.* (See section 38 of the Interpretation Act, 1889, *ante*, p. 635.)

Enactments repealed by Acts substituting other provisions to remain in force until such provisions come into force.

VI. *Be it enacted, that wherever any Act shall be made repealing in whole or in part any former Act, and substituting some provision or provisions instead of the provision or provisions repealed, such provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last made Act.* (See section 37 of the Interpretation Act, 1889, *ante*, p. 635.)

Future Acts to be deemed public unless otherwise provided.

VII. *Be it enacted, that every Act made after the commencement of this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such, unless the contrary be expressly provided and declared by such Act.* (See sections 9 and 39 of the Interpretation Act, 1889, *ante*, pp. 626, 635.)

Commencement of this Act.

VIII. *Be it declared and enacted, that this Act shall commence and take effect from and immediately after the commencement of the next session of Parliament.*

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THE COLONIAL LAWS VALIDITY ACT, 1865.

(28 & 29 Vict. c. 63.)

An Act to remove Doubts as to the Validity of Colonial Laws.

[29th June 1865.]

Whereas doubts have been entertained respecting the validity of divers laws enacted or purporting to have been enacted by the legislatures of certain of Her Majesty's colonies, and respecting the powers of such legislatures, and it is expedient that such doubts should be removed: Be it enacted as follows:

Definitions: "Colony:"

1. The term "colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as hereinafter defined, except the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty under or by virtue of any Act of Parliament for the government of India:

"Legislature:"

The terms "legislature" and "colonial legislature" shall severally signify the authority, other than the Imperial Parliament or Her Majesty in council, competent to make laws for any colony:

"Colonial legislature:"

"Representative legislature:"

The term "representative legislature" shall signify any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony:

"Colonial law:"

The term "colonial law" shall include laws made for any colony either by such legislature as aforesaid or by Her Majesty in council:

Acts of Parliament when to extend to colonies:

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament:

"Governor:"

The term "governor" shall mean the officer lawfully administering the government of any colony:

"Letters-patent."

The term "letters-patent" shall mean letters-patent under the great seal of the United Kingdom of Great Britain and Ireland.

Colonial laws when void for repugnancy.

2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read, subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial laws when not void for repugnancy.

3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order or regulation as aforesaid.

Colonial laws not void for inconsistency with instructions to governors.

4. No colonial law, passed with the concurrence of or assented to by the governor of any colony or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty by any instrument other than the letters-patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace order and good government of such colony, even though such instructions may be referred to in such letters-patent or last-mentioned instrument.

Colonial legislatures may establish, &c. courts of law

Representative legislatures may alter constitutions.

5. Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony and the constitution, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters-patent, order in council, or colonial law for the time being in force in the said colony.

Certified copies of laws assented to or bills reserved to be *primâ facie* evidence that they are properly passed.

Proclamation as to Her Majesty's disallowance or assent, published in colonial newspaper, to be *primâ facie* evidence of disallowance or assent.

6. The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any bill reserved for the signification of Her Majesty's pleasure by the said governor, shall be primâ facie evidence that the document so certified is a true copy of such law or bill, and as the case may be, that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill shall relate, and signifying Her Majesty's disallowance of any such colonial law or Her Majesty's assent to any such reserved bill as aforesaid, shall be primâ facie evidence of such disallowance or assent.

And whereas doubts are entertained respecting the validity of certain acts enacted or reputed to be enacted by the legislature of South Australia: be it further enacted, as follows:

Certain acts enacted by legislature of South Australia to be valid.

7. All laws or reputed laws enacted or purporting to have been enacted by the said legislature, or by persons or bodies of persons for the time being acting as such legislature, which have received the assent of Her Majesty in council, or which have received the assent of the governor of the said colony in the name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the date of such assent for all purposes whatever: provided that nothing herein contained shall be deemed to give effect to any law or reputed law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful disallowance or repeal of any law.

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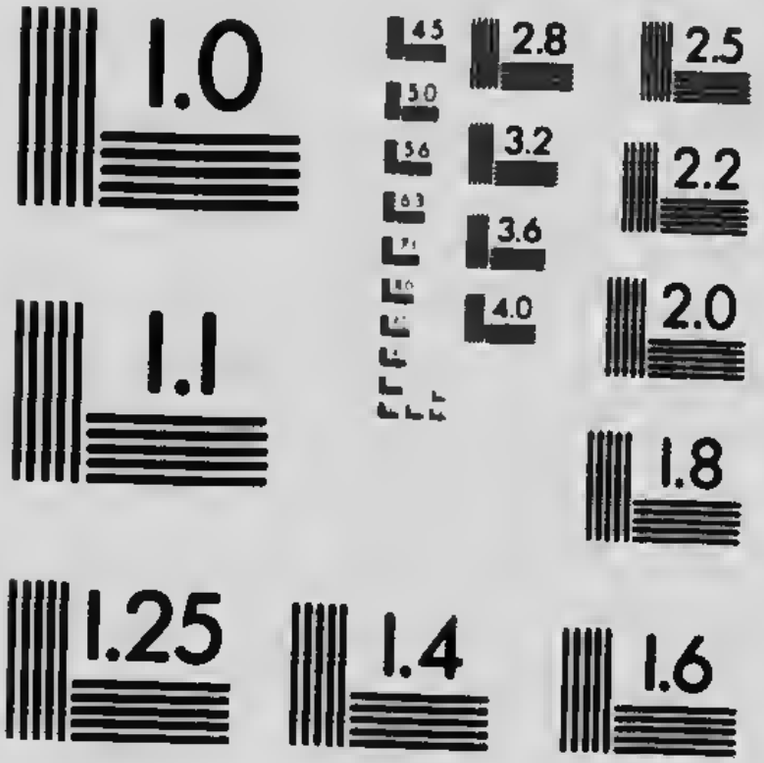

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